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A TREATISE ON THE LAW

OF

NEGOTIABLE INSTRUMENTS

INCLUDING

BILLS OF EXCHANGE; PROMISSORY NOTES; NEGOTIABLE BONDS AND COUPONS; CHECKS; BANK NOTES; CERTIFICATES OF DEPOSIT; CERTIFICATES OF STOCK; BILLS OF CREDIT; BILLS OF LADING; GUARANTIES; LETTERS OF CREDIT; AND CIRCULAR NOTES

BY

JOHN W. DANIEL

OF THE LYNCHBURG (VA.) BAR

IN TWO VOLUMES

VOL. I

SIXTH EDITION

RE-EDITED AND ENLARGED BY

THOMAS H. CALVERT

OF THE RALEIGH (N. C.) BAR. LATELY OF THE EDITORIAL STAFF OF EDWARD THOMPSON COMPANY; AUTHOR OF "REGULATION OF COMMERCE UNDER THE FEDERAL CONSTITUTION;" ANNOTATOR OF THE CONSTITUTION IN "FEDERAL STATUTES, ANNOTATED"

NEW YORK

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1913

TO

CHARLES O'CONOR, ESQ.

WHO, AS A LAWYER

HAS DIGNIFIED HIS PROFESSION BY HIS UPRIGHT CHARACTER

AND

ILLUSTRATED IT WITH THE TRIUMPHS OF HIS GENIUS

AND

WHO, AS A PATRIOT

HAS NEVER FAILED IN FIDELITY TO THE PRINCIPLES OF LIBERTY PROTECTED BY LAW

THIS WORK

IS WITH HIS PERMISSION

RESPECTFULLY INSCRIBED

BY THE AUTHOR

PREFACE TO THE SIXTH EDITION

A FEW words will suffice in presenting the Sixth Edition of this work.

With respect to the treatment of the general law of Negotiable Instruments, the work of the revision has largely taken the form of bringing the citations of cases to date and of adding illustrative notes. No liberties have been taken with the text, as, on this part of the work, it has been the intention of the editor to let it stand as the work of the author, the late Senator Daniel. A few changes in and additions to the text, however, have been made. A characteristic of the work, and one which gave it distinctiveness and added to its value as a text book, was the clear and searching analysis of the cases on questions upon which there was a conflict in the authorities, and the expression by the author of his personal views. These expressions of the author's views, adding discussion and thought, could not mislead the investigator, as on all such points he carefully stated the conflicting decisions.

At the time of the publication of the last edition, the Uniform Negotiable Instruments statute had been then recently adopted by some of the States, and there had been but few decisions construing the statute. Since that time it has been made part of the statute law in many more States and Territories, as well as in the District of Columbia by Act of Congress, and is now in force in forty-one jurisdictions (see the Appendix). The consideration of the effect of the statute forms a very substantial part of the work of this edition. An effort was made to obtain an exhaustive collection of the cases in which the statute has been construed, and, by the arrangement and method of treatment adopted, the discussion of those cases separately, indicated by a catchline "*Under the Negotiable Instrument Statute,*" it is believed that convenient opportunity has been given for a comparative study of the general law and the effect thereon of the statute.

T. H. C.

RALEIGH, N. C., *October, 1913.*

PREFACE TO THE FIFTH EDITION

More than a quarter of a century has elapsed since this work was originally published in 1876, and over eleven years since the last edition appeared in 1891.

Now the fifth edition is required to meet the continuous demand with which it is honored, and to bring its citations of cases up to date.

The general structure of the text remains unchanged. New diversities in the forms of negotiable instruments, and new phases of questions arising in practice, have been appropriately dealt with in new paragraphs or subsections.

Some thirty-five hundred new cases have been embodied. They were selected from the decisions of the highest courts of the British Empire, as well as from those of the highest courts of the United States, both Federal and State. In these tribunals the work has found favor, and frequent quotation, and it seeks to be a true reflex of the law of the subject as understood and applied throughout the domains of the English-speaking people.

Commerce is the pioneer in the assimilation of peoples and laws. The negotiable instrument is the leader of the pioneer corps; and it is quite probable that it will produce the first body of homogeneous law that is evolved in the realms of civilization. These principles were recognized in the first edition of this work, and their triumph predicted. Since then they have been notably illustrated in "The New Negotiable Instruments Law," which, up to this period, has been adopted by nineteen States of the American Union; and is now law in the Territory of Arizona and the District of Columbia. In the Appendix of this edition this new statute will be found.

By reason of other exacting employments, the author could not give to the preparation of this edition throughout the close, personal attention, which he bestowed upon its predecessors. He has, however, himself, examined and annotated many of the new cases. This important work for the most part has been done by Mr. Douglass. Our labors have been assisted by E. S. Douglass, Esq., and by Messrs. Stanhope Henry, Levi H. David, and Joseph D. Wright, all members of the Washington (D. C.) bar—gentlemen whose character and ability give ample assurance of their fidelity.

In the preface to the fourth edition, issued in 1891, the author

expressed his sense of the loss suffered by the then recent death of Mr. Peter C. Baker, who had long been the honored head of the publishing-house. Since then Mr. Voorhis, in the serenity of a well-spent life, has also departed. The "Baker and Voorhis Company," which has succeeded the old firm, preserve the names of the founders in their title, and attest by their courtesy, promptitude, and fairness, that they likewise preserve their virtues.

As commerce moves to greater conquests, the negotiable instrument will maintain itself in the forefront, as the harbinger of uniform law. This work was the first to treat the subject in its ample scope. So far it has upheld itself in the good opinion of the legal profession, and of enlightened laymen, and the hope is indulged that it may long continue to be worthy of confidence.

JNO. W. DANIEL.
CHAS. A. DOUGLASS.

November 20, 1902.

PREFACE TO THE FOURTH EDITION

The first edition to this work appeared in 1876, the second in 1879, and the third in 1882. The last edition has been for some months exhausted and out of print, and the fourth is now issued in response to continuous and unfaltering demand.

The author is gratified with the evidences of the usefulness of his essay afforded in the reception given it by the profession in this country and in foreign lands, and in the extensive and favorable citations of the text by the highest courts. Dissent from its doctrines has been but seldom expressed, and then only in those vexed questions which have elicited conflicting adjudications.

Some two thousand new cases, taken from over eight hundred volumes of Reports (State, Federal, English, and Colonial), are herein cited, and the newly added matter embraces over one hundred printed pages. But the comprehensive plan of the treatise was such that but little emendation of the text has been found necessary, and the amplifications are the result of new illustrations and diversities of established principles rather than of the evolution of new ones. With forty-four States now composing the Federal Union, no one just like another in its system of laws; with the Federal jurisprudence

assuming a certain caste of its own, and with new organizations, ramifications, and phases of business arising out of our rapid and progressive development, no lawyer can keep abreast with the demands of his profession without attention to contemporary decisions. Nevertheless, the scientific basis of the law merchant, and the elastic, equitable spirit which pervades it, provide the solvent of difficulty for all complexities and novelties of circumstance; and amongst the new cases there are but few not referable to principles fixed by precedent, and heretofore expounded in this work.

In the collection and digest of cases for this edition, I have been greatly assisted by the diligent and discriminating labors of my valued friend, Mr. Chapman W. Maupin. of the Bedford City Bar, to whom I render my acknowledgments.

Since the last edition appeared Mr. Peter C. Baker, the senior of the firm of Messrs. Baker, Voorhis & Co., its publishers, has departed this life. He was an honest man who has left an excellent name, and more than this, a liberal-minded and accomplished gentleman, with an enthusiasm for his vocation beyond its mercantile aspects. Out of my business relations with his house grew a friendship for him which strengthened with years, and I mourn his loss in common with all who knew him. His worthy associates in business have my thanks for their uniform courtesy and fair dealing.

J. W. D.

Lynchburg, Va., *April, 1891.*

PREFACE TO THE THIRD EDITION

Since the last edition of this work was issued, just three years ago, interest in the subject of "Negotiable Instruments" has in nowise abated, but steadily increased. It ranks now second to no title of the law. This is shown by the multitude of cases which appear in the reports and the legal periodicals, and by the number of books published on Bills and Notes, and cognate subjects. It is also shown by the fact that the second edition of this treatise was more speedily exhausted than the first, and by the numerous orders which have anticipated the appearance of the third. The reason is obvious. This is an age of rapid transit, of vast material development, and of ever-extending commerce. And Negotiable Instruments are the

instruments of commerce, their forms and varieties taking shape to suit its usages and needs.

As rapidly as was consistent with the engagements of an active practice at the bar, the author has prepared this new edition; and, gratefully appreciative of the favor with which its predecessors were received by the Bench and Bar, he hopes that it will be found more useful in assisting their labors and more worthy of their commendation.

The plan and framework of the original text have undergone but slight alterations. But the result of the most recent and best considered adjudications have been embodied in it; some of the chapters (notably those on Certificates of Stock and Bills of Lading) have been considerably enlarged; many passages have been rewritten where elaboration seemed desirable; and citations of over fifteen hundred cases (for the most part new ones) have been added.

The decisions of the higher courts (Federal and State) of the United States, and of England, have been the chief sources of quotation; but on important questions, and especially where the opinions seemed to possess more than ordinary merit, the adjudications of the Canadian, and other provincial courts, have been cited.

To present the Law of Negotiable Instruments as it is to-day interpreted has been the author's design, and to accomplish it he has not only consulted the reports, but also the advanced publications of judicial opinions in legal transcripts and journals. His researches have been greatly facilitated by the courtesies of the excellent publishers of the work, Messrs. BAKER, VOORHIS & Co., and to them he again renders his thanks.

J. W. D.

LYNCHBURGH, VA., *July, 1882.*

PREFACE TO THE SECOND EDITION

THE rapid sale of the first edition of this work has demonstrated the correctness of the opinion expressed by its author, that a treatise on the subject of "Negotiable Instruments" was a desideratum to the legal profession; and the flattering utterances with which it has been received by the Bench and Bar induce him to hope that he has not altogether failed in his effort to supply it.

In response to continuous demands, a second edition is now put forth, containing one hundred and four pages of new matter, and citations of over a thousand cases not embraced in the first edition. The important adjudications of the English and American courts since the spring of 1876 have been carefully collated, and the text presents, as the author hopes, a faithful record of "The Law of Negotiable Instruments," as it is now interpreted and practiced.

To those who have so generously encouraged and favored his work the author returns his thanks, and to his publishers, Messrs. BAKER, VOORHIS & Co., he begs leave to renew the assurances of his highest consideration.

J. W. D.

LYNCHBURG, VA., *June, 1879.*

PREFACE TO THE FIRST EDITION

WHEN LORD HOLT, in the year seventeen hundred and three, indignantly denied that promissory notes payable to bearer were negotiable and inveighed against the "obstinacy and opinionativeness of the merchants who were endeavoring to set the law of Lombard street above the law of Westminster Hall," he had no prophetic vision of the great part which negotiable instruments were to play in the transactions of commerce, and little dreamed that the struggling idea of Lombard street was destined to develop, expand, and diversify itself, until it overspread the civilized globe. From that day to this, negotiable instruments have been a subject of such rapid and continuous growth that the sheets of the various compilations on the subject have scarcely dried from the printer's hand, ere they have successively become historic records rather than mirrors of existing things. It is true that certain general principles permeate the law affecting every variety of negotiable instruments, and that in Malynes, Marius, Molloy, and Beawes, we may yet find the rudiments of that system which in our own day has received ample illustration from the hands of Story and Parsons; but the pioneer who stood on the borders of our western civilization thirty years ago, and who to-day sees the same landscape, then covered with primeval forest, or stretching wide in solitary prairies, now brilliant with gorgeous cities, and teeming with the industries of crowded millions, recognizes a change not

more marked than that which has been exhibited in the rapid and diversified development of the subject of our treatise. And the development was scarcely more marked in the long period elapsing between the days of the first commentators to whom we have referred and the last, than it has been since the latter put forth their admirable works. Chancellor Kent remarks, with an evident spirit of congratulation, that "the law of negotiable paper has at length become a science which can be studied with infinite advantage in the various codes, treatises, and judicial decisions, for in them every possible view of the doctrine in all its branches has been considered, its rules established, and its limitations accurately defined." But when Chancellor Kent wrote his Commentaries, such a thing as a coupon bond was unknown in the United States. When Story sent forth his treatises on Bills and Notes from Cambridge, it was yet a feeble adventurer, timidly feeling its way on the stock exchange. And, although when Professor Parsons published his work in 1862, it had been recognized as a negotiable instrument, and was becoming familiar to the public eye, the law concerning it was yet in such an inchoate state that a few pages comprehended all that he saw fit to say about it. Now there is no more important figure in financial circles than a coupon bond. There is scarcely a town or county in the United States that has not become interested in it, and the law relating to it has grown into an important title, which would fully justify its embodiment in a separate and independent work. We find, also, an increasing disposition to impart certain negotiable qualities to instruments and documentary evidences of title, which, by the common law, are as devoid of such qualities as any chattel sold behind the counter of a merchant. In some of the States, bonds are placed on the same footing as promissory notes. In some of them deeds to real estate and docketed judgments are just as negotiable as bills of exchange; and in all of them, so to speak, the spirit of negotiability is enlarging its bounds, extending its influence, and impressing itself upon mercantile transactions.

These reflections have led to the production of this work. It is the first effort to embrace in one treatise a classification of all negotiable instruments, with an exposition of the law touching each variety of them. And this has seemed to us the most convenient and philosophical mode of presenting and expounding the law, notwithstanding the views expressed by that great jurist and author, Justice Story, who followed, as he favored, a different plan. To him it seemed (as he states in the preface of his work on Bills of Exchange), that "great practical inconvenience" would result "from uniting and in-

termixing the doctrines respecting bills of exchange and promissory notes in one and the same treatise"; and if his idea be accepted, still greater practical inconvenience would result from gathering under one roof all the members of the negotiable family. But his own learned productions, to our mind, rebut his theory. While sections and pages —and, indeed, we may almost say chapters—of his treatise on Bills are literally transcribed in the succeeding one on Notes. And while there are certain distinctions always to be observed between the two classes of papers, there are more identities *in*, than differences *between*, them; and the differences can always be readily recognized and defined. To use Tennyson's phrase, they are "alike in difference." Indeed, not only may bills and notes be conveniently treated in conjunction with each other (as in fact they have been most successfully treated by Bayley, Byles, Thomson, and Parsons), but their kindred, which are "bone of the same bone and flesh of the same flesh," are like the sciences, which, Lord Bacon says, "dwell sociably together." Checks, so closely assimilated to bills of exchange that they are sometimes called "peculiar kinds of bills," may be fully treated under the same cover with bills, by simply pointing out their peculiar differences and uses.

Coupon bonds, so nearly identical with promissory notes that they might be fitly termed "peculiar kinds of notes," may be thoroughly explained by exhibiting their peculiar variations from them in form, and in the functions which they fulfil. And every species of instrument, really or *quasi* negotiable, may be either thoroughly expounded or, at least, aptly illustrated by a delineation of its lines of departure from the general principles which apply to these two great species of the negotiable genus, bills of exchange and promissory notes.

Such, at least, have been the considerations which inspired the undertaking, the fruit of which is now with diffidence submitted to a practical and critical, but liberal profession. Composed in hours snatched from other exacting labors of the office and the bar, the author can not hope that it will be found free from many crudities of style and other more serious imperfections; but if it contain aught of merit, he feels sure that an enlightened profession will not fail to discern it, nor to apply it as equitable offset to those defects which only the amplest resources of leisure and learning could avoid.

To Mr. P. C. Nicholas, Librarian of the Supreme Court of Appeals of Virginia, the author is much indebted for many courtesies extended and many facilities afforded him, while pursuing his investigations, in the ample collection of books under his charge; and

he begs leave here to acknowledge his obligation and record his thanks. He would be lacking in appreciation and gratitude did he not also here express to his publishers, Messrs. BAKER, VOORHIS & Co., of New York, his sense of the liberal and unremitting kindness with which they have aided and encouraged his work. They have been lacking in nothing that fairness could ask of them, or that an accommodating spirit could suggest to them; and he only trusts that the result may leave them no cause to regret their own generous course.

J. W. D.

LYNCHBURGH, VA., *April, 1876.*

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NEGOTIABLE INSTRUMENTS

NEGOTIABLE INSTRUMENTS

BOOK I

THE MAKING OF THE INSTRUMENT

CHAPTER I

NATURE, HISTORY, AND USES OF NEGOTIABLE INSTRUMENTS

SECTION I

NATURE, ORIGIN, AND HISTORY OF BILLS AND NOTES

§ 1. An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only. The peculiarities which attach to negotiable paper are the growth of time, and were acceded for the benefit of trade.

It was a rule of the common law of England, that a chose in action—by which is meant a claim which the holder would be driven to his action at law to recover—could not be assigned to a stranger, our forefathers conceiving that if claims and debts could be assigned, "pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth." [1] The first relaxation of this rule was made in respect to bills of exchange, and was gradually extended to notes and other securities, until the rule itself disappeared.

But while all choses in action are now transferable, the negotiable instrument is the only species which carries by transfer a clear title and a full measure; and like an instrument under seal imports a con-

1. Coke Litt. 214*a*, Chitty on Bills [*7], 9; Edwards on Bills, 55.

sideration. It has therefore three peculiar and distinguishing characteristics:

First. Respecting the title. If a horse, or other personal chattel, or a nonnegotiable instrument, be lost or stolen, no purchaser, however innocent or ignorant of the loss or theft, can acquire title against the true owner, who may at any place, and at any time, identify his property and reclaim it. But if a negotiable instrument be lost or stolen, and transferred by the finder thief to a third person in the usual course of business, before maturity, and for a valuable consideration, the person so acquiring it may hold it against the world.

Second. Respecting the amount. If a bond or nonnegotiable note be assigned, the assignee steps into the shoes of the assignor, and if the bond or note has been paid, or is subject to any counterclaim or set-off against the original maker, they attach to and incumber it into whosesoever hands it may fall. But a negotiable paper carries the right to the whole amount it secures on its face, and is subject to none of the defenses which might have been made between the original or intervening parties, against anyone who acquired it in the usual course of business before maturity. It is a circulating credit like the currency of the country, and, before maturity, the genuineness and solvency of the parties are alone to be considered in determining its value. It has been fitly termed "a courier without luggage."[2]

Third. Respecting the consideration. By the common law, an instrument under seal imports a consideration, by virtue of the solemn ceremony of its execution; and no other nonnegotiable instrument does. A bill of exchange, however, by the usages of merchants, also *prima facie* imports a consideration; and now by statute promissory notes of a certain kind are placed on the same footing. As between immediate parties, the true state of the case may be shown, and the presumption of consideration rebutted. But when a bill of exchange or negotiable note has passed to a *bona fide* holder for value, and before maturity, no want or failure of consideration can be shown. Its defects perish with its transfer; while, if the instrument be not a bill of exchange or negotiable note, they adhere to it in whosesoever hands it may go.[3]

2. Overton v. Tyler, 3 Barr. 346, Gibson, C. J.; Brown v. First Nat. Bank, 103 Ala. 123, 15 So. 435.

3. Young v. Sehon, 53 W. Va. 127, 44 S. E. 136, 62 L. R. A. 499, 97 Am. St. Rep. 970, quoting the text.

§ 1a. The term "negotiable," in its enlarged signification, is used to describe any written security which may be transferred by indorsement and delivery, or by delivery merely, so as to vest in the indorsee the legal title, and thus enable him to bring a suit thereon in his own name. But in a strictly commercial classification, and as the term is technically used, it applies only to those instruments which, like bills of exchange, not only carry the legal title with them by indorsement, or delivery, but carry as well, when transferred before maturity, the right of the transferee to demand the full amounts which their faces call for. "Assignable" is the more appropriate term to describe bonds, and ordinary notes, or notes of hand as they are most commonly called; as "negotiable" is the more fitting term to describe the peculiar instruments of commerce.[4]

§ 2. Bills of exchange were probably the first instruments for the payment of money that were accorded a negotiable quality, though promissory notes, being simpler in form, were doubtless used as evidences of debt before bills of exchange came in vogue among merchants. Certainly these two securities were recognized as negotiable instruments before any other paper representatives of money or property passed currently from hand to hand in like manner as money; and from them, as fruitful parents, have sprung all the varieties of negotiable instruments now known. Of bills and notes, therefore, we shall first speak, and after they have been sufficiently treated of, the other varieties of negotiable instruments will receive due attention.

§ 3. As to the origin and history of bills and notes.—The numerous commentators on the law of bills of exchange and promissory notes have generally enriched their pages with the results of their classic and antiquarian researches into the origin and history of these instruments. But notwithstanding the number and the diligence of the laborers in this interesting field of inquiry, it cannot be now stated, with any degree of certainty, by whom they were invented, or when they were first used. In respect to bills of exchange, it is said by Pothier, that there is no vestige of them among the Romans, or of any contract of exchange; for though it appears that Cicero directed one of his friends at Rome, who had money to receive at Athens, to

4. Odell v. Gray, 15 Mo. 342; International Bank v. German Bank, 71 Mo. 183; Crouse v. Patrick Co., 4 Hughes, 526; Provident Tr. Co. v. Mercer Co., 170 U. S. 593, 18 Sup. Ct. Rep. 788, text cited; De Hass v. Dibert, 17 C. C. A. 79, 70 Fed. 227.

cause it to be paid to his son at that place, and that friend accordingly wrote to one of his debtors at Athens, and ordered him to pay a sum of money to Cicero's son, yet, it is observed, that this mode amounted to nothing more than a mere order or mandate, and was not that species of negotiation which is conducted through the medium of a bill of exchange.[5]

Chancellor Kent seems to think that a passage in one of the pleadings of Isocrates indicates the use of bills of exchange amongst the Greeks,[6] but Story considers that the transaction referred to was little more than the very case alluded to by Cicero, and put in the Roman law.[7] Sir William Blackstone, remarking upon this subject, says: "This method is said to have been brought into general use by the Jews and Lombards when banished for their usury and other vices, in order the more easily to draw their effects out of France and England into those countries in which they had chosen to reside. But the invention of it was a little earlier; for the Jews were banished out of Guienne in 1287, and out of England in 1290; and in 1236 the use of paper credit was introduced into the Mogul Empire in China." [8] And Chitty says: "Other authors have attributed the invention to the Florentines, when, being driven out of their country by the faction of the Gebelings, they established themselves at Lyons and other towns. On the whole, however, there is no certainty on the subject, though it seems clear foreign bills were in use in the fourteenth century, as appears from a Venetian law of that period; and an inference drawn from the statute 5 Rich. II, stat. 1, chap. 2, warrants the conclusion that foreign bills were introduced into this country previously to the year 1381." [9] Macpherson, in his "Annals of Commerce," speaks of letters of credit being employed by King John to procure advancements to his agents in Rome as early as 1202.[10] And there is reason to believe that bills of exchange were known in England as early as 1307, since in that year King Edward I ordered certain money collected in England for the Pope, not to be remitted to him in coin or bullion, but by way of exchange (*per viam Cambii*).[11]

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5. Pothier de Change, n. 6; Story on Bills, § 6; 1 Bell Com. b. 3, c. 2, § 4 p. 386.

6. 3 Kent Com., Lect. 44.

7. Story on Bills, § 6, note 4.

8. 2 Bl. Com. 467.

9. Chitty on Bills [*11], 16.

10. Page 181, quoted in 1 Parsons on Notes and Bills, 4.

11. Anderson's History of Commerce, vol. I, c. 361.

§ **4.** The term "bill of exchange," derived from the French phrase "*billet de change*," is suggestive of the use which it subserves—that of perfecting a previous distinct contract of exchange or bargain between A. and B. at one place, that A. would cause money to be paid to B. or his assign at another place, by C., a debtor to A., or supplied by him with value to the amount.[12] Thus, if A. and B. are in England, and C. in Jamaica be indebted to A. one thousand pounds, and B. be going to Jamaica, B. may pay A. this thousand pounds and take a bill of exchange drawn by A. in England upon C. in Jamaica, and collect the amount from C. when he comes thither; and thereby A. receives his debt, at any distance of place, by transferring it to B., and B. receives back his money at the end of his journey—and the parties are mutually benefited by avoiding the dangers of loss or robbery which would attend the actual transmission of funds to and fro.[13]

From this primitive use, bills of exchange became, in the expansion of commerce, the evidences of valuable property, and in a great measure the equivalent of money, enlarging the capital stock of wealth in circulation, and thereby facilitating and increasing the operations of trade between communities and nations.[14]

§ **5. Promissory notes have as obscure an origin as bills of exchange.**—There is no doubt that they were in use among the Romans,[15] but they seem never to have acquired those negotiable qualities which now impart to them their chief value as instruments of commerce. They were in use upon the continent of Europe before their introduction into England, where they first came in vogue about the middle of the seventeenth century,[16] although it has been thought that they possess a more recent origin.[17] In the earlier reports the terms "bill" and "note" appear to have been used indiscriminately, and it is difficult to determine in many cases whether the particular suit was brought upon the one instrument or the other.[18] It has been a much debated question whether or not the common law of England recognized the negotiability of promissory notes; and most vigorously was the negative advocated by Lord Holt, who declared that the effort to place them on the same footing as bills of exchange "pro-

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12. Chitty on Bills, 1.
13. 2 Bl. Com. 467.
14. Gibson v. Minet, 1 H. Bl. 618.
15. Story on Notes, § 5.
16. Story on Notes, § 6.
17. Buller v. Crips, 6 Mod. 29.
18. Grant v. Vaughan, 3 Burr. 1525.

ceeded from the obstinacy and opinionativeness of the merchants who were endeavoring to set the law of Lombard street above the law of Westminster Hall."[19] This controversy was terminated by the passage of the statute 3 and 4 Anne, chap. 9 [1705] (made perpetual by the statute 7 Anne, chap. 25), which made promissory notes "assignable or indorsable over in the same manner as inland bills of exchange are, or may be according to the custom of merchants."[20]

This statute has been adopted in some of the States of the United States, or in its lieu other statutes prescribing the criteria and conditions of negotiability.[21] It is not therefore at this time a question of much practical consequence whether at common law promissory notes were negotiable or not; though occasionally the point is presented in States where the statute law on the subject fixes other criteria of negotiability than those established by the statute of Anne. By some authorities it is contended that the statute of Anne was only declaratory of their then existing status,[22] while by others the result of Lord Holt's reasoning is concurred in.[23] Professor Parsons con-

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19. Clerke v. Martin, 2 Ld. Raym. 757 (1703), 1 Salk. 129, 363; Chitty, Jr., on Bills, 219.

20. The statute of Anne (3 & 4 Anne, chap. 9) provides: "That all notes in writing that shall be made and signed by any person, etc., whereby such person, etc., shall promise to pay to any other person, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person, etc., to whom the same is made payable; and also every such note payable to any person, etc., his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the persons, etc., to whom such sum of money is or shall be by such note made payable, shall and may maintain an action for the same, in such manner as he, she, or they, might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, etc., who signed the same; and that any person, etc., to whom such note that is made payable to any person, etc., his, her, or their order, is indorsed or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person, etc., who signed the note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange."

21. Cowan v. Hallack, 9 Colo. 579, citing the text; Pool v. Anderson, 116 Ind. 92, 18 N. E. 445. See *post*, 864.

22. Irvin v. Maury, 1 Mo. 194; Dunn v. Adams, 1 Ala. 527. See Edwards on Bills, 51, 52; 1 Parsons on Notes and Bills, 10–13. There is a very learned and able dissertation on the progress of the Lex Mercatoria and the negotiability of promissory notes in 1 Cranch S. C. R., appendix, note A, 368.

23. Caton v. Lenox, 5 Rand. 31; Davis v. Miller, 14 Gratt. 18; Norton v. Rose, 2 Wash. (Va.) 233; First Nat. Bank v. Hunt, 25 Mo. App. 170.

cludes that "these notes were, at the time the statute was made, negotiable by the law merchant of England, which was and is as much a part of the law of England as— to use the strong language of Christian—the laws relating to marriage and murder.[24]

SECTION II

FOREIGN AND INLAND BILLS

§ 6. **Bills of exchange are either foreign or inland,**—foreign when drawn in one State or country, and made payable in another State or country;[25] inland when drawn, and made payable, in the same State or country.[26] Inland bills are of later origin than foreign bills, not having been in use in England at a much earlier period than the reign of Charles II.[27] The advantages derived from employing foreign bills for remittance of money induced merchants universally to adopt them, and originally deriving their sanction from the custom of merchants, they were subsequently recognized and approved by the judicial tribunals, and the engagements of the various parties to them enforced.[28] Inland bills, like them, were at first more restricted in their operation than at present, for it was deemed essential to their validity that a special custom for the drawing and accepting them should exist between the towns in which the drawer and acceptor lived; or if they lived in the same town, that such a custom should exist therein.[29] At first, also, effect was only given to the custom

24. 1 Parsons on Notes and Bills, 13.

25. Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537.

26. Morrison v. Farmers' &c. Bank, 9 Okla. 697, 60 Pac. 273. An instrument made in one State directing a person in another State to pay a certain amount twelve months after date, and charge to the account of the drawer, is to be regarded not as a promissory note, but as a foreign bill of exchange. Johnson County Sav. Bank v. Kramer, 42 Ind. App. 548, 86 N. E. 84 (1908). Where a note is made in this State, payable at a specified bank, but not naming the State in which the bank is situated, it will be presumed, the contrary not appearing on the face of the note, that the bank is situated in this State, and is negotiable as an inland bill of exchange. Collins v. Frost, 54 Ind. 245.

27. Chitty on Bills [*11], 16.

28. Chitty on Bills [*11], 16; Martin v. Boure, Cro. Jac. 6 (1602); Oaste v. Taylor, Cro. Jac. 306 (1613); Hussey v. Jacob, Ld. Raym. 87 (1696); Chitty, Jr., 157, 158, 189.

29. Buller v. Cripps, 6 Mod. 29 (1704); Pinkney v. Hall, Ld. Raym. 175; Chitty on Bills [*11, 12], 16; Chitty, Jr., 222.

when the parties were merchants, though afterward extended, as in the case of foreign bills, to all persons whether traders or not.[30]

Under Negotiable Instrument statute.—The Negotiable Instrument statute defines inland and foreign bills of exchange.[31]

§ 7. **The chief difference between foreign and inland bills** is this: that the former must be protested in order to charge the drawer, while the latter need not be.[32] But there are other differences important to be observed. Every contract, as to its validity, nature, interpretation, and effect, is governed by the laws of the place where it is made, unless it is to be performed in another place, in which case it is governed by its laws; and as the drawer, acceptor, and each indorser is a several and distinct contracting party, his liabilities are to be ascertained by the law of the place where his engagement is to be performed. This subject, and also the interesting questions which arise when a bill or note is signed or dated in one place and delivered in another, will be discussed elsewhere.[33]

§ 8. **What bills are deemed foreign in England.** In England, whence comes the distinction between foreign and inland bills, a bill drawn in Ireland and payable in England is deemed a foreign bill.[34] And where a bill was drawn in London upon a merchant in Brussels, payable to the drawer's order in London, it was held an inland bill, Bolland, B., saying: "An inland bill is a bill drawn in and payable in Great Britain, which this bill is." [35]

§ 9. **States foreign as to each other.**—There is no doubt that the several States of the United States are foreign as to each other; for though in the aggregate they form a confederated government, yet the several States retain (theoretically) their individual sovereignties, and, with respect to their municipal regulations, are foreign to each other.[36] Thus, if a drawer and drawee reside in Kentucky, and the

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30. Bromwick v. Lloyd, 2 Lutw. 1585; Chitty, Jr., 193; Sarsfield v. Witherly, Carth. 82; Chitty on Bills [*11, 12], 16.

31. Appendix, sec. 129. And see Bank of Laddonia v. Bright-Coy Commission Co. (Mo. App.), 120 S. W. 648.

32. See vol. II, chapter XXVIII, on Protest, § 926 *et seq.*

33. See chapter XXVII, on the Conflict of Laws, § 868 *et seq.*

34. Mahoney v. Ashlin, 2 B. & Ad. 478.

35. Amner v. Clark, 2 Cromp., M. & R. 468.

36. Armstrong v. American Ex. Nat. Bank, 133 U. S. 433; Life Ins. Co. v. Pendleton, 112 U. S. 696; Joseph v. Salomon, 19 Fla. 632, citing the text; Warder

bill be payable in New Orleans, Louisiana, it is a foreign bill;[37] though if it be drawn in Kentucky on a New Orleans merchant, and be payable in Kentucky, it would be inland.[38]

§ 10. Rules of decision of Federal courts.—In the Federal courts of the United States, the decisions are sometimes in conformity with those of the State courts of last resort in respect to the liabilities of parties to bills and notes, but not uniformly. The thirty-fourth section of the Judiciary Act of 1789 provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." But this section has been held to be limited in its application to the laws of the several States of a strictly local character, that is to say, to the positive statutes of the States, and their interpretation by the local tribunals, and the rights and titles to things having a permanent locality, such as real estate, and not to extend to questions of general commercial law. Therefore where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the Federal courts of the United States, which is not determined by the positive words of a State statute, or by its meaning as construed by the State courts, the Federal courts will apply to its solution their conception of the general principles of the law merchant, regardless of any local decision.[39] The rule that a

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v. Arell, 2 Wash. (Va.) 298; Brown v. Ferguson, 4 Leigh, 37; Buckner v. Finley, 2 Pet. 586; Lonsdale v. Brown, 4 Wash. C. C. 86, 153; Chenowith v. Chamberlin, 6 B. Mon. 60; Duncan v. Course, 3 Const. R. (So. Car.) 100; State Bank v. Hayes, 3 Ind. 400; Warren v. Coombs, 20 Me. 139; Ticonic Bank v. Stackpole, 41 Me. 302; Phœnix Bank v. Hussey, 12 Pick. 483; Carter v. Union Bank, 7 Humphr. 548; Carter v. Burley, 9 N. H. 558; Wells v. Whitehead, 15 Wend. 527; Todd v. Neal's Admr., 49 Ala. 266; Donegan v. Wood, 49 Ala. 242. *Contra*, Miller v. Hackley, 5 Johns. 375, Vanness, J.

37. Buckner v. Finley, 2 Pet. 586.

38. Amner v. Clark, 2 Cromp., M. & R. 468. If a draft is drawn on a resident of a State and payable within that State it is an inland bill of exchange notwithstanding the fact that the drawer lives in another State and the draft was actually drawn in the latter. Sylvester v. Crohan, 63 Hun, 509, 18 N. Y. Supp. 546.

39. Swift v. Tyson, 16 Pet. 1, Story, J., saying: "We have not now the slightest difficulty in holding that this section, upon its true intendments and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the

Federal court will not follow the law of the State in which the court is sitting, unless the State law is statutory, has been applied on the questions whether a certificate of deposit is a negotiable instrument,[40] whether a note containing a stipulation for an attorney's fee is negotiable [41] and may be enforced,[42] as to what is sufficient to put the purchaser of negotiable paper on notice of facts that deprive him of the character of an innocent purchaser,[43] as to the obligation incurred by the indorsement of a note,[44] and as to the manner of giving and the sufficiency of a notice of dishonor.[45]

Effect of Negotiable Instrument statute.—In those States, therefore, which have adopted the Negotiable Instrument statute, the Federal courts will apply the statutory provisions and the construction which may have been given thereto by the highest court of the State, but when such State court has not construed the statute, the Federal court will construe it for itself.[46]

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decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. 882, 887, to be, in a great measure, not the law of a single country only, but of the commercial world: '*Non erit alia lex Romæ, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*'" Mercer County v. Hackett, 1 Wall. 96; Township of Pine Grove v. Talcott, 19 Wall. 667; Gelpcke v. Dubuque, 1 Wall. 175; Oates v. National Bank, 100 U. S. (10 Otto) 239; Railroad Co. v. National Bank, 102 U. S. (12 Otto) 14; Farmers' Nat. Bank v. Sutton Mfg. Co., 3 C. C. A. 1, 52 Fed. 191. Where, in an action on promissory notes issued by a city, the defense was raised that the notes were invalid because of an overissue, the question is not one purely of local law, but when the facts are not exhibited on the face of the notes and were not known to the holders at the time the title to them was acquired, the local decisions need not be examined. Citizens' Savings Bank v. Newburyport, 169 Fed. 766. See on this subject article in American Law Review for April, 1875, and *post*, §§ 1525, 1526.

40. Forrest v. Safety Banking & Trust Co., 174 Fed. 345; Bank of Saginaw v. Title & Trust Co. of Western Pennsylvania, 105 Fed. 491.

41. State Nat. Bank v. Cudahy Packing Co., 126 Fed. 543; affirmed 134 Fed. 538.

42. The Avolan, 169 Fed. 696.

43. Union Nat. Bank v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426.

44. Northern Nat. Bank v. Hooper, 98 Fed. 935.

45. Gurnsey v. Imperial Bank of Canada, 188 Fed. 300.

46. Coosley v. Reynolds, 196 Fed. Rep. 640; Forrest v. Safety Banking & Trust Co., 174 Fed. 345; *In re* Hopper-Morgan Co., 154 Fed. 249.

§ 10a. Federal jurisdiction in cases of bills of exchange and promissory notes.—By the Federal Judiciary Act of 1789 it was provided that no district or circuit court shall "have cognizance of any suit to recover the contents of any promissory note, or other *chose in action* in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange." [47] According to the established construction of this act the right of the holder of a promissory note, payable to a particular person or bearer, to sue in his own name, does not depend upon the citizenship of the named payee, or of the first, or of any previous holder; because in all such cases the title passed by delivery and not by virtue of any assignment.[48] By act of Congress of March 3, 1875, it is provided: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange." [49]

The restriction was thus removed as to "promissory notes negotiable by the law merchant," and jurisdiction in such suits made to depend upon the citizenship of the parties as in other cases.[50]

This provision of the statute has been held not to apply in cases removed from the State courts under the removal acts, but to the original jurisdiction of the Federal courts.[51]

In some cases it has been held that the terms "promissory notes negotiable by the law merchant" embrace such instruments as would be negotiable according to the general principles of the law merchant, which was a part of the common law,[52] while others consider that they are confined to those instruments which are nego-

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47. See § 11 of Act of Sept. 24, 1789, chap. 20. Thompson v. Perrine, 106 U. S. 589; Thomson v. Lee County, 3 Wall. 327; Bushnell v. Kennedy, 9 Wall. 387; City of Lexington v. Butler, 14 Wall. 282; Cooper v. Town of Thompson, 13 Blatchf. 434; Coe v. Cayuga Lake R. Co., 19 Blatchf. 522.

48. Bullard v. Bell, 1 Mason, 243; Bank of Ky. v. Wooster, 2 Pet. 318.

49. § 1, chap. 137, Supp. to Revised Statutes of the U. S., p. 174.

50. New Orleans v. Quinlan, 173 U. S. 192, 19 Sup. Ct. Rep. 329; Treadway v. Sanger, 107 U. S. 323, 2 Sup. Ct. Rep. 691.

51. Delaware County v. Diebold & Co., 133 U. S. 473; City of Lexington v. Butler, 14 Wall. 283.

52. Windsor Sav. Bank v. McMahon, 38 Fed. 283; Beverley v. Davidson Co., 2 Flipp. 507; Gloucester Ins. Co. v. Younger, 2 Curtis, 338; Adams v. Addington, 16 Fed. 89.

tiable according to the local law, that is, as said by Gresham, J.: "Notes having the qualities of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a *bona fide* purchaser for value before maturity, were subject to no equities in favor of the maker." [53] This latter view seems to us the correct one. An instrument cannot be negotiable when made in a State whose statutes declare it otherwise. And if the broad interpretation is given to the words "negotiable by the law merchant," the result in some cases would be that suit would be maintainable in a Federal court because the instrument was in a form negotiable "by the law merchant" when negotiable qualities under State statutes did not exist. The intent of the statute was doubtless to give jurisdiction in cases of negotiable instruments; and this would be ousted in some cases where the instrument by State statute was made negotiable, though not so by the law merchant independent thereof. The statute would seem to have contemplated substance rather than form, and the construction given it in the cases which are approvingly cited, enforces this view.

By act of Congress of March 3, 1887, it is declared: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note, or other *chose in action*, in favor of an assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.[54] This statute has been held to prohibit suits in the Federal courts in all cases, other grounds of jurisdiction being wanting, except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer and executed by a corporation.[55]

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53. Gregg v. Weston, 7 Biss. 360; Porter v. City of Janesville, 3 Fed. 317.

54. U. S. Stat. at Large, 1886–1887, p. 552, chap. 373; New Orleans v. Quinlan, 173 U. S. 192, 19 S. Ct. 329. And see Act of August 13, 1888, chap. 866, 25 Stat. 433. The act of March 3, 1911, sec. 24 (1) in part provides: "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

55. Wilson v. Knox County, 43 Fed. 481, a county warrant. See Newgass v. New Orleans, 33 Fed. 196; Rollins v. Chaffee County, 34 Fed. 91; New Orleans

§ 11. The face of the bill does not always disclose its character.—Whether or not a bill is foreign or inland, and by what laws the liabilities of parties to bills and notes are to be governed, may often be not sufficiently disclosed by the date of place on the instrument itself, as the courts of the several States, as of different countries, upon settled principles, do not take judicial notice of the divisions of foreign States into counties, towns, and cities. Thus, in England, the averment that a bill was drawn in Dublin was not considered equivalent to averring that it was an Irish bill. Abbott, C. J., said: "The framer of the declaration has not said that Dublin is in Ireland, and we cannot assume it, whatever may be our belief on the subject;" and Bailey, J., said: "There may be a Dublin in America or Scotland." [56] So the Supreme Court of Texas have held that they could not judicially know that a note payable in New Orleans was payable in Louisiana,[57] or a bill dated there was drawn in Louisiana; [58] or that a note dated "Philadelphia" was made in Pennsylvania.[59] So in Missouri, as to New Orleans, the court would not take judicial notice that a bill dated there was foreign.[60]

§ 12. It may be difficult sometimes to determine whether a bill is inland or foreign.—Thus, suppose a Boston merchant, temporarily in the city of New York, were to draw his bill on a New York merchant, payable in New York, but were to date it in Boston, would it be an inland or a foreign bill? In relation to innocent third parties, who have taken the bill in the belief that it was what its face imported, it would undoubtedly be held foreign.[61] "As between the original parties and others having notice of the circumstances under which the bill was drawn, the question would be more doubtful; but we think it would, even then, be held to be a foreign bill, especially if it appeared that it was drawn in that form for no wrongful purpose, but

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v. Quinlan, 173 U. S. 192, 19 Sup. Ct. Rep. 329. Certificates of corporations payable to bearer were sued on and action sustained. See also New Orleans v. Benjamin, 153 U. S. 411, 14 Sup. Ct. Rep. 905. As to jurisdiction upon an indorsement as a distinct contract, see *post*, under § 678.

56. Kearney v. King, 18 Eng. C. L. 28.

57. Andrews v. Hoxie, 5 Tex. 171.

58. Yale v. Wood, 30 Tex. 17.

59. Cook v. Crawford, 4 Tex. 420.

60. Riggin v. Collier, 6 Mo. 568.

61. See chapter XXVII, on the Conflict of Laws, and Snaith v. Mingay, 1 Maule & S. 87; Lennig v. Ralston, 23 Pa. St. 137.

only that the bill might conform to the drawer's usual course of business, and be what it would have been had he not happened to be at the time in New York. The converse of this has been decided."[62] Such is the language of Professor Parsons on this question, which we adopt as a succinct and judicious view of the law.[63]

§ **13.** If a bill be upon its face an inland bill, the fact that it was actually drawn and delivered in a foreign State will not divest it of its inland character. Thus, where a bill was drawn in Wisconsin, but dated East Fork, in Illinois, it was held in the latter State that it must be treated and considered as an inland bill. "Such was the intention and agreement of the parties, as shown on the face of the instrument. That it was competent for the parties, both being citizens of Illinois, to provide for their express agreement that it should be subject to and construed by the laws of this State, is too well established by authority to admit of doubt."[64]

§ **14.** The presumption is that a bill purporting to be drawn abroad was really so drawn. But evidence would be admissible to show that a bill purporting to have been drawn abroad was, in fact, drawn within the country where suit is brought, and is therefore void, for want of a stamp required by the internal revenue laws of such country.[65] But it has been recently held, in Massachusetts, that the maker or indorser of a note cannot, as against the indorsee in that State for value, before maturity and without notice, show that the note, which was dated in Boston, with intent that it should be a Massachusetts contract, was actually made in New York, and on account of illegal interest, was void under the usury laws of the latter State.[66]

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62. Strawbridge v. Robinson, 5 Gilm. 470.

63. 1 Parsons on Notes and Bills, 57.

64. Strawbridge v. Robinson, 5 Gilm. 472, Caton, J.

65. Abraham v. Dubois, 4 Campb. 269; Bire v. Moreau, 2 Car. & P. 376 (12 Eng. C. L.); Jordaine v. Lashbrooke, 7 T. R. 601; Steadman v. Duhamel, 1 C. B. 888. See *post*, § 869 *et seq*.

66. Towne v. Rice, 122 Mass. 67.

SECTION III

THE EFFECT OF A BILL OF EXCHANGE; WHETHER OR NOT IT IS AN ASSIGNMENT

§ 15. As we have already seen, heretofore it was the policy of the common law to interdict the assignment of possibilities, rights, titles, and things in action, on the ground, as stated by Lord Coke, that "it would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice." [67] Bills of exchange and promissory notes have long been recognized exceptions to this rule; and by courts of equity, it has long been discredited, and assignments of a mere naked possibility or chose in action for valuable consideration have been held valid and effectuated by them.[68] And courts of law, following in the footsteps of equity, now recognize and enforce such assignments in suits brought in the name of the assignor for the benefit of the assignee, it being necessary for the assignee to assert his rights at law in that form, as the want of privity of contract between himself and the debtor is considered to stand in the way of a suit in his own name,[69] except where expressly allowed by statute.

§ 16. The drawing and transferring of bills of exchange depend upon principles of the law merchant, which apply peculiarly to negotiable instruments. But the effect of the drawing of a bill of exchange, upon the rights and interests of the parties in the funds which is in the hands of the drawee, depends very frequently upon principles derived from the doctrines of courts of equity in respect to equitable assignments. And we shall now consider the effect of a bill or order upon the fund on which it is drawn. This inquiry naturally divides itself into several branches: First. What is the effect of a bill of exchange (a negotiable bill in its commercial sense) drawn for the whole amount of a fund in the drawee's hand? Second. What is the effect of a nonnegotiable order for the whole of a fund? Third. What is the effect of a bill of exchange for part of a fund? And fourth. What is the effect of a nonnegotiable order for part of a fund?

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67. Coke's R., Part X, 48*a*.

68. 3 Lead. Cas. in Equity [*652], 307; Chitty on Bills [*7, 8], 9, 10.

69. Wheatley v. Strobe, 12 Cal. 98; Mandeville v. Welch, 5 Wheat. 277; Chitty on Bills [*9], 10.

§ **16a.** The questions stated have elicited very diverse and conflicting opinions, and it has been held or declared in judicial decisions:

(1) That an unaccepted bill of exchange for the whole amount of the debt due by the drawee to the drawer, or for the whole of the funds in the drawee's hands, operates an equitable assignment of the debt or funds; [70] and contrariwise that it does not of itself operate such an assignment.[71]

70. In Gibson v. Cooke, 20 Pick. 15, Dewey, J., said: "It seems to be equally well settled that a draft by the creditor on his debtor *in the form of a bill of exchange to the amount of the debt, or the whole funds in his hands*, is a good and valid assignment of the debt or fund." In Robins v. Bacon, 3 Greenl. 349, Mellen, C. J., said: "A case which seems directly in point is that of Mandeville v. Welch, 5 Wheat. 277. In that case it was decided, as stated by Story, J., in delivering the opinion of the court, that 'where an order is drawn for a particular fund, it amounts to an equitable assignment of the fund; and, after notice to the drawee, it binds the fund in his hands.'" In these cases the bills were not negotiable; but no distinction in respect to them was taken. In Corser v. Craig, 1 Wash. C. C. 426, suit was brought by the payee and indorser, for the benefit of his indorsee, against the drawee. Action was sustained. This is going farther than any other adjudicated cases we know of. Had action been brought in the name of the drawer for the last indorsee's benefit, it would have been unobjectionable, as we think, and the following language of Washington, J., would have been applicable. He said: "If the drawee refuse to accept, and pay the bill, the right of the holder to the debt once assigned to him is not thereby impaired; although he may not be entitled to recover the same in his own name, for the want of a promise to pay. But he may sue the drawer, or the drawee in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a chose in action, that the debtor shall pay, and on failure, that the assignor will. The bill being retained after protest, by the assignee, is evidence that the amount has not been paid by the drawer or any of the indorsers. I see no possible mischief which can result from this doctrine. For, if after payment refused, and protest made, the drawee should pay over the funds in his hands to the drawer, or to his order, without notice from the first assignee, that he should retain the bill and look to him for the amount, so far as he was bound to pay; this would be a good defense against a suit brought in the name of the drawer." In Wheatley v. Strobe, 12 Cal. 97, where bill was for whole amount, it was held that after presentment of the bill, funds could not be reached by attachment at suit of drawer's creditors. Field, J., said: "The want of a written acceptance does not affect the right of Howell (the holder) to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it he must recover upon the original demand by force of the assignment. Under the old common-law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party

71. Bank of Commerce v. Bogy, 44 Mo. 15; Shand v. De Buisson, 18 Eq. Cas. 283; First Nat. Bank v. Dubuque S. R. Co., 52 Iowa, 378; Bush v. Foote, 58 Miss. 5.

(2) That a bill of exchange for part of a debt or fund is not an assignment *pro tanto* unless accepted,[72] and although it be nonnegotiable.[73] But the theory of a bill, as stated by some of the best writers, would lead to a different conclusion,[74] and a check, which is a species of bill, has been, in a number of cases, held an equitable assignment *pro tanto*.[75]

(3) That an order for an entire debt due by the drawee to the drawer, or an entire fund in his hands, specifying the debt or fund, operates an equitable assignment, and binds the drawee as soon as he has notice.[76] This doctrine is well settled.

(4) That an unaccepted order for part of a fund specified in it is not an assignment *pro tanto;*[77] but contrariwise (and the better opinion) that it is.[78]

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beneficially interested. Courts of law, equally with courts of equity, gave effect to assignments like the one under consideration, by controlling the proceeds of the judgments recovered for the benefit of the assignee." Nimocks v. Woody, 97 N. C. 1; Lee v. Robinson, 2 N. Eng. (R. I.) 620; Roberts v. Austin, 26 Iowa, 315. See vol. II, chapter XLVII, on Checks; Chitty on Bills, p. 1 (13th Am. ed.); Hirshfield v. Ludwig, 69 Hun, 554, 24 N. Y. Supp. 634.

72. Brill v. Tuttle, 81 N. Y. 547; Att'y-Gen'l v. Continental Life Ins. Co., 71 N. Y. 325; Noe v. Christie, 51 N. Y. 273; Throop Grain Cleaner Co. v. Smith, 110 N. Y. 90; People v. Remington, 45 Hun, 335; Christmas v. Russel, 14 Wall. 84; Chase v. Alexander, 6 Mo. App. 506. A negotiable draft, not payable out of a specific fund, does not amount to an equitable assignment. Borough of Roselle Park v. Montgomery (N. J. Ch.), 60 Atl. 954; McBride v. American Ry. & Lighting Co. (Tex. Civ. App.), 127 S. W. 229.

73. In Shaver v. West. Un. Tel. Co., 57 N. Y. 461, the nonnegotiable bill ran, "please pay D. L. N. $50 monthly on last day of each and every month, commencing March 31st, 1868, until the sum of $300 is paid, and charge my salary account." Held not an assignment, Lott, Ch. C., saying: "It is not payable out of a particular fund."

74. Story on Bills, § 13.

75. See vol. II, §§ 1643, 1646; First Nat. Bank v. Coates, 8 Fed. 540, Miller, J.

76. Mandeville v. Welch, 5 Wheat. 277; Robins v. Bacon, 3 Greenl. 346; Cowperthwaite v. Sheffield, 3 N. Y. 243; McMenomy v. Ferrers, 3 Johns. 72; Bank of Commerce v. Bogy, 44 Mo. 18; Walker v. Munro, 18 Mo. 564; Anderson v. De Soer, 6 Gratt. 364; Cutts v. Perkins, 12 Mass. 209; Morton v. Naylor, 1 Hill. 583; Gibson v. Cooke, 20 Pick. 15; Moore v. Davis, 57 Mich. 255, distinguishing the case from Grammel v. Carmer, 55 Mich. 201, where the draft was a "banker's draft" and drawn for only a part of the fund. *Contra* in Lewis v. Traders' Bank, 30 Minn. 135, unless the fund be particularly specified.

77. See *post*, §§ 22, 23, 23*a*.

78. In Row v. Dawson, 1 Ves. 331 (1749), it appeared that A. borrowed money of B., and gave him a draft upon a fund due him out of the Exchequer, drawn on Swinburne, the Deputy of Horace Walpole, and payable, as expressed, "out of the money due to me from Horace Walpole out of the Exchequer, and which

(5) That a partial unaccepted order will operate as an equitable assignment, although drawn upon a fund not yet in existence, or upon a debt not yet mature, and although the sources of payment be precarious and uncertain.[79]

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will be due at Michaelmas, pay to T. & C., value received." A. afterward became bankrupt, and it was held that the draft operated in an equitable assignment which should prevail against the assignees in bankruptcy. In Lett v. Morris, 4 Sim. 607, A., having engaged to pay to B. £2,360 by installments, B. signed and gave to C., for value, an order authorizing A. to pay parts of each installment to C., and £460 was to be reserved in A.'s hands out of the balance, and C.'s receipt was to be a discharge to A. A. was served with notice of the order on the day it was signed; but there was no act or expression of consent. Vice-Chancellor Shadwell said: "I entertain no doubt that the order amounts to an equitable assignment." In *Ex parte* South, 3 Swanst. 391, the order for £417 6s., "as part of the amount due to me for plumber's work," etc. Held, subsequent bankruptcy of drawer did not defeat it, it having been shown to the debtor. In Yates v. Groves, 1 Ves. Jr. 281, it appeared that Dawson being indebted to Yates and Brown, upon a note, gave him an order on Groves and Dickinson for the amount of the note, which they surrendered, payable out of an amount for leasehold property. Before the money was paid, Dawson was thrown into bankruptcy, and Yeates and Brown claimed the fund *pro tanto*, and filed their bill to reach it. Lord Thurlow said: "This is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer. The transfer was actually made. They were in the right not to accept, as it was not a bill of exchange. It is not an inchoate business. The order fixed the money the moment it was shown to Groves & Dickinson." Christmas v. Russell, 14 Wall. 84. In Brill v. Tuttle, 81 N. Y. 457, there was an unaccepted order for part of fund, running, "Pay B. & R. $300, and charge same to our account for labor and materials performed and furnished in repairs and alterations of a certain house." It was shown that the amount was not yet due; but the order was held an assignment of the debt *pro tanto*, and that subsequent voluntary payment to the drawer by the drawee was no defense to suit by the payee. Ehrichs v. De Mill, 75 N. Y. 370. Order for part of fund assented to by drawee, running, "Pay E. F. $400 on account of work done as per contract." Action by payee against drawee sustained. In Parker v. Syracuse, 31 N. Y. 376, the order ran, "Pay P. & W. $1,420 on plank-road and sidewalk accounts, and charge to my account." Held, an assignment; and that after notice to the drawee he would violate equitable rights of payee by paying the amount to any other but the payee. In Lowery v. Steward, 25 N. Y. 241, the order ran "Pay to the order of A. H. L. $500 on account 24 bales cotton shipped to you as per bill of lading by steamer *Colorado*, inclosed to you in letter." Held to be an equitable assignment.

79. Row v. Dawson, 1 Ves. Sr. 331. In Brooks v. Hatch, 6 Leigh, 534, the order was payable "out of the first money which should be due him (the drawer) for salt delivered, or to be delivered, to them (the drawees)." Held, equitable assignment *pro tanto*. See also Peyton v. Hallett, 1 Cai. 363; Cutts v. Perkins, 12 Mass. 206; Brill v. Tuttle, 81 N. Y. 547.

(6) That if accepted, the bill or order, whether for the whole or part of a fund, operates as an assignment thereof.[80]

§ 17. Let us now consider the principles to be relied on for the solution of these questions; and in the first place: *as to the effect of a bill of exchange drawn for the entire amount of debt due by the drawer, or entire fund in the drawee's hands.*

By some of the authorities, as we have seen, such a bill is declared to operate as an equitable assignment of the fund.[81] By others the view is taken that the drawing of the bill is an independent transaction totally disassociated in legal effect from the funds in the drawee's hands, and does not operate as an assignment of them, but simply as an engagement of the drawer that the drawee shall pay to the payee a certain amount; or that in the event of the drawee's default the drawer will do so, the due steps being taken to hold him liable. Great confusion has arisen in the adjudicated cases from a failure to discriminate between the parties who may certainly claim that as to them the bill operates as an assignment, and those who cannot make such claim.

In an early English case it was said: "The theory of a bill of exchange is that the bill is an assignment to the payee of a debt due from the acceptor to the drawer";[82] and it is undoubtedly true that the payee has a right to suppose that the drawee has funds of the drawer, upon the faith of which understanding he receives the bill directing them to be paid to him. As between the drawer and payee, then we think it is clear that the bill is intended to operate, and does operate,

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80. See *post*, §§ 18, 22, and notes. In Risely v. Smith, 64 N. Y. 576, it was held, that an acceptor of an order on a fund not then existing could not prevent the fund from accruing, and set it up as a defense; and if he does, that he may be sued on the order. To same effect see Gallagher v. Nichols, 60 N. Y. 438. In Munger v. Shannon, 61 N. Y. 251, the order was for a certain sum, with words, "and deduct the same from my share of the profits, etc.," and it was held that its acceptance implied the condition that it was not to be paid unless there were profits, and that acceptor might show there were none. Nimocks v. Woody, 97 N. C. 1; County of Des Moines v. Hinckley, 62 Iowa, 643.

81. See *ante*, § 16*a*, and notes. Where a creditor has drawn a draft on his debtor for the full amount of the debt claimed with the account attached in favor of a certain bank, this with the payment of the draft by the bank constitutes the assignment of the claim, and, upon protest of the draft, the bank has the right to hold the drawer of the draft and the debtor responsible. Provident Nat. Bank v. C. D. Harnett Co., 45 Tex. Civ. App. 273, 100 S. W. 1024.

82. Gibson v. Minet, 1 H. Bl. 569; Story on Bills, § 18; Chitty on Bills [*1], 2.

as an assignment of the fund in the drawee's hands sufficient to meet it;[83] and if there be no such funds, and no understanding that the bill will be honored, the drawer commits a fraud upon the payee, and will be absolutely bound upon the bill, without notice of dishonor. And if, after drawing the bill, the drawer should withdraw the funds in the drawee's hands, it would be likewise a fraud upon the payee, and the drawer would be absolutely bound without notice.[84]

§ **18. Accepted bill operates as an assignment.**—As between the payee and the drawee, however, there is, as generally held, no privity of contract, unless the drawee accepts to pay the bill. When he does this, he becomes absolutely bound to pay the debt to the holder of the bill. And any subsequent bill drawn upon him, or transfer or assignment of the fund in his hands, or legal process served upon him by a creditor of the drawer, could create no liability upon him to pay or deliver over the funds of the drawer to anyone but the holder to whom he has entered into an obligation to pay them.[85]

It has indeed been said that "a proper bill of exchange does not of itself operate as an assignment to the payee of funds of the drawer, in the hands of the drawee, and even after an unconditional acceptance, it cannot in strictness be held to have that effect, since the drawee becomes bound by reason of the contract of acceptance, irrespective of the funds in his hands." [86] But it has been well replied that, "the

83. Story on Bills, § 13; Chitty on Bills [*1], 2.

84. See *ante*, § 16*a*, and Gibson v. Cooke, 20 Pick. 15; Robins v. Bacon, 3 Greenl. 349; Mandeville v. Welch, 5 Wheat. 277. See Chitty on Bills [*1], 2; Story on Bills, § 13.

85. Mandeville v. Welch, 5 Wheat. 277; Barnsdall v. Walemeyer, 142 Fed. 415; Kyle v. Chattahoochee Nat. Bank, 96 La. 694, 24 S. E. 149; Harris v. Clark, 3 N. Y. 117, Ruggles, J.; First Nat. Bank v. Dubuque S. R. R., 52 Iowa, 378; Lambert v. Jones, 2 Patton & Heath, 144; 2 Parsons and Notes on Bills, 330, 331; Story on Bills, § 13. In Buckner v. Sayre, 17 B. Mon. 754, it appeared that the Lexington Insurance Company drew a bill on the 5th of August, 1851, on its agent, J. H. Wheeler, at New Orleans, payable at six months, for $7,182. In November following, the company made a general assignment to Buckner, as trustee, to pay its debts. And afterward Wheeler who had accepted the bill, paid over $3,000, which he had collected from premiums, to Buckner, the trustee. Simpson, J., said: "Sayre, as the holder of the bill of exchange, was entitled to the fund in the hands of the acceptor, which the latter, by his acceptance, had appropriated for his use and benefit." Until accepted draft does not operate as an assignment, legal or equitable. Erickson v. Inman, 34 Oreg. 44, 54 Pac. 949.

86. Cowperthwaite v. Sheffield, 3 N. Y. 243, Hurlbut, J. See also Wheeler v. Stone, 4 Gill, 47. In Marine and Fire Insurance Bank v. Jauncey, 3 Sandf. 258, it appeared that John Wood having 105 bales of cotton, which he intended

theory is, even in such a case, that funds to the account of the bill have been assigned, and that the acceptor is estopped from setting up any such objection as that there were no funds to assign." [87]

§ 19. Whether unaccepted bill for whole of fund operates as an assignment.—When, however, the drawee has not accepted, or assented to pay the amount to the holder, the rights of the parties are more difficult to determine. The holder (unless authorized by statute) cannot sue the drawee at law in his own name, for there is no contract on the part of the drawee to pay him.[88] But there is force in the doctrine that he might sue the drawee in the name of the creditor for the

to consign to Joseph Wood, drew a bill on him in favor of Walsh at sixty days' sight, for $3,000, which was discounted by plaintiffs, and the proceeds applied by John Wood to pay for the cotton above mentioned, which he had bought. The bill was dated July 29, 1846, and accepted by the drawee on July 6, 1846. The cotton was shipped to the drawee. On the 30th of June, Joseph Wood became insolvent, and executed an assignment of all his estate, including a debt due him by John Wood, the drawer, of $2,200. The cotton was also placed in Jauncey's hands, and its net proceeds were $2,700, which the plaintiffs sought to reach by their bill in equity. The court said in respect to the bill of exchange, that though accepted, it was not an equitable assignment; and that the drawee, on receiving the funds derived from the cotton, "had a right to apply them to the payment of his general balance, or in any other way that John Wood and he might agree upon." The case was, as we think, rightly decided; but we do not see that the broad doctrine declared was necessary to such decision. There was a superior equity in the drawee, which had priority over the equitable assignment. It does not follow that there was not an equitable assignment (subject to superior equitable rights), or rather an equitable right to follow the proceeds of the cotton.

87. Pickering v. Cameron, 103 Iowa, 186, 72 N. W. 447; 1 Parsons on Notes and Bills, 332.

88. Tiernan v. Jackson, 5 Pet. 580; Harris v. Clark, 3 N. Y. 117, Ruggles, J.: "It is clearly settled that no action at law will lie in favor of the holder of a bill of exchange against the drawee, unless he accepts the bill." See *post*, § 50, and note; New York & Va. State Bank v. Gilson, 5 Duer, 574, Duer. J.: "There is no such privity between him (the drawee) and the holder as can entitle the latter to maintain an action against him." Yates v. Bell, 3 B. & Ald. 643; Williams v. Everett, 14 East, 582. Holder has no action against drawee to whom funds are remitted for money had and received. See *ante*, § 15. And as between the drawer and the drawee, it has been held that a cotton factor, unless he has expressly or impliedly engaged to pay the drafts of a customer, is not liable in damages to the latter for refusing to pay his draft, even though the customer had in the factor's hands, funds sufficient to meet the same at the time it was presented; but the contrary is true, when, by express agreement, or by necessary implication arising from the course of dealings between the parties, there is an understanding or contract on the factor's part to pay such drafts. See Moss v. Stokeley, 95 Ga. 675, 22 S. E. 692.

amount of the debt, and offer the bill in evidence to show that it had been assigned to him; [89] and also in the view that although the drawee would be protected if he parted with the funds before notice of the bill, yet if it were payable on demand, and after its presentment for payment, he should pay the amount to another, under a subsequent order, he would be still bound to pay it over to the holder of the first bill.[90] And after presentment to the drawee, a subsequent assignment made by the drawer in trust for creditors, or attachment or garnishment process served upon the drawee, would not defeat the equitable claim of the holder to have the funds appropriated to pay the bill.[91]

§ **20.** The doctrine that an unaccepted bill for the entire debt or fund operates as an equitable assignment thereof is opposed to the current of authority in the United States, and in England as well, it being considered, as already stated, that the bill of exchange is an independent security resting on the commercial responsibility of the parties thereto.[92] But it is conceded that the bill, whether for the whole of the fund or debt, or only a part, may be evidence to show an assignment; and that, with other circumstances indicating that such was the intention, will vest in the holder an exclusive claim to the debt or fund, and bind it in the hands of the drawee after notice.[93] Very

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89. See *ante*, § 16*a*, and note; Corser v. Craig, 1 Wash. C. C. 426.

90. Chitty on Bills [*1], 2, (13th Am. ed.).

91. See *ante*, § 16*a*, note; *post*, § 1635 *et seq.;* Wheatley v. Strobe, 12 Cal. 97; Roberts v. Austin, 26 Iowa, 315; Nimocks v. Woody, 97 N. C. 1; Flour City Nat. Bank v. Garfield, 30 Hun, 580.

92. See Bank of Commerce v. Bogy, 44 Mo. 15. In this case the bill was drawn for the whole debt due the drawer by the drawee. The payee sued the drawee and it was held that the bill did not operate *per se* as an assignment, though connected with circumstances it might be evidence of an assignment. The pleadings did not aver an assignment, and were defective in that respect. Harrison v. Williamson, 2 Edw. Ch. 438. In Shand v. De Buisson, L. R., 18 Eq. Cas. 283 (1874), where the bill was for the exact amount of the funds in the drawee's hands, Sir James Bacon, V. C., said: "It is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of the debt. The note might have been indorsed to any individual, or to any number of people, who might have indorsed it in succession. A mercantile instrument it is in its original, and in that shape it remains; and has no other validity or effect, and to call it an assignment of a debt would be to call it not by its right name." Grammel v. Carmer, 55 Mich. 201; Whitney v. Eliot Nat. Bank, 137 Mass. 351; Meldrum v. Henderson, 7 Colo. App. 256, 43 Pac. 148.

93. First Nat. Bank v. Dubuque S. R. R., 52 Iowa, 378, 35 Am. Rep. 281;

slight circumstances in addition to the bill ought to effectuate an equitable assignment; and while the current of authority is undoubtedly otherwise, the better opinion, as it seems to us, is that a bill for the entire amount of a debt or fund should operate as an equitable assignment thereof. The doctrine of equitable assignment is the creature of courts of equity, and the phrase "equitable assignment" is used because, by the technicalities of pleadings at law, no legal assignment can be effectuated.[94] No assent of the debtor is necessary to an assignment of the debt. Notice to him is all that is essential to affect him with liability to respect the assignment, and so far does equity regard the justice of this principle that it is applied even where an integral debt is broken up into fragments. Now, then, if A. have $1,000 in the hands of B., and draw a bill directing B. to pay $1,000 to C., or order, on demand, there can be no fair inference from the transaction but this: that A. intended to assign the debt due to him by B. to C., and for the bill to stand in B.'s hands as evidence of the acquittance. It is the intention to assign that makes the assignment.[95] And after presentment of the bill to B., which is notice, what sound principle of law could be violated, and what equitable right impaired, by holding that an assignment is effected so as to bind the debt in equity, and bind B. to respect it—not indeed as a party to the bill, but as the holder of the thing assigned? So confident is the expectation among mercantile men that a bill drawn on funds will be honored, that in order to hold the drawer liable in the event of dishonor, he must be specially notified of the fact, and that the holder looks to him for payment. The payee of an unaccepted bill, it is true, has nothing but the drawer's direction to pay him the money to rely on. But that, in its very nature, imports that (1) the drawee holds the money; (2) that the drawer assigns it to the payee; (3) and that if the drawee does not respect the assignment and pay the money to the payee, the drawer will himself pay its equivalent on being notified of the drawee's refusal. It is in anticipation of the drawee's assent that the payee is, or may be, induced to take the bill; and while he cannot exact acceptance, which is a new engagement, from the drawee, that is no reason why he may not compel acquiescence, which in nowise affects his rights or privileges. And it seems just and

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Bank of Commerce v. Bogy, 44 Mo. 17; Bank v. Kowalsky, 105 Cal. 42, 38 Pac. 517.

94. First Nat. Bank v. Coates, 8 Fed. 540, Miller, J.

95. Kahnweiler v. Anderson, 78 N. C. 137, the court saying: "The intention to assign operates as an equitable assignment."

right that courts of equity and courts of law, in so far as their rules of procedure will permit, should carry out and enforce the expectation and intention of the chiefly interested parties. It is not sufficient to answer that the drawer's contract is independent and apart from the fact that he has, or has not, funds in the drawee's hands. The bill imports that he has. He is estopped to deny it. And while it is true he may be held personally bound whether he has them or not—and that indeed he is more rigidly held when he has no funds and no expectation that the bill will be honored than otherwise, because then he has not acted in good faith; and while it is true that the payment of the bill is not *confined* to the funds in the hands of the drawee— we can see no reason why, when the funds are actually in the drawee's hands, and he is notified of the bill being drawn for them, he should not be held bound to hold them, and apply them as his creditor has directed. If a subsequent conveyance of the debt by the drawer to another by deed, or subsequent levy on the debt at the suit of the drawer's creditor, could deprive the holder of the bill of his right to pursue them by proper procedure, recourse against the drawer might prove of no avail; and the most righteous claim upon the fund might fail utterly by a mere technical ruling, which excludes the peculiar instruments of commerce from a basis of security freely accorded to others.

§ 21. In the second place, as to an order for the whole of a fund.—It may be regarded as a settled doctrine that an order founded upon a good consideration, given for a specific debt or fund owing by or in the hands of a third person, operates as, or rather is evidence of, an equitable assignment of the demand to the holder.[96] It is clearly an assignment, as between the drawer and the payee, because so intended.[97] It is equally so as between them and the drawee, as soon

96. Mandeville v. Welch, 5 Wheat. 277; Robins v. Bacon, 3 Greenl. 346; Cowperthwaite v. Sheffield, 3 N. Y. 243; McMenomy v. Ferrers, 3 Johns. 72; Bank of Commerce v. Bogy, 44 Mo. 18; Anderson v. De Soer, 6 Gratt. 364; Cutts v. Perkins, 12 Mass. 209; Morton v. Naylor, 1 Hill, 583; Gibson v. Cooke, 20 Pick. 15; Parker v. City of Syracuse, 31 N. Y. 379; Harris v. Clark, 3 N. Y. 117. A release of a specific fund in bank operates as an equitable assignment. Dirimple v. State Bank of Philips, 91 Wis. 601, 65 N. W. 501.

97. Morton v. Naylor, 1 Hill (N. Y.), 583. A landlord gave an order directing his tenant to pay W. the rents accruing during a specified period, which, on its presentment, he said he would do. The landlord subsequently directed the tenant not to pay, but the latter disregarded the notice and paid the order. It was held that the tenant did right, the order operating as an equitable assignment. Cowen, J., said: "I refer to cases in chancery to show that an order for

as it is presented to him and he assents;[98] and whether he assents or not, the holder may in equity recover the debt or fund from him.[99] And if the debtor be served with garnishment or other process of law after the order has been given, and before he has been compelled to pay the amount to another, the order will take precedence.[1] An order for a specific fund usually contains words indicating an intention to pass or appropriate the whole fund, as, "Pay to A. B., \$......, the amount of your collection from C. D.," or the amount received from such a transaction;[2] which words, unless parenthetically inserted as a

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value is *per se* an equitable assignment to the payee of the debt due from the drawee to the drawer. Our own rules at law as to enforcing such an assignment are well known. We give it the same effect as would a court of chancery." Gardner v. Nat. City Bank, 39 Ohio St. 604, citing the text. To have an order to pay money effectual as an equitable assignment, it must be drawn on a particular fund, and not be payable generally. Izzo v. Ludington, 79 N. Y. S. 744, 79 App. Div. 272, affirmed 178 N. Y. 621, 70 N. E. 1100.

98. Legro v. Staples, 16 Me. 252; Johnson v. Thayer, 17 Me. 403; Desesse v. Napier, 1 McCord, 106; Peyton v. Hallet, 1 Cai. 363. See Story's Eq. Jur., § 1043. Where the assignee of a fund accepted an order drawn on the fund by the assignor, and paid the order partly in cash and gave to the drawee of the order a due-bill representing the balance, the assignee is liable to the drawee on the due-bill as the transaction amounted to an assignment of a chose in action by the drawee of the order to the assignee. Parnell v. Davenport, 36 Mont. 571, 93 Pac. 939. And an order directing the drawee to pay to the payee, "from equities on hosiery consigned to you," a certain sum, "and charge the same to our account," is a direction to make the payment from a fund and to charge it to the drawer, and not to charge the payment to a particular fund, and was an assignment of the rights of the consignor against the consignee growing out of the consignment mentioned in the order, and by acceptance the drawee became bound to pay so much of the amount of the order as, but for the order, would have been payable to the drawer when the "equities" should be adjusted. Morrison v. Lamson, 176 Mass. 536, 57 N. E. 997.

99. Story's Eq. Jur., § 1044; Kahnweiler v. Anderson, 78 N. C. 136; McGahan & Co. v. Lockett, 54 S. C. 364, 32 S. E. 429, 71 Am. St. Rep. 796.

1. Anderson v. De Soer, 6 Gratt. 364. In this case it appeared that a draft for \$10,000, drawn by Grivegnee, a legatee, dated Malaga, 20th July, 1819, upon the executors of his uncle, at Richmond, Va., who had left him a legacy of \$10,000, directing that when forthcoming, and out of the funds destined for that object by his deceased uncle, they should pay that amount to the order of Messrs. Scholtz & Brothers, for value received of them, noting the same as amount of legacy left him by his uncle, was held to be an assignment of the legacy, and as such to have precedence over an attachment thereupon served four days after the drawing of the draft, and before it was presented. Held otherwise in contest between garnisheeing creditor of depositor and holder of check presented for payment after the service of writ of garnishment on bank. See Commercial Bank v. Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873.

2. Bank of Commerce v. Bogy, 44 Mo. 18.

mere earmark, characterize the instrument as an unnegotiable order, and deprive it of its qualities as a commercial instrument.

§ 22. In the third place and fourth place, as to a bill of exchange, or an order for part of a fund.—The doctrine is laid down with emphasis by many authorities that an order, or a bill drawn for part of a fund, does not operate as an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft.[3] And Mr. Justice Story, delivering the opinion of the United States Supreme Court, has said: "The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions, without the consent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fragments to any other persons. So that, if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit." [4]

§ 23. This doctrine is clearly correct in so far as it applies to legal

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3. Bank v. Brewing Co., 50 Ohio St. 151, 40 Am. St. Rep. 660; Covert v. Rhodes, 48 Ohio St. 66, 27 N. E. 94; Harris v. Clark, 3 N. Y. 115, 116. Ruggles, J., in speaking of Justice Story's opinion in Mandeville v. Welch, 5 Wheat. 286, to the effect that a bill of exchange is "in theory an assignment to the payee of a debt due from the drawer to the drawee," says: "This is undoubtedly true *when the bill has been accepted*, whether it be drawn on general funds, or a specific fund, and whether the bill be in its own nature negotiable or not; for in such case the acceptor, by his assent, binds and appropriates the funds for the use of the payee. But where an order is drawn on a general, or on a particular, fund for a part only, it does not amount to an assignment of that part, or give a lien on the drawee unless he consent to an appropriation by an acceptance of the draft." See *Ex parte* Jones, 77 Ala. 330; Missouri Pac. R. R. Co. v. Councilmen, 38 Mo. 141; Rice v. Dudley, 34 Mo. 392; Grammel v. Carmer, 55 Mich. 201; Weinstock v. Bellwood, 12 Bush, 139; Mandeville v. Welch, 5 Wheat. 277; Robins v. Bacon, 3 Greenl. 346; Gibson v. Finley, 4 Md. Ch. 75; Hopkins v. Beebee, 2 Casey, 85; Gibson v. Cooke, 20 Pick. 15; Poydras v. Delamere, 13 La. 98 (O. S. 1838), action against drawee; Cowperthwaite v. Sheffield, 1 Sandf. 416, Vanderpool, J.: "Where an order is drawn for part of the fund only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to an appropriation by an acceptance of the draft." See cases cited *contra*, § 16*a*, notes.

4. Mandeville v. Welch, 5 Wheat. 277.

assignments. The holder of the bill or order cannot sue the drawee-at-law in his own name, as he would thus divide the cause of action, and leave a balance due the creditor.[5] He cannot sue in the creditor's name, except by his consent, as, at best, he is only entitled to a part of the debt due him. But it has been held in numerous cases, and we think should now be regarded as law, that an order for part of a fund operates as an equitable assignment *pro tanto*.[6] Clearly this is the case when it has been accepted or assented to by the drawee.[7] And when it has not been accepted, our own view is this: that a nonnegotiable order for part of a fund does operate as an equitable assignment *pro tanto* as between the drawer and payee, because obviously so intended. But as between drawer and payee on the one side, and the drawee on the other, it creates no obligation on the latter to pay it, as he has a right to insist on an integral discharge of his debt. And if the creditor give a subsequent order for the whole amount, he may pay it with impunity, as he thus discharges his debt in its entirety at once.[8] But if the payee or indorsee goes into equity, or the parties are brought therein by any proceeding, so that all of them are before the court, the holder of the order may enforce it as an equitable assignment as against all subsequent claimants, whether by assignment from the drawer, or by legal process served upon the drawee.[9]

Mr. Justice Story has stated the principle, as we conceive it, more correctly in his treatise on Equity Jurisprudence than in the cases hitherto cited; and he there declares that, while a draft for part of a fund operates no assignment at law, the same principle applies in equity to a draft for part of a fund that applies to a draft for the whole, and that "in each case a trust would be created in favor of the equitable assignee of the fund, and would constitute an equitable lien

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5. Weinstock v. Bellwood, 12 Bush, 139.

6. See cases cited, *ante*, § 16*a*; Yeates v. Groves, 1 Ves. Jr. 281; Bradley v. Root, 5 Paige Ch. 641; Lett v. Morris, 4 Sim. 607; Row v. Dawson, 1 Ves. 331; *Ex parte* South, 3 Swanst. 391; Pope v. Huth, 14 Cal. 407; Christmas v. Russell, 14 Wall. 84; Knapp v. Alvord, 10 Paige, 205; McPhee & McGinnity v. Fowler, 36 Colo. 202, 85 Pac. 421.

7. Desesse v. Napier, 1 McCord, 107; Vreeland v. Blunt, 6 Barb. 182; Peyton v. Hallet, 1 Cai. 363; Pope v. Huth, 14 Cal. 407; Cutts v. Perkins, 12 Mass. 206; Israel v. Douglas, 1 H. Bl. 239; Clark v. Adair, cited by Buller, J., in Masters v. Miller, 4 T. R. 343; Tatlock v. Harris, 3 T. R. 180 (*semble*); *Ex parte* Alderson, 1 Madd. 53. See *ante*, § 16*a*.

8. 3 Lead. Cas. Eq. (3d Am. ed.) 356; Poydras v. Delamere, 13 La. 98 (O. S. 1838).

9. 3 Lead. Cas. Eq. 356; Field v. Mayor of New York, 6 N. Y. 179; Pease v. Landauer, 63 Wis. 20, citing the text.

upon it." We can perceive no sufficient reason for excluding a bill for part of a fund, whether it be negotiable or not, from operating as an equitable assignment within the limitations of the text. It would only carry out to its legitimate sequence the theory of the bill. The doctrine of equitable assignment is progressive, and we regard the refusal of courts to extend it to bills for parts of funds as the result of that ancient prejudice against commercial instruments, which Lord Mansfield so vigorously combated, but the traces of which yet remain in precedents which would be "more honored in the breach than in the observance." [10] It is necessary, in order to support the assignment, that it should be upon a valuable consideration.[11]

Under Negotiable Instrument statute.—The statute declares that a bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same.[12]

SECTION IV

DONATIO MORTIS CAUSA

§ **24.** A gift made in contemplation of death is termed *donatio mortis causa,* an expression derived, with the law on the subject, from the civil law.[13] And the requisites to the validity of such a gift are: (1) That it be made with a view to the donor's death; (2) that the donor should die of his then ailment or peril; [14] (3) that there be a

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10. Story's Eq. Jur., § 1044. See also Zilke v. Woodley, 36 Wash. 84, 78 Pac. 299, holding that where a draft was deposited in a bank for collection with instructions to credit a certain person with a stated amount when the money was collected, this constituted an equitable assignment of that amount to such person. A draft on a special fund created to pay the claims for which the draft was given is in equity an assignment *pro tanto* of the fund. McBride v. American Ry. & Lighting Co. (Tex. Civ. App.), 127 S. W. 229.

11. Alger v. Scott, 54 N. Y. 14.

12. Appendix, sec. 127. See also Fulton v. Gesterding, 47 Fla. 150, 36 So. 56.

13. Guinan's Appeal, 70 Conn. 347, 39 Atl. 482, Baldwin, J., saying: "It differs from a gift *inter vivos* in that the donee takes a present title liable to be divested on the recovery of the donor. If the donor dies, then the effect of the gift is the same as in case of a gift *inter vivos.*"

14. It seems, however, that such gift will not be invalidated because the death results from a cause not immediately the one anticipated. Thus where a gift was made in anticipation of a fatal result from a surgical operation, and death occurred three days after the operation, but not as a result thereof, it was held

delivery, real or symbolical, of the thing given,[15] and (4) that the gift be accepted by the donee.[16] The gift must take effect in the lifetime of the donor, for otherwise it would be available only, if at all, as a

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that the gift was not thereby invalidated. Ridden v. Thrall, 55 Hun, 185, 7 N. Y. Supp. 822. To sustain such a gift, it must be made under apprehension of death from some present disease, *or other impending peril*, and it becomes void by a recovery from the disease or escape from the peril. It is not necessary that it should be made *in extremis*, and when there is not time or opportunity to make a will – in order to render the gift effectual it is not necessary that the donor should die from the apprehended disease—it is sufficient if, and before his recovery from that disease, he died from some other disease existing at the time. See Ridden v. Thrall, 125 N. Y. 572, 26 N. E. 627, 21 Am. St. Rep. 758. See also the case of Board of Missions v. Mechanics' Savings Bank, 40 App. Div. 120, 54 N. Y. Supp. 28, 57 N. Y. Supp. 582.

15. Dickshied v. Exchange Bank, 28 W. Va. 340; McCord v. McCord, 77 Mo. 166. Delivery to a third person for the donee is sufficient. Woodburn v. Woodburn, 123 Ill. 619; Dunbar v. Dunbar, 80 Me. 154; Hatch v. Atkinson, 56 Me. 324; Daniel v. Smith, 75 Cal. 548; Waynesburg College Appeal, 111 Pa. St. 130; Gano v. Fisk, 43 Ohio St. 462; Burton v. Bridgeport, 52 Conn. 398; Curtis v. Portland Bank, 77 Me. 151; Newton v. Snyder, 44 Ark. 42; Stephenson v. King, 81 Ky. 425; Beaver v. Beaver, 117 N. Y. 421. In the case of Ridden v. Thrall, *supra*, held, that any delivery of property which transfers either the legal or equitable title is sufficient to effectuate the gift. The words of donor, referring to gift of deposit in bank, "I think I am going to die, take these books (referring to pass-books), bury me out of them and what is left out of it, is yours," do not limit or place a condition upon the gift, but simply impose upon the donee a trust duty to pay the expenses of the donor's funeral, and in connection with other evidence, is sufficient to establish a valid gift *causa mortis* of the deposit. Podmore v. South Brooklyn Savings Institution, 48 App. Div. 218, 62 N. Y. Supp. 961, and cases there cited. And such a gift is not invalidated by the fact that it is accompanied with a direction to the donee, to divide the balance of the money after the payment of the donor's doctor's bill and funeral expenses, between himself and others named by the donor. See Loucks v. Johnson, 70 Hun, 565, 24 N. Y. Supp. 267. The same principle of law as to delivery is equally applicable to gifts *inter vivos*, and it has been held that if the gift be from father to son, and the son has no general or testamentary guardian, the possession of the pass-book by the father, as the guardian by nature of the child, does not destroy the gift, by reason of nondelivery of the pass-book to the child. See Beaver v. Beaver, 62 Hun, 194, 16 N. Y. Supp. 476, 746; Jones v. Weakley, 99 Ala. 441, 12 So. 420, 42 Am. St. Rep. 84, 8 S. E. 721; Yancy v. Field, 85 Va. 759; Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848.

16. See 22 Moak's Eng. Rep. 687–688, and cases cited. Where a mother on her death-bed delivered a note for her daughter to another, whom the daughter had designated as her agent to receive it, under circumstances indicating the intentive to make a gift either *inter vivos* or *mortis causa*, the delivery was sufficient to pass title to the note, and it will be presumed that it was accepted. Ammon v. Martin, 59 Ark. 191, 26 S. W. 826.

testamentary disposition. It must take effect during the life of the donor as an executed and complete transfer of the thing, although the right of the donee is subject to be divested by actual revocation of the donor, by his survival of apprehended peril, by his outliving the donee, or by the insufficiency of his estate to pay his debts.[17] As to the character of the article which may be the subject of such a quasi-testamentary disposition, the common law has undergone considerable change. Originally, it was limited to chattels which might be delivered by the hand; and the rule was relaxed slowly and somewhat reluctantly by the courts, under the apprehension that fraud upon persons in dying condition might be encouraged by its extension. Bank notes were next embraced, with lottery tickets, and securities transferable by delivery, such as notes payable to bearer [18] or to order, and indorsed in blank, while notes not so payable were excluded.[19] Subsequently it was extended to bonds,[20] and the later cases hold that the note of a third party not negotiable, or if negotiable, not indorsed, but delivered, passes by such a donation, with a right to use the name of the personal representative of the promisee, to collect it for the donee's own use, the equitable title passing to him.[21] In further ex-

17. Basket v. Hassell, 107 U. S. 609; Gass v. Simpson, 4 Coldw. 288; Parcher v. Saco Bkg. & Sav. Inst., 78 Me. 470; Nutt v. Morse, 142 Mass. 3; Walsh's Appeal, 122 Pa. St. 177; Kiff v. Weaver, 94 N. C. 274; Connor v. Root, 11 Colo. 183; Daniel v. Smith, 75 Cal. 548; Seybold v. Nat. Bank, 5 N. Dak. 460, 67 N. W. 682; Plasterstein v. Hoes, 37 App. Div. 421, 56 N. Y. Supp. 103; Gammon Thelogical Seminary v. Robbins, 128 Ind. 85, 27 N. E. 341. The same principle applies to a gift *inter vivos*. Zeller v. Jordan, 105 Cal. 43, 38 Pac. 640.

18. Miller v. Miller, 3 P. Wms. 356, in which case it was held that bank notes passed, but a note payable to the donor's order did not. Chitty on Bills (13th Am. ed.), 3.

19. See Chase v. Redding, 13 Gray, 420.

20. Snellgrave v. Bailey, 3 Atk. 214; Ward v. Turner, 2 Ves. Sr. 431; Duffield v. Elwes, 1 Bligh, 409, in which case a bond with mortgage deeds delivered to the donee was held to create a trust in his favor. Leyson v. Davis *et al.*, 17 Mont. 220, 42 Pac. 775.

21. Chase v. Redding, 13 Gray, 418, in which case it was held that a gift *mortis causa* of promissory notes, secured by mortgages, with assignments of the mortgages, was valid. Grover v. Grover, 24 Pick. 264; Sessions v. Moseley, 4 Cush. 87; Turpin v. Thompson, 2 Metc. (Ky.) 420; Jones v. Deyer, 16 Ala. 221; Borneman v. Sidlinger, 15 Me. 429; Brown v. Brown, 18 Conn. 410; McConnell v. McConnell, 11 Vt. 290; Parker v. Marston, 27 Me. 196; Tillinghast v. Wheaton, 8 R. I. 536; Veal v. Veal, 29 L. J. Ch. 321, 27 Beav. 303; Ranklin v. Weguelin, 27 Beav. 309; Stevens v. Stevens, 2 Hun, 472; Druke v. Heiken, 61 Cal. 346, 44 Am. Rep. 553; Byles on Bills (Sharswood's ed.), 295–296; Thompson on Bills, 20, 21; Redfield on Wills, 312, 313. *Contra*, Bradley v. Hunt, 5 Gill & J. 54, in which case it is limited to bank notes and notes payable to bearer.

tension of the principle, it has been held that, even if the donor indorse a bill or note of a third person as *donatio mortis causa*, the donation will be valid, although the estate of the indorser will not be bound upon his indorsement, as it is without consideration. And this seems to us at once a just extension and limitation of the principle.[22] This doctrine obtains in Scotland, where it has been decided in several cases; [23] and it has been carried even further in England, where it has been held that bills delivered on death-bed, but without consideration, were valid gifts, and authorized the donees, in the first place, to force the donor's executors to indorse the bills, and, in the next place, to recover from the acceptors, the indorsation being regarded as a mere technicality.[24] In Louisiana, where, on the day before he died, plaintiff's testator delivered to defendant the check of another, payable to and indorsed by him in blank, and it was not presented until after the donor's death, it was held a valid gift *causa mortis*.[25]

§ 24a. Deposits in bank may be the subject of a donatio mortis causa, and the doctrine obtains in the United States that the delivery of a bank-book containing entries of deposits in bank with the intent to make the deposits a gift, by a person in contemplation of death, to the donee, constitutes a valid gift of the money deposited.[26]

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22. Weston v. Hight, 17 Me. 287.

23. Thompson on Bills, 20. In one case, where a person had indorsed a bill for 1,000 marks to his grandson, then under age, and put it thus indorsed, but without particular instructions, into the hands of his son and general disponee (distributee), the court, in an action for delivery brought by the grandson, decerned (decreed) in his favor. In a later case, where the holder of two promissory notes indorsed them on his death-bed, and delivered them to a person, telling him to deliver one to a servant, as a reward for services, and the other to certain parties, as a mark of gratitude for past favors, the court sustained the right of the donees to sue the makers.

24. Veal v. Veal, 29 L. J. Ch. 321, 27 Beav. 303; Rankin v. Weguelin, 27 Beav. 309.

25. Burke v. Bishop, 27 La. Ann. 465, 27 Am. Rep. 567.

26. Citizens' Sav. Bank v. Mitchell, 18 I. R. 739, 30 Atl. 626; Hill v. Stevenson, 63 Me. 364; Drew v. Hagerty, 81 Me. 243; Camp's Appeal, 36 Conn. 88, 4 Am. Rep. 39; Minor v. Rogers, 40 Conn. 512; Ray v. Simmons, 11 R. I. 266; Martin v. Funk, 75 N. Y. 134; Millspaugh v. Putnam, 11 Abb. Pr. 380; Tillinghast v. Wheaton, 8 R. I. 536, Durfee, J., saying: "It is true we find no case which is the exact parallel of the case before us, but the principle declared in the cases to which we have referred is broad enough to include the case before us; and therefore whatever, as a matter of wise policy, we may think of the expediency of holding a savings bank to be the subject of a gift *mortis causa*, we do not see how, as a matter of law, we can hold otherwise." *Contra*, McConnell v. Murray,

Delivery of the bank-book of the depositor is all the delivery of which the subject is capable.[27] A certificate of deposit may also be the subject of a valid gift *causa mortis*, but it must be indorsed and delivered to the donee so as to vest in him complete title, or so delivered without indorsement as to create an equitable assignment of the fund it represents, divesting the donor of all control and dominion over it.[28] In a number of cases it has been held that where a person deposits a sum in bank in his own name as trustee for another, and recognizes it as his, a complete and irrevocable gift is effected to the *cestui que trust*,[29] and if the trustee withdraw the amount his personal representative will be liable for it.[30] The courts adopting these views rest them upon the grounds: that by entering the deposit to the credit of the depositor as trustee for another, a plain declaration of trust is made; accompanied by a formal transfer of the money which is the subject-matter to himself as trustee, that thereby the title passes; and that retention of the pass-book by the self-constituted trustee is not inconsistent with the intention to give the deposit to the *cestui que trust*,

Irish R. 3 Eq. 460. Deposits in bank can likewise be the subject of a gift *inter vivos*. See Guinan's Appeal from Probate, 70 Conn. 342; Buckingham's Appeal from Probate, 60 Conn. 143; Scrivens v. North Easton Savings Bank, 166 Mass. 255, 44 N. E. 251; Polley v. Hicks, 58 Ohio St. 218, 50 N. E. 809. Delivery of a pass-book in a saving bank to the donee is a sufficient delivery, but such delivery of a pass-book in an ordinary bank would not, as the depositor does not thereby lose control over the deposit. Jones v. Weakley, 99 Ala. 441, 12 So. 420, 42 Am. St. Rep. 84. See also Thomas v. Lewis, 89 Va. 1, 15 S. E. 389, 37 Am. St. Rep. 848.

27. Martin v. Funk, 75 N. Y. 134; Whalen v. Milholland, 89 Md. 199, 43 Atl. 45.

28. Basket v. Hassell, 107 U. S. 613; Amis v. Witt, 33 Beav. 619; Moore v. Moore, L. R., 18 Eq. 474; Hewitt v. Kaye, L. R., 6 Eq. 198; Westerlo v. Dewitt, 36 N. Y. 340; Emery v. Clough, 63 N. H. 552; Leyson v. Davis *et al.*, 17 Mont. 220, 42 Pac. 775; Telford v. Patton, 144 Ill. 611, quoting text, 33 N. E. 1119.

29. Martin v. Funk, 75 N. Y. 134; Minor v. Rogers, 40 Conn. 512; Willis v. Smyth, 91 N. Y. 297. But the character of such transaction is not conclusively established by the mere fact of the deposits in the savings bank so as to preclude evidence of contemporaneous facts and circumstances, constituting the *res gestæ* to show that the real motive of the depositor was not to create a trust but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund. Macey v. Williams, 83 Hun, 243, 31 N. Y. Supp. 620. And subsequent acts or declarations of the depositor not connected with the deposit so as to constitute *res gestæ* will not avail to defeat the trust. See Hyde v. Kitchen, 69 Hun, 280, 23 N. Y. Supp. 573; Mize v. National Bank, 60 Mo. App. 358; Sayre v. Weil, 94 Ala. 466, 10 So. 546.

30. Milholland v. Whalen, 89 Md. 212; Minor v. Rogers, 40 Conn. 512.

because the legal title remains in the trustee, although the beneficial interest has been transferred; that the pass-book is not the property, but only the voucher for it; [31] and that the trust is valid, although unknown to the beneficiary.[32] If the trust so declared rests upon a legal obligation,[33] and probably if upon a moral obligation,[34] it should be supported, and it is not needful to the validity of the trust that notice be given to the beneficiary.[35] The intention of the trustee to pass the title must be clearly manifested, and if shown not to have existed, it would be defeated.[36] A number of the cases turn rather upon the principles that control voluntary settlements than upon the peculiar doctrines of *donatio mortis causa.* But where the declaration of the trust is plainly made, as by an entry in a pass-book to the credit of the depositor as trustee for another, and it is shown to have been the depositor's intention that at his death the depositor should take the deposit, then, as it seems to us, it should be supported as a valid *donatio mortis causa.*

§ **24b. Delivery to the donee,** or some other person for him, is requisite to a valid *donatio mortis causa,*[37] as it is to gifts *inter vivos,*[38] but delivery may be symbolically or constructively made.[39] And when the depositor causes the sum in bank to be credited to himself as trustee for another, it is deemed a sufficient delivery, as we have already seen.[40]

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31. Milholland v. Whalen, 89 Md. 212, 43 Am. St. Rep. 45; Martin v. Funk, 75 N. Y. 134, Church, C. J.

32. Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 266; Martin v. Funk, 75 N. Y. 134.

33. Brabrook v. Boston, etc., Sav. Bank, 104 Mass. 228.

34. Brabrook v. Boston, etc., Sav. Bank, 104 Mass. 228.

35. Brabrook v. Boston, etc., Sav. Bank, 104 Mass. 228.

36. Clark v. Clark, 108 Mass. 228; Met. Sav. Bank v. Murphy, 82 Md. 314, 33 Atl. 640, 51 Am. St. Rep. 473; Sav. Bank v. McCarthy, 89 Md. 194, 42 Atl. 929.

37. Hill v. Stevenson, 63 Me. 364; Dole v. Lincoln, 31 Me. 422; Wells v. Tucker, 3 Binn. 366; Dunbar v. Dunbar, 80 Me. 154; Hatch v. Atkinson, 56 Me. 324; Whalen v. Milholland, 89 Md. 199, 43 Atl. 45; McMahon v. Newton Sav. Bank, 67 Conn. 80, 34 Atl. 709; Jennings v. Neville, 180 Ill. 270, 54 N. E. 202.

38. Spooner v. Hilfish, 92 Va. 334, 23 S. E. 751; Ewing v. Ewing, 2 Leigh, 343; Miller v. Jeffress, 4 Gratt. 479; Lee v. Boak, 11 Gratt. 185.

39. See *post,* §§ 63, 67; Burney v. Ball, 24 Ga. 565; Darland v. Taylor, 52 Iowa, 503; Stephenson v. King, 81 Ky. 425.

40. The cases on this subject are too numerous, and their refinements too various and subtle, to admit of amplification in this work. Discussion of the subject may be found in Cent. L. J., Jan. 6, 1882, vol. 14, pp. 16, 18, 31 Am.

§ 25. Donee's own note.—The donee's own note may be made a gift *mortis causa*, and its destruction by the donor, with intent that it be extinguished and released in the event of his death, would suffice to effect it.[41] Strict proof of the gift *donatio mortis causa* is requisite. A mere declaration of a gift alone is insufficient,[42] and the evidence should be closely scrutinized.[43] But the gift of the donor's own note as *donatio mortis causa* would not be valid, as his representatives might prove that it was without consideration;[44] and so the draft of the donor on a third person who holds his funds it has been held is not an assignment thereof until accepted, and is not a valid mortuary gift.[45] The theory of the law is to throw the salutary checks which are found in the formal execution of wills around those who are associated with the donor in his dying condition; and to hold these

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Rep. 453, 26 Am. Rep. 684, and in following cases: Gerrish v. New Bedford Institution for Savings, 128 Mass. 159; Brabrook v. Boston, etc., Bank, 104 Mass. 228; Clark v. Clark, 108 Mass. 522; Powers v. Provident Ins. Co., 124 Mass. 377; Stone v. Bishop, 4 Cliff. (U. S. C. C.) 593; Blasdell v. Locke, 52 N. H. 238; Howard v. Windham Bank, 40 Vt. 597; Kerrigan v. Rantigan, 43 Conn. 17.

41. Darland v. Taylor, 52 Iowa, 503. In this case a lady holding her grandson's notes destroyed them, stating that she did not expect to live long, and in case of her death did not desire that he may be compelled to pay them. Held a valid *donatio mortis causa*. To same effect, see Gardner v. Gardner, 22 Wend. 525.

42. Yancy v. Field, 85 Va. 761, 8 S. E. 721.

43. Smith v. Smith, 92 Va. 696, 24 S. E. 280.

44. Basket v. Hassell, 107 U. S. 612; Harris v. Clark, 3 N. Y. 93 (overruling Wright v. Wright, 1 Cow. 598); Raymond v. Sellick, 10 Conn. 480; Parish v. Stone, 14 Pick. 198; Warren v. Durfee, 126 Mass. 338; Irish v. Nutting, 47 Barb. 370; Holley v. Adams, 16 Vt. 206. In Hamer v. Moore, 6 Ohio St. 239, the note ran: "For value received, I promise to pay to Mrs. Hamer, wife of John Hamer, the sum of $300, as a small recompense for the kindness shown to me by her. The executors of my last will and testament are hereby directed to pay the above to Mrs. H. or her sons, Moses and John, after my decease." Signed and attested. It was held invalid as a gift *causa mortis*. In Helfenstein's Estate, 77 Pa. St. 328, H. made his note for the sum of $4,000, payable one year after date, to Treasurer of Theological Seminary, and delivered it to the chairman of the seminary library committee; subjoined to it was a statement that it was a donation, the interest of which was to be applied to the purchase of books for the seminary. Shortly afterward the maker died. Held, that the note, being without consideration, and not having been accepted by the trustees before the maker's death, was revoked thereby, and a subsequent acceptance of it was ineffective. Tracy v. Alvord, 118 Cal. 654, 50 Pac. 757, citing text.

45. Harris v. Clark, 3 N. Y. 93; Craig v. Craig, 3 Barb. Ch. 76 (overruling Wright v. Wright, 1 Cow. 598); Billing v. Devaux, 3 Man. & Gr. 565. See Bayley on Bills, 348, intimating the contrary. See Lawson v. Lawson, 1 P. Wms. 441, and *post*, § 26.

dispositions valid would, in effect, dispense with the guards against fraud and imposition which are found in the rules which govern the authentication and probate of last testaments. "The very circumstance," as has been said, "which sometimes renders a will suspicious, is the living principle in a *donatio mortis causa.*" [46] But it would seem that the payee even of an undelivered bill could recover, in England, if it were attested in terms of the Wills Act.[47]

§ 26. **Whether donor's check is valid donatio mortis causa.**—If a check of the donor be delivered to the donee as *donatio mortis causa*, and the donee transfers it for a present valuable consideration, or in discharge of a debt, or if it be paid by the bank before it is apprised of the drawer's death, it seems to be conceded by the authorities that no court should or would take it from the donee, and that the gift would be sustained as a valid *donatio mortis causa.*[48] But where none of these circumstances exist the gift is regarded as incomplete and invalid, the check being considered a mandate revoked by death, and the bank not being justified in paying it, if it is apprised of the drawer's death.[49] The better opinion, as we think, is that the bank would be justified in paying, unless in addition to knowing that the drawer was dead, it also knew that the check was a mere gift; [50] and even if it knew the latter fact we do not think that should change its right to pay. It is observed by Vice-Chancellor Malins that the law on the question considered here "seems to be in a very curious state," and that "the result of the authorities appears to be that a gift of a bill of exchange,

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46. Holley v. Adams, 16 Vt. 206.

47. Gough v. Findon, 7 Exch. 48.

48. Tate v. Hilbert, 2 Ves. Jr. 118, 4 Bro. C. C. 291; Rolls v. Pearce, 5 Ch. Div. 730 (1877), 22 Moak's Eng. Rep. 432. See § 1618*a*, *post*.

49. Ibid.; Burke v. Bishop, 27 La. Ann. 465; Matter of Smither, 30 Hun, 632. In Basket v. Hassell, 107 U. S. 615, Matthews, J., says of a check that, "as shown by all the authorities, and upon the nature of the case it cannot be valid as a *donatio mortis causa*, even when it is payable *in præsenti*, unless paid or accepted while the donor is alive; how much less so when, as in the present case, it is made payable only upon his death." But "all the authorities" do not sustain this view. In Simmons v. Savings Society, 31 Ohio St. 530, the bank was notified after drawer's death not to pay, and did not pay the check. Held, that check was revoked by drawer's death, and payee could not recover of his estate. In Thrasher v. Dyer, 69 Conn. 411, 37 Atl. 979, Hammersly, J., says: "Gift is not completed by mere delivery of a check, which remains unacted on in the hands of the payee." See *post*, § 1618*b*; McNamara v. McDonald, 69 Conn. 485, 38 Atl. 54, 61 Am. St. Rep. 48; Zeller v. Jordan, 105 Cal. 43, 38 Pac. 640.

50. See *post*, § 1618*a*, and notes.

which is by its very nature payable at a future day, may be a good *donatio mortis causa*, but the gift of a check is not valid unless it is presented for payment, or paid before the death of the donor," and in respect to the case then under adjudication he expressed his opinion to be, that "when a man gives his wife a check it is in substance as complete a gift as if he had handed her the cash." [51]

Where a bill was drawn by the donor, in his last illness, on a goldsmith, to enable his wife to purchase mourning, it was held in an early case that it was valid as *donatio mortis causa*, and would operate like a direction of the testator touching his funeral, which ought to be observed though not in his will; [52] and, as said by the vice-chancellor in the case already cited, we "can see no reason why, if a bill drawn on a goldsmith would be a valid *donatio mortis causa*, a check should not be so too.[53] It is clear that no *donatio mortis causa* can prevail against the creditors of the donor when his assets would be otherwise insufficient to satisfy their claims,[54] nor unless delivered; [55] but when no such question arises, we see no reason why a check should not be supported as a valid disposition—as checks are generally regarded as the equivalent of cash. And consistently with the general principles that prevail as to *donationes mortis causa*, the rule should be that bills or checks should be supported as such as to all parties, except in so far as to authorize suit against the decedent's estate. Being executory contracts as to the decedent and his estate, they are without consideration, and might be defended on that ground; but as to the drawees and other parties they should be upheld.[56]

§ 26a. The validity of a gift causa mortis is to be determined by the law of the place where it was made, without regard to the domicile of the donor.[57]

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51. Rolls v. Pearce, 5 Ch. Div. N. C. J. 730, 22 Moak's Eng. Rep. 436. At variance with the propositions stated in the text is the case of Matter of James, 78 Hun, 128, 28 N. Y. Supp. 992, which holds that checks given by a person, when dying, to his wife, named in his will as executrix, in the absence of any evidence explaining why such checks were given, or the purpose for which they were received and used, must, upon her accounting as executrix, be treated as a part of the testator's estate, and be accounted for by her. (Dykman, J., dissenting.)

52. Lawson v. Lawson, 1 P. Wms. 440 (1718).

53. Rolls v. Pearce, 5 Ch. Div. 730, 22 Moak's Eng. Rep. 432.

54. Chase v. Redding, 7 Gray, 418.

55. Ward v. Turner, 2 Ves. Sr. 431. See Southern Law Review for April, 1875, p. 145, and *ante*, § 24.

56. See *ante*, § 24.

57. Emery v. Clough, 63 N. H. 552.

CHAPTER II

DEFINITION AND ESSENTIAL REQUISITES OF BILLS AND NOTES

§ 27. **A bill of exchange** is an open letter addressed by one person to a second, directing him, in effect, to pay absolutely, and at all events, a certain sum of money therein named, to a third person or to any other to whom that third person may order it to be paid; or it may be payable to bearer or to the drawer himself.[1]

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1. The definitions of bills and notes are given as follows by various writers. Blackstone defines a bill of exchange to be "an open letter of request from one man to another, desiring him to pay a sum of money therein named to a third person on his account." 2 Bl. Com. 466. Bayley says: "A bill of exchange is a written order or request, and a promissory note a written promise, for the payment of money absolutely and at all events." Bayley on Bills, 1. Chitty follows Blackstone, and Chancellor Kent follows Bayley. Chitty on Bills, 1, 3 Kent's Com. 74. Byles says: "A bill of exchange is an unconditional written order from A. to B., directing B. to pay C. a sum of money therein named." Byles (Sharswood's ed.), 1. And that "A promissory note, or, as it is frequently called, a note of hand, is an absolute promise in writing, signed, but not sealed, to pay a specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer." Byles (Sharswood's ed.) [*5]. In Story on Bills the definition of a bill given by Bayley is commended as concise, clear, and accurate. The learned author adds however: "But here again its peculiar distinguishing quality in modern times, its negotiability, is omitted, which, although not by our law essential to the instrument, is still that which, practically speaking, among merchants, constitutes its true character." Mr. Kyd has accordingly given the more extended definition, stating it to be "an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other, to whom that third person shall order it to be paid; or it may be payable to bearer." See Kyd on Bills, 3, and Story on Bills, § 3. Tiedemann says: "A bill of exchange is an unconditional written order by one person on another, directing him to pay to a third person, or to his order, or to the bearer the sum of money therein named." Tiedemann on Commercial Paper, § 2. In Randolph on Commercial Paper, § 3, it is said: "A bill of Exchange is an unconditional order for the payment of a certain sum of money by the person addressed in it to the person in whose favor it is drawn." In Story on Promissory Notes it is said: "A promissory note may be defined to be a written engagement by one person to pay another person, therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Notes, § 1. Without adopting the precise lan-

Abram, who draws the bill, is called the drawer; Benjamin, to whom it is directed, is called the drawee, and upon accepting it, becomes the acceptor. Charles, to whom the bill is made payable, is called the payee.

If the bill be payable to "Charles *only*," it is not negotiable; but if payable to "Charles or order," he may, by indorsing it, direct that it be paid to David, and in that case Charles becomes the indorser, and David the indorsee.

§ 28. Definition of promissory note.—A promissory note or note of hand, as it is often called, is an open promise in writing by one person to pay another person therein named, or to his order, or to bearer, a specified sum of money absolutely and at all events.[2]

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guage of any author, we have given herein definitions which seem to us more accurate than some others, and which, at least, cannot be misleading. In Allen v. Leavens, 26 Oreg. 169, 37 Pac. 488, 46 Am. St. Rep. 613, citing text, the court held that a promise to accept the order of another with such other's name indorsed thereon is in no sense a bill of exchange. This case is reported in 26 L. R. A. 620, with a useful note collecting the authorities on the validity of parol promises to accept orders or bills of exchange, (a) where the orders or bills have been drawn, and (b) where the orders or bills have not been drawn. See Woodall v. People's Nat. Bank, 153 Ala. 756, 45 So. 194; Culbertson v. Nelson, 93 Iowa, 187, 61 N. W. 854, 57 Am. St. Rep. 266, quoting with approval the text; Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291; Mechanics' & Farmers' Sav. Bank v. Katterjohn, 137 Ky. 427, 125 S. W. 1071; Vaughn v. Farmers', etc., Nat. Bank (Tex. Civ. App.), 126 S. W. 690; Chamberlain v. Young (1893), 2 Q. B. 206. An order at the bottom of a bill for goods in the following words "Please pay [the creditor] the above bill, and oblige," signed by the debtor, is a bill of exchange. Knefel v. Flanner, 66 Ill. App. 209, affirmed 166 Ill. 147, 46 N. E. 762.

2. Harris v. Pate (Ind. Ter.), 104 S. W. 812; Bick v. Clark, 134 Mo. App. 544, 114 S. W. 1144, citing the text; Dobbins v. Oberman, 17 Neb. 165, citing the text; New York Security & Trust Co. v. Storm, 81 Hun, 33, 30 N. Y. Supp. 605; First Nat. Bank of Farmersville v. Greenville Bank, 84 Tex. 40, 19 S. W. 334, quoting text. In Hegeman v. Moon, 131 N. Y. 462, it was held that a written statement signed by the maker to the effect that a certain amount is due a person named, implies that the money is due from the maker and is an indebtedness, from him to the person named. The acknowledgment of the indebtedness, and that it is due implies a promise to pay it on demand, in the absence of other direction as to time of payment. Such an instrument is a promissory note, and as such imports a consideration by its terms. The instrument in question above defined was in the following form:

"$1976 90-100 Brooklyn, Feb. 8th, 1871.

"One year after my death I hereby direct my executor to pay to Joseph Hegeman, his heirs, executors or assignees, the sum of nineteen hundred and seventy six dollars, and ninety cents, being the balance due him for cash advanced at

Abram, who makes the note, is called the maker; Benjamin, to whom the promise is made to pay, the payee; and if the note is transferred from Benjamin to Charles by indorsement, they are termed respectively indorser and indorsee. If the transfer from Benjamin to Charles be by delivery merely, they are termed respectively assignor and assignee.

The maker of a note is sometimes termed the drawer, and in accommodation indorsements the indorser frequently writes over his name: "Credit drawer." When the term "drawer" is so used, the maker is of course meant, though not accurately described.

"Holder" is a general word applied to any one in actual or constructive possession of the bill or note, and entitled at law to recover or receive its contents from the parties to it.

§ 29. **Difference between bills and notes.**—In their original structure, a bill of exchange and promissory note do not strongly resemble each other. In a bill there are three original parties: drawer, drawee, and payee; in a note only two: maker and payee. In a bill the acceptor is the primary debtor. In a note the maker is the only debtor. But if the note be transferred to a third party by the payee, it becomes strikingly similar to a bill. The indorser becomes then, as it were, the drawer, the maker the acceptor, and the indorsee the payee.[3] The reader, bearing this similitude in mind, will easily be able to apply to notes the decisions hereinafter cited concerning bills, and *vice versa.*

§ **30.** In order to fulfill the definition given, the paper must carry its full history upon its face, and embrace the following requisites:

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various times by him to Adrian Hegeman my son, and others, as per statement rendered by him this day, without interest.

"CORNELIA W. HEGEMAN."

A draft, drawn by one officer as an authorized agent of a company on another officer of the same company in favor of a third person, is in effect the promissory note of the company payable on demand. National Fire Ins. Co. v. Eastern B. & L. Asso., 65 Neb. 483, 91 N. W. 482. "The essential elements of a promissory note are: first, that it must be in writing; second, it must contain, either express or implied, a promise to pay; third, the promise must be for the payment of a sum certain of money absolutely and at all events; fourth, the promise must be unincumbered with collateral agreements to do something else; and fifth, the instrument must indicate with certainty the parties to the contract. And under the old law it was essential that it be not sealed." Kessler v. Clayes, 147 Mo. App. 88, 125 S. W. 799.

3. Penniman v. Alexander, 111 N. C. 427, 16 S. E. 408, citing text.

First. It must be open, that is, unsealed. Second. The engagement to pay must be certain. Third. The fact of payment must be certain. Fourth. The amount to be paid must be certain. Fifth. The medium of payment must be money. Sixth. The contract must be only for the payment of money. And Seventh. It is also essential to the operation of the instrument that it should be delivered.[4]

SECTION I

THE PAPER MUST BE OPEN, THAT IS, UNSEALED

§ 31. The first requisite of a bill is, that it shall be an "open letter" of direction—and of a note, that it shall be an open promise—for the payment of money. By the term "open" is meant "unsealed"; and though the instrument possess all the other requisites of a bill or note, its character as a commercial instrument is destroyed, and it becomes a covenant, governed by the rules affecting common-law securities, if it be sealed.[5] It has been held, however, that the affixing of a seal to a bill is a mere superfluity, and does not interfere with its validity or negotiability;[6] but the doctrine of the text is supported by the highest authority.

§ 32. Seals to notes.—In respect to promissory notes, the same rules prevail. If a seal be affixed to a paper in the ordinary form of a note, its character as such is destroyed; and it is thereby converted into the deed or bond of the maker, who is then termed the obligor, and the instrument is not subject to the peculiar doctrines that are applicable to mercantile securities.[7] An instrument binding the signers to pay a certain sum of money, and signed by some with,

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4. Certainty as to the payor and payee, the amount to be paid, and the terms of payment, is an essential element of a negotiable promissory note, and that certainty must continue until the obligation is discharged. Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946.

5. Edwards on Bills, 208, 210; Chitty on Bills (13th Am. ed.) [*166], 190; Story on Bills, § 62; Story on Notes, § 55; Nicely *et al.* v. The Winnebago Nat. Bank of Rockford, 18 Ind. App. 30, 47 N. E. 476, citing text.

6. Irwin v. Brown, 2 Cranch C. C. 314.

7. Clegg v. Lemesurier, 15 Gratt. 108; Mann v. Sutton, 4 Rand. 253; Hopkins v. Railroad Co., 3 Watts & S. 410; Clark v. Farmers' Mfg. Co., 15 Wend. 256; Parks v. Duke, 2 McCord, 380; Lewis v. Wilson, 5 Blackf. 369; Helper v. Alden, 3 Minn. 332; Warren v. Lynch, 5 Johns. 239; Brown v. Jordhal, 32 Minn. 135; Muse v. Dantzler, 85 Ala. 361; McCrummen v. Campbell, 82 Ala. 567; Rawson v. Davidson, 49 Mich. 607; Laidley v. Bright, 17 W. Va. 779.

and by others without, seals, is the bond of the former, and the promissory note of the latter, and one action of debt may be brought against all the parties.[8] It appears indeed that anterior to the statute of 3 & 4 Anne, already quoted,[9] bonds were occasionally transferred by indorsement in like manner as bills and notes, but the practice did not ripen into a settled custom, and by the above-mentioned statute they were not included with notes in being declared negotiable.[10] It is to be observed, however, that merely by attaching a seal to the signature does not make it a sealed instrument, unless there be a recognition of the seal in the body of the instrument by some such phrase as "witness my signature and seal," or "signed and sealed," for otherwise the door would be thrown open to frauds and forgeries, by the facility with which seals could be superadded.[11] Such is the view taken in Virginia; but it is conceded that the rule was otherwise at common law,[12] and there are decisions adhering to the common-law rule.[13]

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8. Rankin v. Roler, 8 Gratt. 63. Where a note was signed by one person at the bottom under seal, and by another person across the back without a seal, both before delivery, the note is nonnegotiable as to the former and a negotiable promissory note as to the latter. McLaughlin v. Braddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681.

9. See *ante*, § 5, note.

10. Buller v. Crips, 6 Mod. 29 (1704). Holt, C. J., declared that he had desired to speak with two of the most famous merchants in London, and that they had told him that not only notes, but bonds for money, were transferred frequently and indorsed as bills of exchange.

11. Jackson v. Augusta Southern R. Co., 125 Ga. 801, 54 S. E. 697; Skrine v. Lewis, 68 Ga. 828; Humphries v. Nix, 77 Ga. 98; Weeks *et al.* v. Esler, 143 N. Y. 374, 38 N. E. 377; Cromwell v. Tate's Exrs., 7 Leigh, 305; Peasley v. Boatwright, 2 Leigh, 196; Clegg v. Lemesurier, 15 Gratt. 108; Austin v. Whitlock, 1 Munf. 487; Argenbright v. Campbell, 3 H. & M. 174; Jenkins v. Hart, 2 Rand. 446; Baird v. Blagrove, 1 Wash. 170. In Anderson v. Bullock, 4 Munf. 442, the following was held to be a promissory note, and the scroll annexed as a seal to be mere surplusage:

"$2,361.81 Richmond, October 10, 1801.

"On or before the first day of February next, we bind ourselves, our heirs, executors, or administrators, to pay Thomas and Amos Ladd, or order, two thousand three hundred and sixty-one dollars and eighty-one cents.

"Austin & Anderson, [L. S.]"

A promissory note, concluding in the following language: "witness my hand and seal the date and year above written" –signed in the name of the maker by his mark, followed by a printed "[L. S.]," is an instrument under seal. Bankston v. Kennesaw Guano Co., 7 Ga. App. 573, 67 S. E. 679.

12. Cromwell v. Tate's Exrs., 7 Leigh, 305; Clark v. Read, 12 D. C. App. 343.

13. Trasher v. Everhart, 3 Gill & J. 246.

§ 32a. Seals on corporate bills and notes.—The rule that if a seal be affixed to an instrument, its negotiable character is destroyed, was early applied to both corporate bills [14] and notes.[15] But the later, and apparently better considered cases, say that the presence of the seal of a corporation does not of itself render its instrument non-negotiable, as a corporate seal is equally appropriate as a means of evidencing its assent to be bound by a simple contract or by a specialty.[16]

§ 33. Statutes as to sealed instruments.—In some of the States of the United States sealed instruments for the payment of money are placed by statute upon the same footing as bills and notes in respect to their negotiability, and the addition of a seal to a bill or note payable to order or bearer in no way impairs its negotiability. In others, bonds are made transferable, and may be sued upon in the name of the assignee, but the latter takes them subject to all defenses that were available to the original obligee.[17]

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14. In Conine v. Junction & B. R. Co., 3 Houst. (Del.) 289, Gilpin, C. J., said: "Deeds or sealed instruments are not only of a much higher antiquity than bills of exchange, but they are of a totally different origin. They cannot be said to be made *secundum usum mercatorum*, since they find their recognition and validity in the more ancient rules of the common law. On the other hand, bills of exchange find their origin and sanction in the usage and custom of merchants, the *lex mercatoria*, a particular or peculiar system, which, being in the interest of commerce, became at length gradually engrafted into, and established as a part of the common law itself. * * * All contracts under seal are specialties, sealing and delivery being the particular form and ceremony which alter the nature and operation of the agreement. Forms, consecrated by time and usage, become substance. The seal is substance and changes the nature and operation of the contract. It seems to me, therefore, that the question which I have been considering is settled upon principle against plaintiffs. But however this may be, it has been held as settled upon authority for more than thirty years past."

15. Clark v. Farmers' Mfg. Co., 15 Wend. (N. Y.) 256. In Weeks v. Esler, 68 Hun (N. Y.), 518, 23 N. Y. Supp. 54, it was held that the seal affixed must have been the seal of the corporation and affixed by its authority. See also Chase Nat. Bank v. Faurot, 72 Hun (N. Y.), 373, 25 N. Y. Supp. 447.

16. Rand v. Dovey, 83 Pa. St. 280; McLaughlin v. Boaddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681; Central Nat. Bank v. Charlottesville, etc., R. Co., 5 S. C. 156. See also Auerback v. Le Sereur Mill Co., 28 Minn. 291, under a statute relating to corporate bonds and notes, and Landauer and Sioux Falls Improvement Co., 10 S. Dak. 205, 72 N. W. 467, under a general statute.

17. See the statutes of the several States, and Farrar v. Bank of New York, 90 Ga. 331, 17 S. E. 87; Christian v. Parrott, 114 N. C. 215, 19 S. E. 151; Railway Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596; Marble Falls Ferry v. Spitler, 7 Tex. Civ. App. 82, 25 S. W. 985. A note signed in a partnership name under

Under Negotiable Instrument statute.—Under the statute, an instrument in the form of a promissory note, but under seal, is negotiable.[18]

§ 34. Scrolls used as seals.—A scroll affixed as a seal is generally of the same force as a seal,[19] and parol evidence, where such is the case, is admissible to show that a scroll affixed was intended as a seal.[20]

SECTION II

CERTAINTY AS TO ENGAGEMENT TO PAY

§ 35. In the second place the engagement to pay must be certain.—Therefore the bill must contain a certain direction, and the note a certain promise to pay. A bill is in its nature the demand of a right, not the mere asking of a favor, and therefore a supplication made, or authority given to pay an amount, is not a bill. The language, "Mr. Little, please to let the bearer have £7, and place it to my account, and you will much oblige your humble servant," was held not a bill;[21] and so "please to send £10 by bearer, as I am so ill I cannot wait upon you;"[22] but on the other hand, where the language was: "Mr. Nelson will much oblige Mr. Webb by paying I. Ruff, or order, on his account, twenty guineas," was held to import on order, and therefore a good bill.[23] The usual and appropriate expression used in bills is, "please pay," and it has been well said by Justice Story that the language should not be too nicely scanned, nor be regarded because of its politeness as asking a favor rather than de-

seal is the simple contract of the firm, regarding the seal as surplusage. Cowan, McClung & Co. v. Cunningham & Ward, 146 N. C. 453, 59 S. E. 992. The custom of putting a seal upon a promissory note has come about, not through a desire on the part of those making and taking such papers to foreclose the question of consideration, but chiefly to make the period of the statute of limitations applicable thereto that of a sealed instrument instead of that governing a simple contract. Lacey v. Hutchinson, 5 Ga. App. 865, 64 S. E. 105.

18. Appendix, sec. 6; St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145.

19. Giles v. Maulden, 7 Rich. 11; Osborn v. Kistler, 35 Ohio St. 99; Peasley v. Boatwright, *supra*. *Contra*, Blackwell v. Hamilton, 47 Ala. 470.

20. Pollock v. Glassell, 2 Gratt. 439.

21. Little v. Slackford, 1 Moody & M. 371; Nicely *et al.* v. The Winnebago Nat. Bank of Rockford, 18 Ind. App. 30, 47 N. E. 476, citing text.

22. The King v. Ellor, 1 Leach Cr. Law, 323.

23. Ruff v. Webb, 1 Esp. 129.

manding a right.[24] It is a perfectly valid phrase, being a mere form of civility.[25] "Please let the bearer have $50; I will arrange it with you this forenoon," and signed, "yours, most obedient," was held sufficient in Kentucky.[26] An instrument directing a certain person to deliver a particular sum to A. B., or to be accountable or responsible to him for a particular sum, would be a good bill,[27] and so would a direction to credit him in cash for a particular sum,[28] or any expression from which such direction could be inferred.

§ 36. **Certainty of promise in a note.**—A promissory note must contain a certain promise to pay. "I promise to pay, or cause to be paid," would suffice, because the undertaking that the payment be made is definite and certain.[29] It is said by Story, that "it seems that to constitute a good promissory note, there must be an express promise upon the face of the instrument to pay the money; for a mere promise implied by law, founded upon an acknowledged indebtedness, will not be sufficient." [30] But we think the better language is used by Byles, who says: "No precise words of contract are necessary, provided they amount, in legal effect, to a promise to pay." [31] In other words, if over and above the mere acknowledgment of debt, there may be collected from the words used a promise to pay it, the instrument may be regarded as a promissory note.[32]

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24. Story on Bills, § 33; Chitty, 150; Thompson, 6.

25. Patterson v. Poindexter, 6 Watts & S. 235; Wheatley v. Strobe, 12 Cal. 92; 1 Ames on Bills and Notes, 3; Jarvis v. Wilson, 46 Conn. 90.

26. Bresenthal v. Williams, 1 Duv. 329.

27. Morris v. Lee, 2 Ld. Raym. 1396.

28. Ellison v. Collingride, 9 C. B. 570; Allen v. Sea Fire, etc., Ins. Co., 9 C. B. 574. But see Woolley v. Sergeant, 3 Halst. 262, *contra*.

29. Lovell v. Hill, 6 Car. & P. 238; Caviness v. Rushton, 101 Ind. 500. Here the language was, "I promise to give Emily Caviness two thousand dollars at my death, which she claims of my estate." Held insufficient to support an action. An instrument with the words "Hibbard, Spencer & Co., Cartage Ticket, 50 cents," in print, and the name "Hibbard, Spencer & Co." signed in writing, was held not to be negotiable paper. Hibbard v. Holloway, 13 Ill. App. 101; Kirsch v. Braun, 153 Ind. 247, 53 N. E. 1082. "This note subject to conditions of hotel purchase contract of even date herewith," is not a negotiable note. Rieck v. Daigle, 17 N. D. 364, 117 N. W. 346 (1908).

30. Story on Promissory Notes, § 14; Rice v. Rice, 68 Ala. 217.

31. Byles on Bills, 8.

32. Cowan v. Hallack, 9 Colo. 578, citing the text. One C. W. Bishop executed an instrument in writing, as follows:

"$1,000.00 "Penn Yan, July 23, 1883.

"At my death, I request to be paid to Mary A. Chase one thousand dollars,

§ **36a. Due-bills.**—In England it seems to be well settled that an ordinary due-bill, which is there frequently given in the following form:

"London, 1st January, 1875.

"Mr. A. B.:

"I. O. U. £100.

"C. D."

does not amount to a promissory note, but is mere evidence of an account stated, requiring no stamp under the English Stamp Acts. This was the view taken by Lord Chief Justice Eyre in 1795, where the paper ran, "I. O. U. eight guineas," [33] and though in 1800 Lord Eldon held a similar paper to be a promissory note, and ruled it out when offered in evidence, because it had no stamp,[34] subsequent decisions have recurred to the doctrine of Chief Justice Eyre, and it is the established law of England.[35]

In the United States the decisions are conflicting. In some of them a naked due-bill is held to be a promissory note; [36] as in Illinois, for instance, where the paper ran, "Due G. S. W., five hundred and twenty-five dollars," [37] and in Missouri, where the words were, "Due B., one hundred and fifty dollars," [38] and in Arkansas, "Balance due

for value received, if she is my wife; this note is void if I should die before she is my wife; this is to be paid in full with interest; this is to be paid before anything else." Held, that the instrument contains no promise to payee, and is therefore not a promissory note. Hatch v. Gillette, 8 App. Div. 605, 40 N. Y. Supp. 1016.

33. Fisher v. Leslie, 1 Esp. 425.

34. Guy v. Harris, Chitty on Bills, 526.

35. Israel v. Israel, 1 Campb. 499, Lord Ellenborough. The paper ran: "I owe my father £470." Childers v. Boulnois, Dowl & Ry. 8; Payne v. Jenkins, 4 Car. & P. 325; Fesenmayer v. Adcock, 16 M. & W. 449; Tompkins v. Ashby, 6 B. & C. 541, 9 Dowl. & Ry. 543.

36. Fleming v. Burge, 6 Ala. 373; Brewer v. Brewer, 6 Ga. 588; Marrigan v. Page, 4 Humphr. 247; Cummings v. Freeman, 2 Humphr. 145 (overruling Read v. Wheeler, 2 Yerg. 50); Agens v. Agens, 50 N. J. Eq. 566, 25 Atl. 707; Kessler v. Clayes, 147 Mo. App. 88, 125 S. W. 799.

37. Jacquin v. Warren, 40 Ill. 459.

38. Brady v. Chandler, 31 Mo. 28. A due-bill is not a negotiable note when it does not contain the words "for value received," under section 457, Rev. St. 1899, but it is a promissory note though it does not contain an express promise to pay as the word "due" imports a promise, and under a statute providing that all instruments of writing made and signed containing a promise to pay any sum of money shall import a consideration, such an instrument imports a consideration. (Rev. Stat. 1899, section 894.) Locker v. Kuecheumiester, 120 Mo. App. 701, 98 S. W. 92.

P. & S., \$178, for work done." [39] In others such a paper is held to be a mere acknowledgment of indebtedness.[40]

§ **37.** The question seems to us simply one of intention. If a debtor give a mere due-bill to his creditor containing nothing but an acknowledgment of the debt, it is fair to presume that he merely designed to furnish him with evidence of its existence. The law implies a promise to pay from the existence of the debt; but that promise not being written on the note, it cannot be regarded as a promissory note. To be a "promissory note," the promise must not only be implied from the fact of indebtedness evinced by the note, but should be expressed in the note in so many words, or by necessary implication.[41]

This was the ruling in Maine where the paper was signed by the president of the corporation with his personal signature only, and ran, "Amount due C. E. Ward to date \$28.26"—the court considering that it was a mere voucher of the amount due, that it was without consideration as a note, and should not be so regarded.[42]

§ **38.** There may be words superadded to the acknowledgment however, from which an intention to accompany it with an engagement to pay may be gathered. Thus, in New York, the words, "Due S., or bearer, \$340, for value received, with interest," were held to constitute a note; [43] so in the same State, the words, "Due A. B., or bearer, two hundred and 26–100, for value received"; [44] in Maine, the words, "Good to bearer," [45] and in that state, "Due A. B., or order, \$20, on demand," [46] and in Tennessee, "Due J. C. R., or order," [47] were held sufficiently obligatory to constitute a promissory

39. Anderson v. Pearce, 36 Ark. 293; St. Louis R. Co. v. Camden Bank, 47 Ark. 545.

40. Currier v. Lockwood, 40 Conn. 348; Read v. Wheeler, 2 Yerg. 50; Gay v. Rooke (Mass.), 23 N. E. 835. This case holds an I. O. U. to be not a note.

41. Long v. Straus (Ind.), 4 West. 235; Kessler v. Clayes, 147 Mo. App. 88, 125 S. W. 799.

42. Ward v. Barrows, 86 Me. 148, 29 Atl. 922.

43. Sackett v. Spencer, 29 Barb. 180. In Colorado, the words, "Due A. \$250, value received," are held sufficient by force of statute. Lee v. Balcom, 9 Colo. 216; Lowe v. Murphy, 9 Ga. 338; Schmitz v. Hawkeye Gold Mining Co., 8 S. Dak. 544, 67 N. W. 618.

44. Russell v. Whipple, 2 Cow. 536.

45. Hussey v. Winslow, 59 Me. 170.

46. Carver v. Hayes, 47 Me. 257.

47. Marrigan v. Page, 4 Humphr. 247.

note. So in New Hampshire the language, "Good R. C., or order, for thirty dollars, borrowed money," [48] and in Arkansas, "Due I. H., or order, value received," has been given the like effect.[49] In these, as in other cases, the insertion of negotiable words have been justly construed as manifesting an intention to make the instrument promissory and negotiable, and they have been given effect accordingly.[50]

§ 39. The words " on demand " as importing promise.—The insertion of "on demand" has been thought, in itself, sufficient to show that the debtor intended to do more than merely state the balance due on account. It recognizes an obligation, and necessarily implies a promise to pay when demanded. This view was taken in Connecticut, where the words used were, "Due John Allen, $94.91, on demand," Smith, J., saying: "Where a writing contains nothing more than a bare acknowledgment of a debt, it does not, in legal construction, import an express promise to pay; but where a writing imports not only the acknowledgment of a debt, but an agreement to pay it, this amounts to an express contract." [51] And the like view has obtained in other cases. The mere addition of the words "value received," would not alone, it seems, import a promise in addition to the acknowledgment,[52] though it has been held otherwise.[53] But,

48. Franklin v. March, 6 N. H. 364; Huyck v. Meador, 24 Ark. 195; Cummings v. Freeman, 2 Humphr. 144.

49. Huyck v. Meador, 24 Ark. 192.

50. Johnson School Township v. Citizens' Bank, 81 Ind. 515.

51. Smith v. Allen, 5 Day, 337. An instrument "For value received of C. P. Coleman three hundred dollar, in full, with use or bearer, waiving valuation and appraisement laws. Paid when kald for," is a note payable generally, at no particular place, on demand, and is a promissory note. Kraft v. Thomas, 123 Ind. 513, 24 N. E. 346, 18 Am. St. Rep. 345.

52. Read v. Wheeler, 2 Yerg. 50 (overruled by Cummings v. Freeman, 2 Humphr. 143); Gray v. Bowden, 23 Pick. 282; Currier v. Lockwood, 40 Conn. 348, Am. Law Reg., Jan., 1875. Judge Redfield, in a note to this case, dissents from its conclusions, as did also two of the judges (Foster and Phelps), who were members of the court which decided it. Judge Redfield says: "A promissory note is not required to be in any particular form, much less to embrace the word 'promise.' All that is required is that the written terms used, in their proper legal construction, shall import an admission by the maker that he holds himself bound to pay the payee a definite sum of money at a definite time; or, no time being named, then presently on demand." See also in accord with decision in Currier v. Lockwood, the following cases: Davis v. Allen, 3 N. Y. 168 (*semble*); Hotchkiss v. Mosher, 48 N. Y. 478 (*semble*).

53. Finney v. Shirley, 7 Mo. 42; McGowen v. West, 7 Mo. 42. See Huyck v. Meador, 24 Ark. 192; Lee v. Balcom, 9 Colo. 216.

"Due A. B., $325, payable on demand," [54] or, "I acknowledge myself indebted to A. in £109, to be paid on demand, for value received," [55] or "I. O. U. £85, to be paid May 5th," [56] would constitute promissory notes, significance being given to the words of payment as indicating a promise.[57]

§ **40.** The words, "I undertake to pay A. B. a certain sum for a suit of clothes ordered by Daniel Paige," have been held to be a guarantee and not a note.[58] There are other memoranda of indebtedness which have been held, like bare due-bills, not to amount to notes. Thus, a memorandum, "Mr. T. has left in my hands $200," is not a note.[59] And the following papers:

"I have received the sum of ——, which I borrowed from you, and I have to be accountable for the said sum with interest," [60] and "I. O. U. ——, which I borrowed of Mrs. Melanotte, and to pay her five per cent. till paid," [61] have been held not notes, because not importing promises to pay.

So, in a written bargain for buying goods, a promise to pay the seller the price in a limited time is not a note, but a mere memorandum of the terms of the bargain.[62] But mere expressions of gratitude, where there is a promise, or other needless addition, will not deprive the instrument of its character as a bill or note.[63]

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54. Kimball v. Huntington, 10 Wend. 675; Mitchell v. Rome R. Co., 17 Ga. 574; Pepoon v. Stagg, 1 Nott & McC. 102.

55. Casborne v. Dutton, 1 Selwyn's N. P. 401.

56. Waithman v. Elzee, 1 C. & K. 35.

57. Cowan v. Hallack, 9 Colo. 578, citing the text.

58. Jarvis v. Wilkins, 7 M. & W. 410, Lord Abinger, C. B., saying: "This is a memorandum that if the plaintiff will sell Paige clothes, he, the defendant, will pay for them."

59. Tompkins v. Ashby, 6 B. & C. 541, 1 Moody & M. 32.

60. Horne v. Redfearne, 4 Bing. N. C. 433.

61 Melanotte v. Teasdale, 13 M. & W. 216. See also Taylor v. Steele, 16 M. & W. 665; Hyne v. Dawdney, 21 L. J. R. 278; Gay v. Rooke (Mass.), 23 N. E. 835.

62. Ellis v. Ellis, Gow. 216.

63. Ellis v. Mason, 7 Dowl. 598.

SECTION III

CERTAINTY AS TO THE FACT OF PAYMENT

§ 41. In the third place the fact of payment must be certain.— The instrument must be payable unconditionally, and at all events, in order to be negotiable. If the order or promise be payable provided terms mentioned are complied with; as, for instance, that a railroad be built to a certain point by a certain time, it is not a bill or note;[64] and likewise if payable provided a certain act be not done;[65] or that a certain receipt be produced;[66] or another person shall not previously pay;[67] or provided a certain ship shall arrive;[68] or provided the maker shall be able;[69] or provided the maker shall live a certain time;[70] or "on account of contract when completed and satisfactory;"[71] or provided one person shall first pay another a certain sum,[72] or upon any contingency.[73] Sometimes a condition of time is

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64. Blackman v. Lehman, 63 Ala. 547; Eldred v. Malloy, 2 Colo. 320; Chitty on Bills, 134; Kingston v. Long, reported in Bayley on Bills (6th ed.), 16; Ames on Bills and Notes, vol. 1, p. 31.

65. Appleby v. Beddolph, 8 Mod. 363; Chitty, Jr., on Bills, 5, 246,—sometimes cited as Appleby v. Biddle; Van Zandt v. Hopkins, 151 Ill. 248, citing text, 37 N. E. 845. An instrument promising to pay a certain sum in money at a certain time, but containing an express condition that it is "void and nonpayable" upon the happening of a certain event, and stating that it was given to indemnify a certain person against loss in a particular matter, is not a promissory note but a contract of indemnity only. Jenckes v. Rice, 119 Ia. 451, 93 N. W. 384.

66. Mason v. Metcalf, 8 Baxt. 440.

67. Roberts v. Peake, 1 Burr. 323.

68. Coolidge v. Ruggles, 15 Mass. 387; Palmer v. Pratt, 2 Bing. 185.

69. *Ex parte* Tootle, 4 Ves. 372; Salinas v. Wright, 11 Tex. 572.

70. Braham v. Bubb, Chitty on Bills (13th ed.), *135, 136.

71. Home Bank v. Drumgoole (N. Y.), 15 N. E. 747; Lawrence v. Phipps, 67 Hun. 61, 22 N. Y. Supp. 16.

72. Chapman v. Wright, 79 Me. 595.

73. Sloan v. McCarty, 134 Mass. 245; Nicely *et al.* v. The Winnebago Nat. Bank of Rockford, 18 Ind. App. 30, 47 N. E. 476, citing text; Succession of Rabasse, 49 La. Ann. 1405, 22 So. 767. The following instruments, because containing conditions or contingent stipulations, have been held not to be negotiable: a draft, issued by a benefit society, payable on presentation of a certain certificate properly released (Knights & Ladies of Security v. Hibernian Banking Assn., 137 Ill. App. 175); a note payable "upon publication" (Hovorka v. Hemmer, 108 Ill. App. 443); an instrument agreeing on the part of the promisor to pay or cause to be paid to the payee a certain sum in case she should remain with him as his housekeeper, companion, and nurse, and should perform these duties and

expressed by the word "when," as "when A. shall marry;" [74] "when a certain suit is determined;" [75] "when a certain sale is made;" [76] or "certain dividends declared;" [77] or "upon completion of work to be done on a dwelling-house;" [78] or "not to be paid unless I shall have the use of certain premises;" [79] "when a certain amount is collected;" [80] or "when the estate of M. is settled up;" [81] "after arrival and discharge of coal by brig A." [82]

In Massachusetts a ninety-day note for $500 was held not negotiable, because it contained the proviso: "as soon as $400 shall be received by the payees, then this note is to be given up to payor." [83]

So, if it be expressed to be "payable subject to the policy;" [84] or subject to a certain contract; [85] or if an order be given on a savings

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care for him until death (Russel v. Close's Estate, 83 Neb. 232, 119 N. W. 515); and an instrument containing a promise to pay a certain sum "on the day after my nomination for county clerk in the year 1900." Harris v. Firth (N. J.), 68 Atl. 1064. In Aden v. Doub, 146 N. C. 10, 59 S. E. 162, Walker, J., said that it is not a correct proposition in law that a negotiable instrument is of such high dignity, as a medium of exchange, that the parties cannot annex any lawful condition to its payment at the time it is given, when the action to recover it is between the original parties to it, and this as to a collateral agreement to the effect that the maker should have one month after the date of the note to determine whether he would take the policy of insurance, and, if he decided not to accept it, then the note is to be void.

74. Pearson v. Garrett, 4 Mod. 242; Beardsley v. Baldwin, Stra. 1157; Ahlstrong v. Fitzpatrick, 17 Mont. 295, 42 Pac. 757.

75. Shelton v. Bruce, 9 Yerg. 24.

76. De Forest v. Frary, 6 Cow. 151; Hill v. Halford, 2 B. & P. 413.

77. Brooks v. Hargreaves, 21 Mich. 255.

78. Chandler v. Carey, 64 Mich. 238. An instrument promising to pay: "On or before one year after the date of the completion of the piling filling and of the premises described in a certain trust deed * * * ; said completion of piling and filling to be according to the requirements of a certain agreement * * * ; the date of said completion of piling and filling to be determined by the board of commissioners," is not a promissory note, and cannot be reissued by the maker. 190 Ill. Trust, etc., Bank v. Chicago Title, etc., Co., 92 Ill. App. 366, affirmed 404, 60 N. E. 586, 83 Am. St. Rep. 138.

79. Jennings v. First Nat. Bank, 22 Pac. 777, citing the text.

80. Corbett v. State of Georgia, 24 Ga. 287; Martin v. Shumatte, 62 Tex. 189.

81. Husband v. Epling, 81 Ill. 172.

82. Grant v. Wood, 12 Gray, 220; The Lykus, 36 Fed. 922.

83. Hubbard v. Moseley, 11 Gray, 170. See also Roads v. Webb, 91 Me. 411, 40 Atl. 128, 64 Am. St. Rep. 246.

84. American Exchange Bank v. Blanchard, 7 Allen, 332. But a mere note of the number of the policy for which the note was given would not vitiate its negotiability. Union Ins. Co. v. Greenleaf, 64 Me. 123. See § 797.

85. Cushing v. Field, 70 Me. 50.

bank with a memorandum thereon "the bank-book of the depositor must accompany this order," [86] it is not negotiable. And so if expressed "as per agreement," [87] or "given as collateral security with an agreement," [88] or "unless a certain other note shall not be paid;" [89] and a note containing a provision that the payee, or his assigns, may extend the time of payment thereof, is not negotiable.[90] But the words, "as per memorandum of agreement," were not considered to render the promise conditional in an English case.[91] In all these cases the contingency implied deprives the instrument of its character as a bill or note, as the events named may never happen. If payable in installments, no time for the payment of the installments being mentioned, it is not a promissory note.[92] In Illinois, where the promise was to pay a railroad company or order, a certain sum, in such installments, and at such times as the directors of the payee company might assess or require, it was held negotiable, and in effect payable on demand, or in installments on demand.[93]

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86. White v. Cushing, 88 Me. 342, 34 Atl. 164, 51 Am. St. Rep. 402.

87. Bank of Sherman v. Apperson, 4 Fed. 25.

88. Costello v. Crowell, 127 Mass. 293.

89. Grimison v. Russell, 14 Nebr. 521, 45 Am. Rep. 126.

90. Woodbury v. Roberts, 59 Iowa, 348, 44 Am. Rep. 685; Rosenthal v. Rambo, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; Evans v. Odem, 30 Ind. App. 207, 65 N. E. 755; City Nat. Bank v. Gunter Bros., 67 Kan. 227, 72 Pac. 842; Smith v. Van Blarcom, 45 Mich. 371; Coffin v. Spencer, 39 Fed. 262. But in Farmer, Thompson & Helsell v. Bank of Graettinger, 130 Ia. 469, 107 N. W. 170, it was held that a promissory note in ordinary form except this provision: "sureties hereby consent that time of payment may be extended from time to time without notice thereof" was not negotiable, and, commenting on the Woodbury v. Roberts case, *supra*, the court said: "We may concede that in the case of an instrument providing in terms for extension of time of payment indefinitely there is such uncertainty as to make the same nonnegotiable. * * * But, in the notes before us, we have a distinct and unqualified agreement on the part of the makers to pay on a certain date. And we perceive no good reason for holding that the negotiable character thereof is destroyed because of a clause embodied therein providing that a surety, if such there shall be, will not claim a release from his collateral liability on the instrument, if, forsooth, an extension of time shall be granted the makers without notice to him." And in National Bank of Commerce v. Kenney, 98 Texas, 293, 83 S. W. 368, it was said that when the extension meant is that which takes place when the debtor and creditor make an agreement for a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated, the note is negotiable. See also City Nat. Bank v. Goodhue-McClelland Com. Co., 93 Mo. App. 123.

91. Jury v. Baker, El., Bl. & El. 459.

92. Moffat v. Edwards, Car. & M. 16. See *post*, § 48.

93. White v. Smith, 77 Ill. 351.

Under Negotiable Instrument statute.—Under the statute[94] it has been held that a note which upon its face states that it is given as a "part of the purchase price of real property, and is secured by mortgage of even date herewith, and is subject to all the terms and conditions of said mortgage," the mortgage referred to giving the maker of the note an option to pay it, or to have it canceled within one year, is not a negotiable instrument.[95]

§ **42.** In England, it has been held that an order for a certain sum "payable ninety days after sight or when realized," was not a bill, as the latter alternative made it payable upon a contingency,[96] but this is not the view which prevails in such cases in the United States.[97]

§ **43. Authorities in the United States.**—In the United States, if the time must certainly come, although the particular day is not mentioned in the note, it is regarded as negotiable, as the fact of payment is then certain. Thus, where the note ran, "I promise to pay A. B., or bearer, $75 one year from date, with interest annually, and if there is not enough realized by good management in one year, to have more time to pay, in the manufacture of the plaster bed on Stearns' land," it was held negotiable, Pierpont, C. J., saying that the only uncertainty was as to the length of time to be given, and "this uncertainty the law makes certain by giving him a reasonable time thereafter (the time prescribed) to make the payment." [98] So, where the note ran, "to be paid as soon as collected from my accounts at P.," it was held that the phrase was not intended to make the debt conditional, but only to prescribe that a reasonable time be allowed for collection of the accounts.[99] So, where the note was to pay "by

94. Appendix, sec. 1 (2).

95. Hull v. Angus (Ore.), 118 P. 284.

96. Alexander v. Thomas, 16 Q. B. 333.

97. See Charlton v. Reed, 61 Iowa, 166, Day, J., saying that the English view "is not recognized in the United States as announcing the correct rule" and approving the text.

98. Capron v. Capron, 44 Vt. 412 (1872); Riker v. Sprague Mfg. Co., 14 R. I. 402 (1884), citing the text, where reservation in a note to pay it before maturity in installments of not less than 5 per cent., whenever semi-annual interest falls due, was held not to render it nonnegotiable. See also Campbell v. Equitable Securities Co., 17 Colo. App. 417, 68 Pac. 788. In Missouri-Lincoln Trust Co. v. Long, 31 Okl. 1, 120 P. 291, it was held that a note is negotiable though it contains a clause that the maker consents that the time for payment may be extended without notice thereof.

99. Ubsdell v. Cunningham, 22 Mo. 124 (1855). And a note which contains

20th of May, or when he completes the building according to contract," it was held that the 20th of May fixed the ultimate day when it should fall due.[1] So, where the promise was to pay "against the 19th of December, or when the house John Mayfield has undertaken to build for me is completed," the like decision was made.[2] So, where a promise to pay on or before March 12, 1882, contained the further provision, "this note becomes due and payable when (if before March 12, 1882) A. B. & Co. shall dispose of a part or all of their interest in the New York Hotel, or when the interest of B. may be sold or disposed of." [3] So a note payable on or before a certain day; [4] for, as said in such a case by Cooley, J.: "The legal rights of the holder are clear and certain; the note is due at a time fixed, and it is

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provision authorizing an attorney to appear at any time and confess judgment therein does not render a note uncertain as to time of payment, such provision is illegal and no part of the note. See Tolman v. Janson, 106 Iowa, 455, 76 N. W. 732.

1. Stevens v. Blount, 7 Mass. 240 (1810); Garner v. Hall & Farley, 114 Ala. 166, 21 So. 835.

2. Goodloe v. Taylor, 3 Hawks, 458.

3. Kiskadden v. Allen, 7 Colo. 206; Dobbins v. Oberman, 17 Nebr. 165.

4. Miller v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432, 42 L. R. A. 797, 69 Am. St. Rep. 242; Mattison v. Marks, 31 Mich. 421; Jordan v. Tate, 19 Ohio (N. S.), 586; First Nat. Bank v. Skeen, 29 Mo. App. 119, citing text; Curtis v. Horn, 58 N. H. 504; Cunningham v. McDonald, 98 Tex. 316, 83 S. W. 372, citing text; Hughes County v. Livingston, 43 C. C. A. 541, 104 Fed. 306; Lovenberg v. Henry (Tex.), 140 S. W. 1079, reversing Henry v. Lovenberg, 128 S. W. 675. Under a statute providing that: "No written promise to pay money shall be held not to be a promissory note, or not to be negotiable for the reason that the time of payment is uncertain, provided that the money is payable at all events and at some time that must certainly come," it was held to be unnecessary to decide whether a note containing the language: "The privilege being allowed the makers hereof to pay the whole or any portion of said principal sum at any time within said five years if they so desire" was negotiable by the law merchant, as it was within the terms of the statute. Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363. In Strickland v. National Salt Co., 77 N. J. Eq. 328, 76 Atl. 1048, it was held that a corporate certificate containing an agreement to pay to a party named, or to his order, a sum of money in several equal semiannual installments, but further stipulating that the maker may cause its liability to be discharged by paying the amount of all future installments to a trustee in trust to pay the same to the registered holder of the certificate, was not negotiable, as the paper did not on its face bear a promise to pay the amount named to the holder or owner absolutely and at all events. The same certificate was held negotiable in National Salt Co. v. Ingraham, 143 Fed. 805, but the above point was not noticed; it was there held that the right to pay before maturity did not affect negotiability.

not due before. True, the maker may pay sooner if he shall choose, but this option if exercised would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiability is ever questioned in business dealings. It ought not to be questioned for the sake of any distinction that does not rest upon sound reason." [5]

§ **44. Other cases have arisen illustrative of these views.**—A note payable on demand after date, "when convenient," has been held payable absolutely in a reasonable time; [6] and so a note payable "as soon as I can." [7] So a note payable in six months, "or as soon as I can with due diligence make the money out of said patent right;" [8] a note payable in nine months, "or as A.'s horse earns the money in the cavalry service;" [9] a note payable twelve months after date, "or sooner if made out of a certain sale," [10] have been each held valid, negotiable notes, payable absolutely at the termination of the time expressed, and earlier, provided the alternative event transpired. A note payable "from the avails of logs bought of M. M., when there is a sale made;" [11] or "when I sell my place where I now live," have been held payable absolutely after a reasonable time.[12]

5. Mattison v. Marks, 31 Mich. 421 (1875); Helmer v. Krolick, 36 Mich. 373 (1877). See *post*, § 46. To same effect, Smith v. Ellis, 29 Me. 422, note payable as soon and as fast as the money could be collected; and, if not collected, in four years. But a note promising to pay a stated sum with interest "on or before two years from date," and providing that if it be paid within one year no interest should be paid, has been held nonnegotiable, because lacking certainty in time and amount. Story v. Lamb, 52 Mich. 525; Charlton v. Reed, 61 Iowa, 166, 47 Am. Rep. 809, citing the text; Fogg v. School District, 75 Mo. App. 159; Pagal v. Nickel, 107 Wis. 471, 83 N. W. 767.

6. Works v. Hershey, 35 Iowa, 340; Lewis v. Tipton, 10 Ohio (N. S.), 88. See *post*, § 88.

7. Benton v. Benton, 78 Kan. 366, 97 Pac. 378, 130 Am. St. Rep. 376; Kincaid v. Higgins, 1 Bibb, 396.

8. Palmer v. Hummer, 10 Kan. 464. *Contra*, Hubbard v. Mosely, 11 Gray, 170.

9. Gardner v. Barger, 4 Heisk. 669.

10. Ernst v. Steckman, 74 Pa. St. 13. To same effect, see Cidne v. Chidester, 85 Ill. 523; Walker v. Woollen, 54 Ind. 164; Woollen v. Ulrich, 64 Ind. 120; Noll v. Smith, 64 Ind. 511; Charlton v. Reed, 61 Iowa, 166. A promise to pay a certain sum "on or before the completion of a certain contract," is not a contingent but an absolute promise, and the completion of the contract is referred to merely as fixing the time. Crocker-Woolworth Nat. Bank v. Carle, 133 Cal. 409, 65 Pac. 951, citing text.

11. Sears v. Wright, 24 Me. 278. See Fiske v. Pratt, 154 Mass. 367, 28 N. E. 282.

12. Crooker v. Holmes, 65 Me. 195.

§ **45.** So, where the note was to pay "as soon as realized," to which was added, "to be paid in the course of the season now coming," Shaw, C. J., said the undertaking to pay was absolute, and that "whatever time may be understood by the 'coming season,' whether harvest-time or the coming year, it must come by mere lapse of time, and that must be the ultimate limit of the time of payment." [13] So, where the certificate is payable "on the return of this certificate," it is negotiable, because that merely requires, as in the case of any note, the return of the evidence of the debt: [14] but if there be added, "and the return of my guaranty of a certain note," it would engraft a collateral condition which would defeat the negotiability of the instrument.[15]

The American decisions quoted seem to us salutary and correct. It has been held by the United States Supreme Court that a note payable "as soon as the crop can be sold, or the money raised from any other source," is not a promissory note.[16]

§ **45a.** In Massachusetts, it is considered essential to the negotiability of the note that it be payable at a definite time, or at a time that can be made definite at the election of the holder. And accordingly that an instrument given with a mortgage, promising to pay a certain sum in a year or a half from date, "or sooner, at the option of the mortgagor, with interest at a certain rate during the term of the mortgage," was not a negotiable note.[17] And this view has been approved in Missouri, where corporate bonds provided that "the company reserve the right to pay the same at any time by adding to the principal a sum equal to twenty per cent. thereof." [18] This latter decision seems clearly right, as the amount payable was not certain. But if a certain, or reasonably definite, time be fixed when the liability

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13. Cota v. Buck, 7 Metc. (Mass.) 588.

14. See §§ 47, 1703, 1707.

15. Smilie v. Stevens, 39 Vt. 316; Blood v. Northrup, 1 Kan. 29; Van Zandt v. Hopkins, 151 Ill. 248, citing text, 37 N. E. 845.

16. Nunez v. Dautel, 19 Wall. 560.

17. Stults v. Silva, 119 Mass. 137; Way v. Smith, 111 Mass. 523; Mahoney v. Fitzpatrick, 133 Mass. 151. On the other hand it has been held that "A promissory note payable when payor or payee mutually agree is to be construed as meaning that it is payable on demand when and after the payor ought reasonably to have agreed." Page v. Cook, 164 Mass. 166, 41 N. E. 115, 49 Am. St. Rep. 440. See also Powers v. Manning, 154 Mass. 370, 21 N. E. 290.

18. Chouteau v. Allen, 70 Mo. 339; Brown v. Vossen, 112 Mo. App. 676, 87 S. W. 577 and Bank v. Booze, 75 Mo. App. 189, citing text.

to pay occurs, thus marking the limit of the currency of the note and the period of its maturity, the fact that it may be taken up in advance ought not to impair its character as a negotiable note, and we have already given what seems to us the better opinion, as expressed by Judge Cooley, in reference to instruments so payable.[19]

§ 46. If payable when, or so many days after, "A. shall come of age," [20] the instrument would not be a bill or note, as A. might die a minor, and the fact that he actually attains majority does not alter it; but if the time when A. will come of age is specified, it will be good, as it will be taken to be payable absolutely when the time arrives.[21] If payable at, or within a certain time after, a man's death, it is sufficient, because the event must occur.[22] And the words after the

19. Fogg v. School District, 75 Mo. App. 159; *ante*, § 43; Coulter v. Clark, 2 Ind. App. 512, 28 N. E. 723.

20. Rice v. Rice, 43 App. Div. 458, 60 N. Y. Supp. 97, citing text; Kelley v. Hemmingway, 13 Ill. 604.

21. Goss v. Nelson, 1 Burr. 226.

22. Cooke v. Colehan, 2 Stra. 1217; Colehan v. Cooke, Welles, 393; Roffey v. Greenwell, 10 Ad. & El. 222; Crider v. Shelby, 95 Fed. 212; Conn. v. Thornton, 46 Ala. 587; Simon v. Jones' Estate (Ark.), 138 S. W. 986; Beatty v. Western College, 179 Ill. 281, 52 N. E. 432, 69 Am. St. Rep. 242; Price v. Jones, 105 Ind. 544, citing the text; Mortee v. Edwards, 20 La. Ann. 236; Harper v. Davis, 115 Md. 349, 80 Atl. 1012; Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487; Carnwright v. Gray, 127 N. Y. 93, 27 N. E. 835, 24 Am. St. Rep. 424; Chitty, Jr., on Bills, 301; 1 Ames on Bills and Notes, 83. The fact that a note was made payable after the death would not of itself defeat recovery. Harper v. Davis, 115 Md. 349, 80 Atl. 1012. An instrument directing the maker's executor to pay to the order of a certain person a certain sum, and adding the words: "It being for work in house and for manual labor on my farm," shows a *debitum in præsenti*, the time of payment of which was to be deferred until after the death of the maker. Junkins v. Sullivan, 110 Md. 539, 73 Atl. 264. A note payable in "twelve months after I shall become the legal owner of one hundred and fifteen acres of land conveyed to me by my father, H. V. Davis, reserving to him, H. V. Davis, a life estate in said land," is not open to the objection that it is payable upon a contingency. McClenathan v. Davis, 243 Ill. 87, 90 N. E. 265, 27 L. R. A. (N. S.) 1017. In Banker v. Coons, 40 App. Div. 572, 58 N. Y. Supp. 47, the note read: "After the death of Elizabeth Avery Horton, for value received, I promise there shall be paid by my administrators or executors to Luella Banker, if living, if not, to her heirs, if any, if none, to my nearest kin, three thousand dollars with interest." The court commenting upon the note, said: "It is not necessary to characterize it as a nonnegotiable note; it is simply necessary to observe that it is a valid contract to pay upon consideration a fixed sum to the plaintiff, if she should be alive to receive it at the due day thereof." A curious case arose in Scotland, in which it appears that a party accepted a bill payable at a certain time after his decease. He survived the acceptance thirty years. The court regarded

promise "to be allowed at my decease" would mean to be paid out of the maker's estate, and the paper would be a good negotiable note.[23] And a promise to pay "on demand, after my decease, $850," signed by the promisor, is a good note, negotiable as any other, and binding on the promisor's estate at his death.[24] So a note payable "one day after date or at my death,"[25] and if the day of payment must come at the same time, it has been said that the distance is immaterial.[26] The English courts have gone so far as to hold that if payable at a certain time after a government ship is paid off, it would be good, because government is sure to pay;[27] but this decision has been justly criticised and distrusted.[28]

An agreement to pay ninety days after the happening of two events, one of which may never happen, is not negotiable.[29] A note payable "on or by" a certain day is payable on that day;[30] and a note payable "by" a certain day may be declared on as payable on

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the matter as so anomalous as not to be subject of a bill of exchange, and sustained objections to the bill. Stewart v. Fullarton, Morrison's Dictionary of Decisions, 1408.

23. Martin v. Stone, 67 N. H. 367, 29 Atl. 845.

24. Bristol v. Warner, 19 Conn. 7.

25. Conn v. Thornton, 46 Ala. 588; Hegeman v. Moon, 60 Hun, 412, 30 N. E. 487; Shaw v. Camp, 160 Ill. 425, 43 N. E. 608.

26. Worth v. Case, 42 N. Y. 362; Garrigas, Admr., v. The Home Frontier and Foreign Missionary Society, 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262, citing text.

27. Andrews v. Franklin, 1 Stra. 24; Evans v. Underwood, 1 Wils. 262.

28. 1 Parsons on Notes and Bills, 40; Edwards on Bills, 142. Seemingly in support of the proposition stated is the case of Powers v. Manning, 154 Mass. 370, 28 N. E. 290. Held, an action may be brought upon a promissory note which by its terms is payable "when the United States pays judgments" under sections 5 and 8 of United States Statutes of June 5, 1882, upon the "Alabama claims in the so-called class 2 cases," if the United States has in the main paid all judgments of the first class in full and over 35 per cent. of the greater part of those of the second class and has substantially exhausted the fund. In Joseph v. Carton, 13 N. M. 202, 81 Pac. 439, 1 L. R. A. (N. S.) 1120, citing the text, it was held that a note containing a promise to pay upon the confirmation by Congress of a certain land grant is not a negotiable instrument, since it was not certainly and at all events payable; it not being morally certain that the grant would ever be confirmed by Congress, the court saying further that the fact that the grant may, as a matter of fact, have been confirmed many years after the making of the instrument, does not alter the rule, since the certainty of maturity must be of the date of the instrument, and cannot derive support from any subsequent event.

29. Sackett v. Palmer, 25 Barb. 178; Specht v. Beindorf, 56 Nebr. 553, 76 N. W. 1059.

30. Massie v. Belford, 68 Ill. 290; *ante*, § 43.

that day."[31] A bill payable in New York, October 31st, or in Paris, December 31st, is unobjectionable.[32]

§ **47.** A promise to pay a certain sum for stock, "in whole or from time to time in part, as the same shall be required within thirty days after demanded, or upon notification of thirty days in any newspaper," would answer the conditions necessary to a negotiable promissory note.[33]

And so would a promise to pay a certain sum "in such manner and proportions, and at such time and place as A. shall require," being payable on demand;[34] but a like promise to pay at such times and in such articles as C. may need for support, would not, the medium of payment not being money.[35] A promise to pay a certain sum after six months' notice is a good note.[36] A written instrument acknowledging receipt of a certain sum, and promising to pay it to a certain party, "on return of this receipt," has been held a perfect negotiable note in New York, and its return was regarded as not of the essence of the contract.[37]

If the note be in part for a sum certain, and part upon a contingency, it will not be negotiable.[38]

Under Negotiable Instrument statute.—Under the statutory definition that, to be negotiable, an instrument must be payable on demand, or at a fixed or determinable future time,[39] it has been held that an

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31. Preston v. Dunn, 25 Ala. 507.

32. Henschel v. Mahlen, 3 Den. 428.

33. Protection Ins. Co. v. Hill, 31 Conn. 534. See Stillwell v. Craig, 58 Mo. 24, where note payable in installments not to exceed 10 per cent. on each share, at thirty days' notice of call from board of directors, was held negotiable.

34. Goshen v. Turpin, 9 Johns. 217 (*semble*); Washington County Mutual Ins. Co. v. Miller, 26 Vt. 77.

35. Corbett v. Steinmetz, 15 Wis. 170.

36. Walker v. Roberts, Car. & M. 590; Gaytes v. Hibbard, 5 Biss. 99 (*semble*); Dutchess County v. Davis, 14 Johns. 238 (*semble*).

37. Frank v. Wessels, 64 N. Y. 158, Church, C. J., saying of the paper: "It contains an express promise to pay Feist or order a specified sum of money upon demand, with interest. These are the statutory elements of such a (negotiable promissory) note." 1 Rev. Stat. 721, § 7. "The words, 'on the return of this receipt,' do not make it payable upon a contingency, or constitute a condition precedent to any payment. * * * This restriction would be implied, if not expressed; it is implied in every promissory note; and there is also an implied exception on account of mistake or accident. * * * This clause is not of the essence of the contract." See *ante*, § 45.

38. Palmer v. Ward, 6 Gray. 340.

39. Appendix, sec. 1 (3); see also secs. 4, 5. A draft, containing the words "upon

order that a certain sum is to be due Oct. 1st means that the sum stated is to be paid Oct. 1st and, so construed, is an unconditional order to pay a sum certain in money, at a fixed future time, to the payee or order, and is a bill of exchange, within the meaning of the statute.[40] When the time of payment depends upon the will of the holder and is uncertain, the instrument is not negotiable, as when it contains a provision retaining title to the property for the purchase of which the note was given, and further provides that the payee has full power to declare the note due and take possession of the property when he deems the debt insecure even before the maturity of the note.[41] Where, however, the contingency as to time of payment depends upon some act done or omitted to be done by the maker, or upon the occurrence of some event indicated in the note, and not upon the act of the payee or holder, this does not render the instrument nonnegotiable.[42] When an option to extend the time of pay-

acceptance," is payable only on a contingency or condition, and therefore is not negotiable. Berenson v. London & Lancashire Fire Ins. Co., 201 Mass. 172, 87 N. E. 687. And so as to a note "Payed when we get it from the brewery after date." Wray v. Miller, 120 N. Y. S. 787.

40. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223.

41. Kipton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185 (see also appendix, sec. 1 [5]). See further, *post*, under § 61. A note which contains a recital that collateral security was attached of a certain value, and a stipulation that "If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver, when demanded, additional security to the satisfaction of said holder; otherwise this note shall mature at once," is nonnegotiable because it contains a promise to do an act in addition to the payment of the money, and because the date when it is to come due is uncertain. Holliday State Bank v. Hoffman, 116 P. 239, 85 Kan. 71, 35 L. R. A. (N. S.) 390.

42. Joergenson v. Joergenson, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888, as to a note containing a provision that "if we sell or remove the timber that we have bought on Johan Joergenson's homestead claim, before the expiration of said four years, then this note shall be paid at the time of such sale or removal of said timber." In Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237, it was held that notes are nonnegotiable where they and a chattel mortgage were executed at the same time, and were part of the same transaction, and the mortgage provides that if the mortgagor dispose of or attempt to dispose of or remove the whole or any part of the goods, then the whole amount not paid shall be immediately due and payable, and the notes provide that in case of default, the payee shall have the option to declare any and all other notes at once due and payable. Subsequently, in State Bank of Halstead v. Bilstad (Iowa), 136 N. W. 204, the court said that the above case should be qualified, as the statute, section 4 (2) expressly makes notes payable on or before a certain time negotiable. And in Mackintosh v. Gibbs, 79 N. J. L. 40, 74 Atl. 708, it was held that by sec-

ment can be exercised by the payee or holder only upon failure to pay at maturity the instrument is negotiable,[43] but if a clause in a note is to be construed as giving the maker and indorser the right before maturity to extend the time of payment, the note is not negotiable.[44]

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tion 2, a note is negotiable notwithstanding the fact that it contained provisions for payment with interest payable semiannually, and a provision that, upon default, the whole sum should become immediately due and payable at the option of the holder. In Thorpe v. Minderman, 123 Wis. 149, 101 N. W. 417, 63 L. R. A. 146, 107 Am. St. Rep. 1003, it was held that an agreement in a note that the whole principal of the note shall be due at the mortgagee's option in case of a failure to pay interest or perform any of the conditions of the mortgage, does not render the note nonnegotiable. The point was decided on the clause of the Wisconsin statute, sec. 4, subd. 4: "At a fixed period after the date or sight, though payable before then on a contingency;" this clause does not appear in the other statutes. Citing Thorpe v. Minderman, *supra*, it was held in Taylor v. American Nat. Bank of Pensacola (Fla.), 57 So. 678, that a promissory note in negotiable form, with interest payable quarter-annually, is negotiable, though accompanied by an ordinary real estate mortgage, which provides that, upon default in the payment of any installment of interest, which interest is payable quarter-annually, the whole amount of such note shall thereby become due and payable.

43. Stitzel v. Miller, 95 N. E. 53, 250 Ill. 72, 34 L. R. A. (N. S.) 1004, as to a provision in a note, "in case said note is not paid at maturity, that it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note." See also State Bank of Halstad v. Bilstad (Iowa), 136 N. W. 204, as to a note due at a certain time, but containing a stipulation that on a certain contingency the note shall be extended one year, wherein the court said: "These provisions clearly provide for flexibility in fixing the time of payment, provided only that there shall certainly come a time when the note is, by its terms, due. In other words, they recognize the right of the parties to an instrument to contract for their mutual benefit, and say, in effect, that, if the contract made is certainly to be performed at some definite time in the future, its negotiability is not destroyed. A determinable future time, as used in the second clause of the section, can mean nothing else than a time that can be certainly determined after the execution of the note. The contingency which will render a note nonnegotiable under the last clause of the section clearly means an event which may or may not happen."

44. Rosville State Bank v. Heslet, 84 Kan. 315, 113 Pac. 1052, as to a provision: "The makers and indorsers of this note hereby severally waive presentment for payment, notice of payment, protest and notice of protest, and all exemptions that may be allowed by law, and valuation and appraisement laws waived, and each signer and indorser makes the other an agent to extend the time of this note." See also Union Stockyards Nat. Bank v. Bolan, 14 Idaho, 87, 93 Pac. 508. But in First Nat. Bank v. Buttery (N. D.), 116 N. W. 341, 16 L. R. A. (N. S.) 878, it was held that the negotiable quality of a promissory note is not destroyed by a provision therein, that the makers and indorsers thereof severally waive presentment of payment and notice of protest, and consent that the time of payment may be extended without notice, when by its terms it is made payable on or before a day named, the court saying: "This phrase does not express an

§ 48. Notes payable in installments.—If a promissory note be made payable by installments, with a condition that if default be made in the payment of the first installment by the maker, the whole shall be immediately payable, it is negotiable within the statute of Anne. It is not payable upon a contingency, or at a time uncertain, but is likened to a bill payable at a certain time after sight; and the period or periods when it shall be due is dependent on the act of the maker himself.[45] In Michigan, where the promise was to pay "$1,500, to be paid 20 per cent a month from the 1st of July, 1871," toward building a certain road, the note was held negotiable.[46] And in Illinois, where a note is not payable to a corporation or order, "in such installments, and at such times as the directors of said company may from time to time require," the like decision was rendered, Sheldon, J., saying: "It was in effect payable on demand, or in installments on demand." [47] An option expressed in a note that the holder may treat it as due immediately upon default in payment of an installment of interest must be exercised in a reasonable time, and delay of seven months, as has been held, would be unreasonable and would discharge an indorser.[48] Such a provision has also been held not to impair the negotiability of the instrument.[49]

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agreement to extend time, but leaves the matter of extension optional with the holder, and not obligatory upon him, and the note on its face fixes the time when it becomes due. In this respect it must be distinguished from a provision to the effect that the time of payment shall be extended indefinitely, in which case the uncertainty of the time renders the instrument nonnegotiable."

45. Carlon v. Kenealy, 12 M. & W. 139; Martin v. Jesse French Piano, etc., Co., 151 Ala. 289, 44 So. 112; Strickland v. National Salt Co., 77 N. J. Eq. 328, 76 Atl. 1048; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554, affirming judgment 79 N. J. L. 40, 74 Atl. 708; Clark v. Skeen, 61 Kan. 526, citing text. See Miller v. Biddle, 13 L. T. R. 334 (1865), Pollock, C. B., questioning Carlon v. Kenealy.

46. Wright v. Irwin, 33 Mich. 32.

47. White v. Smith, 77 Ill. 351 (1875).

48. Crossmore v. Page, 73 Cal. 213. In Wisconsin, however, it is held that a note payable in installments is rendered nonnegotiable by a subjoined agreement that in case of default in any payment, or an attempt to dispose of, or remove the chattel for the price of which the note is given, the holder may declare the whole amount due. Kimball County v. Mellon, 80 Wis. 133, 48 N. W. 1100.

49. Roberts v. Snow, 43 N. W. 241. Where a printed clause in a note, read: "Principal and interest payable in gold coin of the United States," and continued in writing "in sums of twenty-five dollars or more monthly, together with interest monthly," the provision for the payment of twenty-five dollars or more was merely an option given to the makers whereby they were permitted, in advance of the maturity of the note, to make partial payments on account of the principal, and did not limit their obligation to pay the interest monthly, nor did

§ 49. **Cases arising out of Confederate War.**—During the war between the United States and the Confederate States, obligations were frequently given, payable when, or a certain time after, peace should be declared. Where a note was expressed to be payable "six months after peace is declared between the United States and the Confederate States of America," it was held actionable six months after peace ensued.[50] And the like ruling prevailed as to a note payable "thirty days after peace between the C. S. and the U. S.," [51] and as to a note payable "one day after the treaty of peace." [52] But in West Virginia, where a bond was payable "six months after the ratification of peace between the U. S. and C. S.," it seems to have been regarded as a wager upon the success of the Confederacy; but the case went off on a formal point.[53] In North Carolina this view has been adopted and applied,[54] and certainly is not without force. Only the United States Senate can ratify a peace, and a peace ratified between two countries implies the independence of each. And further, it may be said that until the condition precedent is fulfilled, no liability accrues. But upon the principle "*res magis valeat, quam pereat,*" we think the better view is that "six months after peace" would fulfill the meaning of the terms as they were used in the country, though they are the very words of Confederate treasury notes; and it has been so decided in a number of cases, the courts construing the language according to its popular import, and the probable intention of the parties, rather than in its strict technical sense.[55]

§ 50. **Instruments payable out of a particular fund not negotiable.**—In accordance with these principles the character of the instrument as a bill or note is destroyed if it be made payable expressly or by

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it destroy or modify the holder's right to declare the entire sum due when there should be a default in the payment of interest. Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620.

50. Brewster v. Williams, 2 S. C. 455 (1871).

51. Mortee v. Edwards, 20 La. Ann. 236 (1868).

52. Gaines v. Dorsett, 18 La. Ann. 563 (1866).

53. Harris v. Lewis, 5 W. Va. (Hagans) 576 (1872).

54. McNinch v. Ramsey, 66 N. C. 229 (1872).

55. Knight v. McReynolds, 37 Tex. 204; Atcheson v. Scott, 51 Tex. 213 (overruling Thompson v. Houston, 31 Tex. 610). A case arose in the Supreme Court of Appeals of Virginia, involving this question (Phelps v. Moomaw), but it was compromised and never came to trial. The inferior court ruled as in Texas. Brewster v. Williams, 2 S. C. 455; Mortee v. Edwards, 20 La. Ann. 236; Gaines v. Dorsett, 18 La. Ann. 563; Nelson v. Manning, 53 Ala. 549.

implication out of a particular fund; for its payment becomes then conditioned on the sufficiency of that fund, which may prove inadequate.[56] Thus the insertion, in an order of A. upon B. to pay a certain sum, of the words "on account of brick work done on a certain building," [57] or "out of any money in his hands belonging to me," [58] or to "charge the same to the account of R. M. I. 100 bales of cotton," [59] have been held to imply contingencies, and nonnegotiable. So, also, where the paper was expressed as payable "for value received in stock, ale, brewing vessels, etc., this being intended to stand against the undersigned as a set-off for the sum left me in my father's will above my sister's share." [60] and where the words were added, "out of rents," [61] "out of avails, when received, on sale of logs," [62] "out of my growing substance," [63] "out of the net proceeds of certain ore," [64] or "out of a certain claim," [65] "out of a certain payment when made," [66] or "the demand I have against the estate of A.," [67] or "out

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56. Woodall v. Peoples' Nat. Bank, 153 Ala. 756, 45 So. 194; Miller v. Poage, 56 Iowa, 96; White v. Cushing, 88 Me. 342, 34 Atl. 164, 51 Am. St. Rep. 402; Wadlington v. Covert, 51 Miss. 631; Sonnethiel v. Skinner, 67 Tex. 455. As recognizing a distinction where the instrument is simply chargeable to a particular account, see, *post*, § 51, and First Nat. Bank of Hutchinson v. Lightner, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, citing text.

57. Pitman v. Crawford, 3 Gratt. 127; Edwards on Bills, 143.

58. Averett's Admr. v. Booker, 15 Gratt. 165, Lee, J.: "Here, the sum to be paid is not payable absolutely and at all events. It is payable out of a particular fund, to wit, the moneys, if any, in the hands of the drawee, belonging to the drawer. The draft, therefore, cannot be treated as a bill of exchange, nor can a recovery be had upon it as such." Jenney v. Hearle, 2 Ld. Raym. 1361. But see Corbett v. Clark, 45 Wis. 403, where the words "and take the same out of our share of the grain," were added to the request by the drawee to pay; and the instrument was held a valid bill.

59. Hannay v. Guaranty Trust Co. of New York, 187 Fed. 686.

60. Clarke v. Perceval, 2 B. & Ad. 660.

61. 1 Parsons on Notes and Bills, 43. And see Thompson v. Wheatland Mercantile Co., 10 Wyo. 86, 66 Pac. 595, holding that an instrument which is only a promise to pay "out of the equity in the above described land, or out of the crop raised on the said land," which is contingent upon the sufficiency of the fund, is not a negotiable bill or note, and citing text.

62. Kelly v. Bronson, 26 Minn. 359.

63. Josselyn v. Lacier, 10 Mod. 294.

64. Worden v. Dodge, 4 Den. 159.

65. Richardson v. Carpenter, 46 N. Y. 661; Corbett v. State, 24 Ga. 287; Hoagland v. Erck, 11 Nebr. 580.

66. Haydock v. Lynch, 2 Ld. Raym. 1563

67. West v. Forman, 21 Ala. 400.

of my part of the estate of A.,"[68] or "being the amount that came to you from B. to me,"[69] or "out of the proceeds of A.'s bond,"[70] or "and deduct the same from my share of the profits of the partnership,"[71] or "and charge the same to our account for labor and materials, performed and furnished,"[72] or "on account of work done as per contract,"[73] or "out of amount due me on contract."[74] But a written promise to pay, one day after the promisor's death, $2,000 for services rendered, "to be paid out of my estate," would be a good note, because payable generally and not out of a particular fund.[75]

§ **50a. Certificates of receivers** of courts are not regarded as negotiable, although framed with the negotiable words usual in promissory notes, for the reason, as assigned in Illinois, that "whether in any event they are payable in full depends on the question whether the fund under the control of the court is sufficient for that purpose."[76] Such certificates have not the quality of negotiable instruments not-

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68. Mills v. Kuykendale, 2 Blackf. 47.

69. Harriman v. Sanborn, 43 N. H. 128.

70. Kenny v. Hinds, 44 How. Pr. 7.

71. Munger v. Shannon, 61 N. Y. 258, Dwight, C.: "The present order, it should be observed, is payable out of an uncertain fund, from profits, and, of course, none may be realized. This fact deprives it of an element essential in a bill of exchange, which is that it be payable absolutely, and not upon a contingency. * * * I think that the true construction of the present order is, that it was an equitable assignment of a certain amount of the profits of the business of L. A. Gulick. Cowperthwaite v. Sheffield, 3 N. Y. 243, is not opposed to this view, since, in that case, there was nothing on the face of the bills to indicate that they were drawn on a specific fund, but they were in the ordinary forms of bills of exchange. The same remark is to be applied to Harris v. Clark, 3 N. Y. 93."

72. Brill v. Tuttle, 81 N. Y. 457. (But query, see § 51.) The language was regarded as ambiguous, and attendant circumstances were considered.

73. Ehrichs v. De Mill, 75 N. Y. 370, Hand, J.: "It would seem clear that an order for payment, as *per contract*, confined the direction for payment to the fund becoming due by contract." Gerow v. Riffe, 29 W. Va. 462; American Boiler Co. v. Fontham, 34 App. Div. 294, 55 N. Y. Supp. 923.

74. Hoagland v. Erck, 11 Nebr. 580; Stebbins v. Union Pac. R. Co., 2 Wyo. Ter. 78.

75. Price v. Jones, 105 Ind. 543.

76. Turner v. P. & S. R. Co., 95 Ill. 134; Union Trust Co. v. Chicago, etc., R. Co., 7 Fed. 513; Staunton v. Ala. & C. R. Co., 31 Fed. 587; McCurdy v. Bowes, 88 Ind. 583. The principle stated in the text has been applied in Indiana to gravel-road bonds. See Kirsch v. Braum, 153 Ind. 247, 53 N. E. 1082.

withstanding the terms of the order of the court authorizing the receiver to issue a negotiable receiver's certificate.[77]

§ 51. Indications as to mode of reimbursement.—The statement as to a particular fund in a bill however will not vitiate it if inserted merely as an indication to the drawee how to reimburse himself, or to show to what account it should be charged.[78] Thus, where the bill said, "and charge the sum against whatever amount may be due for my share of fish," it was held a mere indication of the means of reimbursement, and the payment not limited to the proceeds of the fish,[79] and so as to a sight draft to the order of a certain person, for a stated amount, "and charge to account of one bale of cotton, bill of lading attached."[80] So, where A. B. directed the defendant in writing to pay the plaintiff or order £9 10s., "as my quarterly half-pay, to be due from 24th of June to 27th of September next, by advance," the court held it a good bill, saying, "The mention of the half-pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person."[81] So it was held where the expression used was "pay A. L., or order,—it will be in full of a certain judgment."[82] Where the words used were, "which I agree to pay out of my next quarter's mail pay," the Supreme Court of Maine said: "The promise is both absolute, and to pay in money," and it was deemed evident that the payment was not to be confined to the particular fund, but was to be made whether it sufficed or not. Hence the note was held negotiable.[83]

Under Negotiable Instrument statute.—Under the statutory definition of a negotiable instrument and of an unconditional promise to pay,[84] an order or promise to pay out of a particular fund is not un-

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77. Bernard v. Union Trust Co., 159 Fed. 620, 16 L. R. A. (N. S.) 1118.

78. Corbett v. Clark, 45 Wis. 307; Edwards on Bills, 144. See §§ 41, 797; Whitney v. Eliot Nat. Bank, 137 Mass. 351. The words in an order "on account of contract" do not mean "out of the proceeds of contract," but amount to no more than an indication of the fund from which the drawee is to reimburse himself. First Nat. Bank of Hutchinson v. Lightner, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353, citing text.

79. Redman v. Adams, 51 Me. 433.

80. Bank of Guntersville v. Jones Cotton Co., 156 Ala. 525, 46 So. 971.

81. Macleod v. Snee, 2 Stra. 762, 2 Ld. Raym. 1481; Nichols v. Ruggles, 76 Me. 27.

82. Ellett v. Britton, 6 Tex. 229.

83. Nichols v. Ruggles, 76 Me. 27.

84. Appendix, secs. 1, 3.

conditional and not negotiable.[85] The instrument is negotiable, however, under the statute as under the law merchant, when it does not limit payment out of a particular fund but is made to the general credit of the maker or drawer and indicates the fund or source from which it may be paid.[86]

§ 51a. Recitals of collateral matters or words of consideration.—The fact that a writing in the form of a promissory note forms part of an instrument containing other conditions and stipulations does not destroy its character as a negotiable promissory note when the whole instrument indicates that the note was to be considered between the parties as an absolute payment to the payee of the amount stated.[87] The negotiability of the instrument is not impaired by recitals or statements upon its face, which merely state the consideration upon which it was made, and impose no other liability upon any party thereto than that for the payment of the sum of money therein expressed,[88] as that it was "given in consideration of a certain patent

85. National Sav. Bank v. Cable, 73 Conn. 568, 48 Atl. 428, as to an order to pay a certain sum "or what may be due on my deposit book;" Fulton v. Varney, 102 N. Y. S. 608, 117 App. Div. 572, as to an instrument providing: "this amount to be paid out of our profits" on a certain job. A written promise to pay the amount named from the final payment due to the drawer under a building contract in process of performance, should not be treated as an inland bill of exchange (see appendix, secs. 126, 129). Buttrick Lumber Co. v. Collins, 202 Mass. 413, 89 N. E. 138.

86. Hibbs v. Brown, 190 N. Y. 167, 82 N. E. 1108; Waddell v. Hanover National Bank, 97 N. Y. S. 305, 48 Misc. 578, as to a draft for a certain sum "4 hundred cases A. R. L. No. 3362—via A. R. L. B. L. direct." This section is merely declaratory to the common law, and the insertion in a bill of exchange of the words "on account of" has not the same effect as the words "out of the proceeds of," and does not render the bill nonnegotiable. First Nat. Bank v. Lightner, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. 353. A provision in a note that "In case of the death of the insured before the note falls due, the above amount with interest shall be deducted from the amount of the policy," is clearly covered by section 3, and also is within the spirit of section 5, and the note is negotiable. Union Bank of Bridgwater v. Spies, 151 Iowa, 178, 130 N. W. 928. A demand note otherwise negotiable is not rendered nonnegotiable by a provision: "This note is given to take up the freight and rehauling of N. P. Car 43607 and proceeds from resale of said car shall apply on this note," as it was made on the general credit of the maker, and pointed to proceeds of a sale which might be applied to its payment. First Nat. Bank of Snohomish v. Sullivan, 66 Wash. 375, 119 P. 820.

87. New Bank of Eau Claire v. Kleiner, 112 Wis. 287, 87 N. W. 1090. See *post*, § 156.

88. Siegel v. Chicago Tr. & Sav. Bank, 23 N. E. 417; Chase v. Behrman, 10

right;"[89] or "as part pay for a piano-forte," or for any other consideration,[90] or "and the same will be credited in your joint note to me."[91] The statement that collateral security has been given or deposited for the performance of the promise contained in the bill or note is a recital only, which does not affect its negotiability;[92] and though the recital contain the terms of the deposit, that does not alter the case, for it renders neither the amount, the time of payment, the payee, nor the engagement to pay, uncertain.[93]

Daly, 345; Clanin v. Esterly Machine Co., 118 Ind. 373; *post*, §§ 108, 150; Bresee v. Crumpton, 121 N. C. 122, 28 S. E. 351, citing text; Nat. German Am. Bank v. Lang, 2 N. Dak. 66, 49 N. W. 414; Beatty v. Western College, 177 Ill. 281, 52 N. E. 432, 69 Am. St. Repr. 242; Simmons v. Council, 5 Ga. App. 386, 63 S. E. 238.

89. Hereth v. Meyer, 33 Ind. 511. See *post*, § 797. So a recital in the note showing that the consideration was a sale to the maker of a soda fountain, and retaining title in the payee until the note is paid, does not impair its negotiability. Choate v. Stevens, 116 Mich. 28, 74 N. W. 289.

90. Preston v. Whitney, 23 Mich. 260; Wright v. Irwin, 33 Mich. 32; Mott v. Havana Nat. Bank, 22 Hun, 354; Newton Wagon Co. v. Dyers, 10 Nebr. 284; Collins v. Bradbury, 64 Me. 37; Ridgely Nat. Bank v. Patton, 109 Ill. 484; First Nat. Bank v. Badham, 86 S. C. 170, 68 S. E. 536, 138 Am. St. Rep. 1043. See §§ 41, 797.

91. Adams v. Boyd, 33 Ark. 33.

92. Wise v. Charlton, 4 Ad. & El. 786; Fancourt v. Thorne, 9 Q. B. 312; Hassoullier v. Harkenck, 7 T. R. 733; Farmer v. First Nat. Bank, 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79; Roberts v. Jacks, 31 Ark. 597; First Nat. Bank v. Mineral Farm Consol. Min. Co., 17 Colo. App. 452, 68 Pac. 981; Zollman v. Jackson Trust & Savings Bank, 23 Ill. 290, 87 N. E. 297; Duncan v. Louisville, 13 Bush. 385; Howry v. Eppinger, 34 Mich. 29; Littlefield v. Hodge, 6 Mich. 326; Kelley v. Whitney, 45 Wis. 110. See *post*, § 156. A recital in an instrument, in other respects like a promissory note, that it is secured by a lien or by a deposit of collaterals, does not destroy its negotiability, unless such recital qualifies the promise or makes it uncertain or conditional. Beckstrom v. Krone, 125 Ill. App. 376. An instrument that "Six months and twenty-four days after date, I promise to pay to the order of J. G. Rathburn one thousand dollars, with interest from maturity. And to better secure the payment of the same, the attached certificate No. 184, for twenty shares of the stock of the Car. Sulph. Acid Mfg. Co., is herewith deposited as collateral without recourse," is both a promissory note and a pledge of collateral security, and the words "without recourse" refer to the pledge. Rathburn v. Jones, 47 S. C. 206, 25 S. E. 214. In Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598, under a statute providing that several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together (Civil Code, § 2207), it was held that though a note should be negotiable so far as concerns the conditions expressed upon its face, its negotiable character must be determined by the provisions of the mortgage.

93. Towne v. Rice, 122 Mass. 67; Arnold v. Rock River, etc., R. Co., 5 Duer,

Under Negotiable Instrument statute.—Under the statutory definition of a promissory note,[94] it has been held that an instrument reciting: "Having been cause of a money loss to my friend Gerardine H. Hickok, I have given her three thousand dollars. I hold this amount in trust for her, and one year after date or thereafter on demand I promise to pay to the order of Gerardine H. Hickok, her heirs or assigns, three thousand dollars with interest." contained every essential element to constitute a promissory note.[95] And a note given for the premium on an insurance policy is not rendered nonnegotiable from the fact that it contains language from which it appears that the promise was an indebtedness for a balance remaining unpaid of the first annual premium upon a policy which had been actually delivered.[96]

§ **52.** The rule seems to be that if the memorandum or collateral agreement impairs the essential characteristics of certainty necessary to negotiable paper, it destroys its negotiability, but otherwise not.[97] A promise to pay S. or order $1,000, or upon surrender of "this note," to issue stock for the same, does not violate this rule, and is a good note, the option to receive the stock being entirely with the payee.[98] And the like view applies to a note payable in money, or in goods on demand, the election to take the goods or no resting with the payee.[99] So it was held in Wisconsin that a note, otherwise negotiable, was not therein affected by the fact that it contained a memorandum that, if the maker failed to pay it at maturity, the whole amount of the premium on a policy of insurance, for which it was given, should be

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207; Heard v. Dubuque County Bank, 8 Nebr. 16. In Mott v. Havana Nat. Bank, 22 Hun, 354, the note was expressed on its face to be "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note until the amount hereby secured is paid." Held negotiable. In Perry v. Bigelow, 128 Mass. 129, the note contained a memorandum authorizing the collateral to be sold. Held negotiable. See §§ 108, 110, 797.

94. Appendix, sec. 184.

95. Hickok v. Bunting, 73 N. Y. S. 967, 67 App. Div. 560. On a later appeal in the same case, Hickok v. Bunting, 86 N. Y. S. 1059, 92 App. Div. 167, it was further held that, in the absence of contrary evidence, the note showed *prima facie* a consideration, the court saying that the note did not show that the stated loss did not constitute a legal obligation.

96. Equitable Trust Co. of New York v. Taylor, 131 N. Y. S. 475, 146 App. Div. 424; Equitable Trust Co. v. Newman, 131 N. Y. S. 1113, 146 App. Div. 953.

97. Gilpin v. People's Bank, 45 Ind. App. 52, 90 N. E. 91, citing text.

98. Hodges v. Shuler, 22 N. Y. 114.

99. Hosstater v. Wilson, 36 Barb. 307.

considered earned, and the policy void.[1] And so, where, in a note, the obligation to pay is not limited or contingent, but is absolute and unequivocal, the character of the note as a negotiable instrument is not affected by a recital therein that it was given for an amount due by the makers for goods furnished by the payee upon a reservation of title as upon a conditional sale.[2]

The negotiability of a promissory note payable to order is not restrained by the circumstance of its being for the purchase of real property in Louisiana, and the notary before whom the contract of sale was executed writing upon it the words, "*ne varietur*," according to the laws and usages of that State, and others governed by the civil law.[3]

SECTION IV

CERTAINTY AS TO THE AMOUNT TO BE PAID

§ **53. In the fourth place, the amount to be paid must be certain.**[4] Therefore, the instrument is not negotiable if it engages

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1. Kirk v. Dodge County Mutual Ins. Co., 39 Wis. 138. But in that State, where the note contained a provision for the sale, before its maturity, of collateral securities delivered therewith, and the application of the proceeds to the payment of the note, the balance, if any, to become immediately due, it was held that the note was thereby rendered nonnegotiable. Continental Nat. Bank v. McGooch, 73 Wis. 335.

2. First Nat. Bank v. Alexander, 161 Ala. 580, 50 So. 45; J. B. Pyron & Son v. Ruohs, 120 Ga. 1060, 48 S. E. 434; Howard v. Simpkins, 70 Ga. 323; Choate v. Stevens, 116 Mich. 28, 74 N. W. 289; Burnley v. Tufts, 66 Miss. 48; Heard v. Dubuque County Bank, 8 Nebr. 16. A condition in a note which presents a case in which the title to goods never passed to the maker, as distinguished from a case of a completed sale with a reservation of title by way of security only, destroys the negotiability of the note. Worden Grocer Co. v. Blanding, 161 Mich. 254, 126 N. W. 212. Compare Schmidt v. Pegg (Mich.), 137 N. W. 524, where the sale reserved title by way of security only, and was not a conditional sale, and the notes were given after delivery of the machine, and the notes were not rendered nonnegotiable.

3. Fleckner v. Bank of U. S., 8 Wheat. 338.

4. Parsons v. Jackson, 99 U. S. (9 Otto) 440; Gilpin v. People's Bank, 45 Ind. App. 52, 90 N. E. 91; Nicely *et al.* v. Winnebago Nat. Bank of Rockford, Ill., 18 Ind. App. 30, 47 N. E. 476, citing text; Smith v. Marland, 59 Iowa, 345; Gaar v. Louisville B. Co., 11 Bush, 180; Story v. Lamb, 52 Mich. 525; Roblee v. Union Stock Yards Nat. Bank, 69 Neb. 180, 95 N. W. 61; Farquhar v. Fidelity Ins. Co., 13 Phila. 473; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779. Instruments which include an order for certain goods at certain prices and also a part which

to pay a certain sum "and all other sums which may be due," as the aggregate amount is not capable of definite ascertainment.[5] So, if it be for a certain sum "and whatever sum you may collect of me for C.;"[6] or "and taxes;"[7] or if it be for "the proceeds of a shipment of goods, value about £2,000, consigned by me to you;"[8] or "the demands of the sick club in part of interest;"[9] or "a certain sum, the same to go as a set-off;"[10] or if it be expressed, "deducting all advances and expenses;"[11] or if it be for "$800 and such additional premium as may be due on policy No. 218,171;"[12] or if it be for a principal sum certain but uncertain as to the amount of interest payable;[13] or if it provide that there shall be no interest if paid within

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is in the form of a promissory note for the amount of purchase price of the goods, is not a negotiable promissory note. Neyens v. Hossack, 142 Ill. App. 327. In Roblee v. Union Stock Yards Nat. Bank, 69 Neb. 180, 95 N. W. 61, the court said that where a note and mortgage are executed together, the provisions may be such as to make the note nonnegotiable as to all persons chargeable with notice thereof, and that the incorporation of a collateral agreement in a promissory note which requires or may cause payment to be made of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, renders the note nonnegotiable. In Kendall v. Selby, 66 Nebr. 60, 92 N. W. 178, 103 Am. St. Rep. 697, it was held that a mortgage, referred to in a note, providing that the mortgager should pay all taxes on the premises before they become delinquent, and that on his failure so to do the holder might pay the same, and recover ten per cent. interest thereon, and that the mortgage should stand as security therefore, does not render the note nonnegotiable. But in Allen v. Dunn, 71 Nebr. 831, 99 N. W. 680, it was held that a mortgage containing a provision that in case any taxes or assessments shall be levied against the legal holder of the indebtedness on account of the loan within the state in which the mortgaged property is situated, the party of the first part shall pay them, renders a note secured by the mortgage nonnegotiable.

5. Smith v. Nightingale, 2 Stark. 375; Dodge v. Emerson, 34 Me. 96; Roads v. Webb, 91 Me. 412.

6. Legro v. Staples, 16 Me. 252; Lime Rock F. & M. Ins. Co. v. Hewitt, 60 Me. 407.

7. Smith v. Myers, 207 Ill. 126, 69 N. E. 858, affirming 107 Ill. App. 410.

8. Jones v. Simpson, 2 B. & C. 318.

9. Bolton v. Dugdale, 4 B. & Ad. 619.

10. Clark v. Percival, 2 B. & Ad. 660.

11. Cashman v. Haynes, 20 Pick. 132.

12. Marret v. Equitable Ins. Co., 54 Me. 537.

13. Whitewell v. Winslow, 134 Mass. 346 ("with interest the same as Savings banks pay"); Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Randolph v. Hudson, 12 Okl. 516, 74 Pac. 946 ("with interest at the rate of 12 per cent. from date if not paid at maturity"); Davis v. Boady, 17 S. D. 511, N. W. 719 ("with interest from date until fully paid at the rate of 10 per cent.

a certain time.[14] But, *id certum est quod certum reddi potest*, and if the amount can be ascertained from the face of the paper, the form of expression is immaterial.[15] Therefore a promise to pay bearer a certain sum per acre for so many acres as a certain tract contained,

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per annum, payable annually on principal and all over due unpaid interest. If the said interest is not paid when due, it becomes a part of the principal and draw interest at the rate of 12 per cent. per annum until paid"). A provision in a note and mortgage that in case of default in some particular the debt shall draw a higher rate of interest than would otherwise be the case is in the nature of a penalty, is nonenforceable, and its incorporation in the note does not affect its negotiability. Kendall v. Selby, 66 Nebr. 60, 92 N. W. 178, 103 Am. St. Rep. 697. In Brown v. Vossen, 112 Mo. App. 676, 87 S. W. 577, it was held that a note, providing "and if interest be not paid semiannually to become as principal and bear the same rate of interest," was negotiable.

14. Lamb v. Story, 45 Mich. 488. Or "with 10% damages for expense of collection or may take possession of, and sell property to pay the unpaid balance, interest, damages, and costs of sale, and that if there is a deficiency on such sale the receiver will pay it on demand." Kimball v. Mellon, 80 Wis. 133, 48 N. W. 1100; Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779. Held in this case that the stipulation in a note which included the covenants of a mortgage by which the maker agrees to pay the taxes on the property, assessments, insurance, and waste, renders the note nonnegotiable. *Contra*, Hope v. Barker, 112 Mo. 338, 20 S. W. 567, 34 Am. St. Rep. 387; Grutacup v. Woulluse, 2 McLean, 581; Price v. Teal, 4 McLean, 201; Johnson v. Frisbie, 15 Mich. 286.

15. Parsons v. Jackson, 99 U. S. (9 Otto) 440; Lamb v. Story, 45 Mich. 488. See vol. II, § 1496*a*. An instrument certifying that the payee is the holder of a certain number of shares of nonassessable stock in a certain piece of property, and promising to redeem the stock with interest within a stated time, is an engagement to pay a certain sum of money, absolutely and unconditionally, within a specified time, and contains all the requisites of a promissory note. Greenwood Lodge No. 135, A. F. & A. M. v. Priebatsch, 83 Miss. 120, 35 So. 427. See also Luther v. Crawford, 116 Ill. App. 351, affirmed 213 Ill. 596, 73 N. E. 430, holding that a note: "Deposited with me by David Luther eight hundred dollars in cash and three hundred dollars in Yorktown bonds, to be delivered on call," was negotiable. Where one part of a note states that it was given for $1,500, but other parts of the note and the coupons attached, as also the mortgage securing the note, combine to show that it was given for $1,000, in an action seeking to recover $1,000, objection that the note was for an indefinite amount was held not good. Griggs v. Corson, 71 Kan. 884, 81 Pac. 471. In Loving v. Anderson, 95 Minn. 101, 103 N. W. 722, citing the text, it was held that a note promising to pay a certain amount on Oct. 1st., 1903, and containing a provision: "A discount of 6 per cent to be allowed if paid on or before Oct. 1, 1903," is negotiable, the court saying that an instrument whereby the maker promises to pay to the payee or order or bearer a definite sum plus or minus a definite amount or discount is a promissory note, and hence it is negotiable; but, if the promise be to pay a stated sum of money plus or minus an indefinite amount or discount, it is not a negotiable instrument.

was held to be a note as soon as the number of acres was indorsed upon it.[16]

Under Negotiable Instrument statute.—Under the statute [17] it has been held that a stipulation in a mortgage requiring the mortgagor to pay, in addition to the principal debt and interest, such sums as the mortgagee may be required to incur for insurance, taxes, assessments and charges on the land, etc., is not imported into the note secured so as to render it nonnegotiable.[18]

§ 54. Bills and notes payable with exchange.—If there be added to the amount "with current exchange on another place," the commercial character of the paper is not impaired, as that is capable of definite ascertainment.[19] Exchange is an incident to bills for the transmission of money from place to place. Its nature and effect are well understood in the commercial world, and merchants having occasion to use their funds at their place of business sometimes make the currency at that point the standard of payments made to them by their customers at a different point. Exchange preserves the equivalence of amounts in value, and does not introduce such an element of uncertainty as destroys the negotiability of the bill or note which embodies it in its terms.[20] But there are cases which hold that an agreement to pay exchange destroys the negotiable character of the paper, and renders it a special promise requiring proof of consideration.[21] Where there is such an addition to a bill or note, payable

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16. Smith v. Clopton, 4 Tex. 109.

17. Appendix, secs. 1 (2), 2.

18. Barker v. Sartori, 66 Wash. 260, 119 P. 611.

19. Price v. Teal, 4 McLean, 201; Mich. 137; Grutacup v. Woulloise, 2 McLean, 581; Bradley v. Lill, 4 Biss. 473; First Nat. Bank v. Dubuque S. R. Co., 52 Iowa, 378 (*semble*); First Nat. Bank v. Nordstorm, 70 Kan. 485, 78 Pac. 804; Bullick v. Taylor, 39 Mich. 137; Johnson v. Frisbie, 15 Mich. 286; Smith v. Kendall, 9 Mich. 241; Haslack v. Wolf, 66 Nebr. 600, 92 N. W. 574, 60 L. R. A. 434, 103 Am. St. Rep. 736, quoting text; Morgan v. Edwards, 53 Wis. 599; Leggett v. Jones, 10 Wis. 34. See Pollard v. Herries, 3 B. & P. 335, where a paper "payable in Paris, or, at the choice of the bearer, at the Union Bank in Dover, or at H.'s usual residence in London, according to the course of exchange upon Paris," was declared on and treated as a promissory note. *Contra*, Culbertson v. Nelson, 93 Iowa, 187, 61 N. W. 854, 57 Am. St. Rep. 266.

20. Smith v. Kendall, 9 Mich. 242.

21. Smith v. First State Bank of Tyler, 95 Minn. 496, 104 N. W. 369; Low v. Bliss, 24 Ill. 168; Read v. McNulty, 12 Rich. (Law) 445; Savings Bank v. Strother, 28 S. C. 518. In Russell v. Russell, 1 McArthur, 263 (1874), it was held that a note made and payable in Michigan, "with current exchange on New York,"

where it is drawn, it is clear that it might be rejected as surplusage, there being in such case no exchange.[22]

§ **54a.** It has been urged that an instrument payable "with exchange" on another place cannot be regarded as a bill or note: (1) Because the fluctuations in the rate of exchange make it impossible to ascertain the amount payable when the bill is issued; and (2) because, if this were not so, evidence *dehors* the instrument would be necessary to ascertain the amount due at maturity.[23] The words of the rulings as to the requisites of negotiable instruments would lead to these conclusions, and the doctrine of the text has been declared "a slight modification of the general rule." [24] But reply may be made that instruments payable with exchange have been generally treated as commercial instruments by the business world and the courts; [25] that a fair construction of the statute of Anne, upon which many of the modern statutes are modeled, and which has been deemed by some of the courts only declaratory of the common law, does not necessarily impeach as a note an instrument so payable; and that the spirit of the rule requiring precision in the amount of negotiable instruments applies rather to principal amount than to the ancillary and incidental additions of interest or exchange.[26]

was not negotiable, the court regarding the sum as uncertain, so that an indorsee could not sue in his own name. Philadelphia Bank v. Newkirk, 2 Miles, 412.

22. Garrettson v. Bank, 47 Fed. 867, citing text; Clauser v. Stone, 29 Ill. 116; Hill v. Todd, 29 Ill. 103; The Christian County Bank v. Good, 44 Mo. App. 129, citing text; Chandler v. Calvert, 87 Mo. App. 368; Buck v. Harris, 125 Mo. App. 365, 102 S. W. 640. See Byles on Bills (Sharswood's ed.), 73.

23. Benjamin's Chalmers on Bills and Notes, 18; Fitzharris v. Leggatt, 10 Mo. App. 528; Windsor Sav. Bank v. McMahon, 38 Fed. 283; Hughitt v. Johnson, 28 Fed. 865; Flagg v. School District, 4 N. Dak. 30, 58 N. W. 499; Nicely *et al.* v. Winnebago Nat. Bank of Rockford, Ill., 18 Ind. App. 30, 47 N. E. 476; Orner v. Sattley Mfg. Co., 18 Ind. App. 122, 47 N. E. 644; Buck v. Harris, 125 Mo. App. 365, 102 S. W. 640; Palmer v. Fahnestock, 9 Up. Can. C. P. 172; Saxton v. Stevenson, 23 Up. Can. C. P. 503; Cazet v. Kirk, 4 Allen (N. B.), 543; Nash v. Gibbon, 4 Allen (N. B.), 479.

24. Leggett v. Jones, 10 Wis. 30; Clark v. Skeen, 61 Kan. 526; Hope v. Barker, 43 Mo. App. 632, 34 Am. St. Rep. 387, citing text; The Christian County Bank v. Good, 44 Mo. App. 129, citing text.

25. Leggett v. Jones, 10 Wis. 30.

26. In Morgan v. Edwards, 53 Wis. 599, the court said, per Lyon, J., though the precise question was not before it: "A note is payable in lawful money of the United States, which is at par in every portion of the country. If a note is made payable in Milwaukee with exchange on New York, it requires precisely the same sum of money to pay it as would be required had it been made payable

SECTION V

CERTAINTY AS TO THE MEDIUM OF PAYMENT, WHICH MUST BE MONEY

§ 55. In the fifth place the medium of payment must be money.—It is indispensably requisite, in order to constitute a bill of exchange or negotiable promissory note, that the direction or promise be to pay in money.[27] And if the instrument be expressed to be payable "in cash or specific articles," in the alternative,[28] or in merchandise, as for instance, "in good merchantable whisky at trade price," [29] or "in ginned cotton at eight cents per pound," [30] or "in work," [31] or in any other article than money [32] as for instance "an ounce of gold," [33] it becomes a special contract, and by the law merchant loses its character

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in New York. The exchange is the cost of drawing a bill and transmitting the money to New York to meet it. In Leggett v. Jones, the note was payable at the Dodge County Bank with exchange on New York. Had the note been made payable in New York, no one would claim that there was any uncertainty in the amount, although the maker would necessarily have been subjected to the expense, uncertain in amount, of providing funds there to meet it. It is precisely that expense which constitutes and governs the cost of exchange. Hence, the same sum of money which would have been required to pay the note in New York, would have paid it at the Dodge County Bank, including the exchange, according to its terms. In speaking of the cost of exchange, we refer only to transactions in money. Nominally, the cost of exchange may include the discount on the ordinary currency of the place where the bill is drawn, at the place of payment, and such discount may greatly fluctuate. But a note payable with exchange is not affected by those facts, for it cannot be payable in anything but money (unless by virtue of some special statutory provision) and still be a note. There can be no discount on money to affect the cost of inland exchange. Hence, it may well be said, that the uncertainty in the amount due on a note which stipulates for the payment of exchange between two points, is rather apparent than real and substantial."

27. Roads v. Webb, 91 Me. 410, 40 Am. Rep. 128; Chandler v. Calvert, 87 Mo. App. 368; Chitty on Bills [*132], 153.

28. Matthews v. Houghton, 2 Fairfax, 377.

29. Rhodes v. Lindley, Ohio Cond. 465, Chitty on Bills [*132].

30. Lawrence v. Dougherty, 5 Yerg. 435.

31. Quimby v. Merritt, 11 Humphr. 439.

32. Auerbach v. Pritchett, 58 Ala. 451; Dixon v. Bovill, 3 Macq. H. L. 1. In Missouri contracts to pay in property, to order or to bearer, are made negotiable by statute. Spears v. Bond, 79 Mo. 470; Hyland v. Blodgett, 9 Oreg. 166; McClellan v. Coffin, 93 Ind. 456. In this case a note payable in services was held nonnegotiable.

33. Roberts v. Smith, 58 Vt. 494.

as commercial paper, Nor can it be for payment in "good East India bonds," [34] or in "foreign bills," [35] or "by bill or note," [36] or in county scrip.[37] A bond payable "in notes of the United States Bank, or either of the Virginia banks," has been held not payable in money; [38] but where the bond was for a certain sum, and it was added, "which sum may be discharged in notes or bonds due on good solvent men in R.," it was held payable in money.[39] But the courts would not go so far, we think, as to hold an instrument couched in such terms negotiable,[40] for in order to possess that quality it should afford on its face every element necessary to fix its value, and such a paper would be a special contract rather than a negotiable bill or note.

§ **56. Instruments payable in bank bills or in currency.**—Strictly pursuing this principle, it has been held in England that a note payable "in cash, or Bank of England notes," or payable "in Bank of England notes," was not negotiable under the statute of Anne, though the bills of that bank were at any time redeemable in money.[41] In Pennsylvania, this ruling was followed upon an instrument payable in "current bank bills or notes," the court remarking that "it was payable in more than forty kinds of paper of different value." [42] The Supreme Court of the United States has applied it where the note was payable in the "office notes of a bank." [43] When the medium of payment is expressed to be "good current money," or "current money," it is not objectionable, as legal tender money is intended; [44] but if it be "in currency" simply, the paper is not negotiable, as the

34. Smith v. Boehm, Chitty, Jr., 234.

35. Jones v. Fales, 4 Mass. 245; Young v. Adams, 6 Mass. 182.

36. Chitty on Bills [*132], 143, Chitty, Jr., 538.

37. Jones v. State, 40 Ark. 347.

38. Beirne v. Dunlap, 8 Leigh, 514.

39. Butcher v. Carlisle, 12 Gratt. 520.

40. Williams v. Sims, 22 Ala. 512.

41. See Rex v. Wilcox, Bayley on Bills (6th ed.), 11 (in cash or Bank of England notes); *Ex parte* Imeson, 2 Rose, 225 (Bank of England notes).

42. McCormick v. Trotter, 10 Serg. & R. 94.

43. Irvine v. Lowry, 14 Pet. 293.

44. Wharton v. Morris, 1 Dall. 124. See the following cases where the instruments were held negotiable: Graham v. Adams, 5 Ark. 261 (good current money of the State); Wilburn v. Greer, 6 Ark. 255 (Arkansas money); Black v. Ward, 27 Mich. 173; Searcy v. Vance, Mart. & Y. 225 (Tennessee money); Chrysler v. Rendis, 43 N. Y. 209 (in gold coin). But *contra*, McCherd v. Ford, 3 T. B. Mon. 166.

term includes all varieties of the circulating medium.[45] But the decisions, as will be seen from the subjoined notes, are contradictory.[46]

45. Lampton v. Haggard, 3 Mon. 149; Farwell v. Kennett, 7 Mo. 595; Mobile Bank v. Brown, 42 Ala. 108; Rindskoff v. Barrett, 11 Iowa, 172; "*in current bills,*" Collins v. Lincoln, 11 Vt. 268; Ford v. Mitchell, 15 Wis. 304. And like decisions were rendered where the bill or note was payable "*in common currency of Arkansas,*" Dillard v. Evans, 4 Ark. 185; "*in current bank paper,*" Campbell v. Weister, 1 Litt. 30: "*in notes receivable in bank,*" Breckenridge v. Ralls, 4 Mon. 533; "*in current bank notes,*" Gamble v. Hatton, Peck, 130; Kirkpatrick v. McCullough, 3 Humphr. 171; Whiteman v. Childress, 6 Humphr. 303; Simpson v. Moulders, 3 Caldw. 429; McDonnell v. Keller, 4 Caldw. 258; "*in Tennessee currency,*" 2 Yerg. 448; "*in Canada bills,*" Gray v. Worden, 29 Up. Can. Q. B. 535; "*in bank bills,*" Simpson v. Meneden, 3 Caldw. 429; "*in New York funds or their equivalent,*" Hasbrook v. Palmer, 2 McLean, 10; "*in current bank bills,*" Fry v. Rousseau, 3 McLean, 106; "*in foreign bills,*" Jones v. Fales, 4 Mass. 245; "*in paper medium,*" Lange v. Kohne, 1 McCord, 115; "*in current bank notes,*" Little v. Phœnix Bank, 2 Hill, 425; Gray v. Donahoe, 4 Watts, 400. See Pardee v. Fish, 60 N. Y. 265; "*in Pennsylvania or New York paper currency,*" Lieber v. Goodrich, 5 Cow. 186; "*in current notes of the State of North Carolina,*" Warren v. Brown, 64 N. C. 381; "*in current funds of Pittsburg,*" Wright v. Hart, 44 Pa. St. 454; "*in current funds,*" Cornwell v. Pumphrey, 9 Ind. 135; Haddock v. Woods, 46 Iowa, 433; Johnson v. Henderson, 76 N. C. 227; Lafayette Bank v. Ringel, 51 Ind. 393; Platt v. Sauk County Bank, 17 Wis. 222; Lindsey v. McClelland, 18 Wis. 481.

46. In the following cases instruments expressed to be payable as indicated were held negotiable: "*in current funds,*" Shoemakers' Bank v. Street, 16 Ohio (N. S.), 5; Bull v. Kasson, 123 U. S. 112; Laird v. State, 61 Md. 309, citing the text. *Contra* in Texas Land Co. v. Carroll, 63 Tex. 52; "*in current Ohio bank notes,*" Swetland v. Creigh, 15 Ohio, 118; "*in current funds of the State of Ohio,*" White v. Richmond, 16 Ohio, 5; "*current bank notes of Cincinnati,*" Morris v. Edwards, 1 Ohio, 80; "*currency of this place,*" Dugan v. Campbell, 1 Ohio, 47; "*in funds current in the city of New York,*" Lacy v. Holbrook, 4 Ala. 88; "*current money of Alabama,*" Carter v. Penn, 4 Ala. 140: "*in good current money of this State* (*or in Arkansas money*)," Graham v. Adams, 5 Ark. 261; Wilburn v. Greer, 1 Eng. 255; but otherwise if "*in Arkansas money of the Fayetteville branch,*" Hawkins v. Watkins, 5 Ark. 481; in New York "*in New York State bills or specie,*" Keith v. Jones, 9 Johns. 120; "*in bank notes current in the city of New York,*" Judah v. Harris, 19 Johns. 144; "*in North Carolina bank notes,*" Deberry v. Darnell, 5 Yerg. 451; "*in lawful current money of Pennsylvania,*" Wharton v. Morris, 1 Dall. 124; "*in foreign money,*" Sanger v. Stimpson, 8 Mass. 260; "*in currency,*" Butler v. Paine, 8 Minn. 324; Hunt v. Divine, 37 Ill. 137; Swift v. Whitney, 20 Ill. 144; Laughlin v. Marshall, 19 Ill. 390; Peru v. Farnsworth, 18 Ill. 563; Drake v. Markle, 21 Ind. 433; Fry v. Dudley, 20 L. Ann. 368; Klauber v. Biggerstaff, 47 Wis. 551; Phelps v. Town, 14 Mich. 374 (*semble*); Howe v. Hartness, 11 Ohio St. 449; "*in currency of the State of Mississippi,*" Mitchell v. Hewitt, 5 Smedes & M. 361; "*in currency of Missouri,*" Cockrell v. Kirkpatrick, 9 Mo. 688; "*in New York State currency,*" Ehle v. Chittenango Bank, 24 N. Y. 549; "*in current bank notes,*" Pardee v. Fish, 60 N. Y. 265; Fleming v. Nall, 1 Tex. 246. A note for

In some cases it is held that the meaning of such phrases as "current funds," may be explained by parol evidence as to the understanding of the parties and that they may be shown to have meant *money*.[47]

In business paper it is best to adhere to strict rules; and as certainty is of the first moment in commercial dealings, and paper payable in fluctuating values is uncertain and delusive, we think sound judgment approves the doctrine of the text. Money alone is legal tender, and only the note which represents money should be held negotiable. It should be expressed simply as payable in dollars, which have a definite signification fixed by law.[48]

§ 57. It has been suggested that since Congress has declared, and the Supreme Court held, that the treasury notes of the United States shall be "legal tender" in discharge of debts, the term "in currency" should be construed to mean legal tender currency, and instruments so payable should be deemed negotiable. But "the very reverse of this proposition is true," as said in Iowa, in respect to a certificate of deposit payable in currency. And, continued Beck, J.: "It is evident that it was not intended that payment should be made in coin, or 'legal tender' government notes. The holder of the paper could have demanded payment thereon in 'legal tender' money, without any words in the instrument indicating the currency in which payment should be made. * * * Some other medium of circulation is described by the word currency." [49] In Arkansas it has been held that a note payable "in greenback currency" was negotiable, because legal tender currency, and not national or other bank notes, was intended; [50] and in New York it has been said by Church, Ch. J.: "The objection that the instrument is not a promissory note because payable in paper currency, is answered by the suggestion that this must be taken to refer to the legal tender paper currency which under

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$1,000, payable "*in levee bonds of the State of Arkansas at par*" is not an undertaking for the payment of money but for the payment in such bonds absolute so that the payee on the maker's default is entitled to damages only to the extent of the value of such bonds and not to the sum of money named with interest. Johnson v. Dooley, 65 Ark. 71, 44 S. W. 1032; Kampmann v. McCormick, 24 Tex. Civ. App. 462.

47. Haddock v. Woods, 46 Iowa, 435; Huse v. Hamblin, 29 Iowa, 501; Pilmer v. Branch Bank, 16 Iowa, 321.

48. Omohundro v. Crump, 18 Gratt. 703.

49. Huse v. Hamblin, 29 Iowa, 244. See also Dille v. White, 132 Ia. 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510. But see Fry v. Dudley, 20 La. Ann. 368.

50. Burton v. Brooks, 25 Ark. 215.

the United States laws and decisions is money." [51] The United States Supreme Court has held that a check payable "in current funds" is negotiable.[52] National bank notes would be embraced by these words, and the decision is not in consonance with the precedents that require negotiable paper to be payable in money. In England, Bank of England notes were made legal tender, but nevertheless a promise to pay in that medium was not considered a promissory note.[53] And similar views were taken in Canada.[54]

§ **58.** It is not necessary however that the money should be that current in the place of payment, or where the bill is drawn; it may be in the money of any country whatever.[55] But it has been held that it is necessary that the instrument should express the specific denomination of money when it is payable in the money of a foreign country, in order that the courts may be able to ascertain its equivalent value; otherwise it is not negotiable. Thus in New York, where a note was given for a certain sum "payable in Canada money," it was held not negotiable; and the court said:

"This view of the case is not incompatible with a bill or note payable in money of a foreign denomination, or any other denomination, being negotiable, for it can be paid in our own coin of equivalent value, to which it is always reduced by a recovery. A note payable in pounds, shillings, and pence, made in any country, is but another mode of expressing the amount in dollars and cents, and is so understood judicially. The course, therefore, in an action on such an in-

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51. Frank v. Wessels, 64 N. Y. 158 (1876).

52. Bull v. Kasson, 123 U. S. 112, Field, J., saying: "Within a few years commencing with the first issue in this country of notes declared to have the quality of legal tender, it has been a common practice of drawers of bills of exchange or checks, or makers of promissory notes, to indicate whether the same are to be paid in gold or silver, or in such notes; and the term 'current funds' has been used to designate any of these, all being current and declared by positive enactment to be legal tender." Woodruff v. Mississippi, 162 U. S. 302, 16 Sup. Ct. Rep. 820. See section 1651. See also Krieg v. Palmer Nat. Bank (Ind. App.), 95 N. E. 613.

53. Rex v. Wilcox, Bayley on Bills (6th ed.), 11, 1 Ames on Bills and Notes, 39.

54. Gray v. Worden, 29 Up. Can. Q. B. 535. The paper was payable in Canada bills, which, by Stat. 29 & 30 Vict., chap. 10, were made legal tender, Wilson, J., saying: "They have no intrinsic value as coin. They represent only, and are the signs of value."

55. Chitty on Bills [*133], 154, Story on Bills, § 43; Black v. Ward, 27 Mich. 193; Thompson v. Sloan, 23 Wend. 71; King v. Hamilton, 12 Fed. 478, citing the text.

strument, is to aver and prove the value of the sum expressed, in our own tenderable coin." [56]

Intention, to be gathered from the face of the paper, according to fixed rules, is the test of negotiability, and we do not see how the idea of its possessing a negotiable quality is excluded by the mere fact that the denomination of foreign money is not set out. A case, remarkable for its learning and ability, decided by the Supreme Court of Michigan, adopts this view; and there it has been held that a note payable "in Canada currency" is negotiable, the terms being equivalent to Canada money.[57]

Under Negotiable Instrument statute.—The statute declares the rule that an instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable,[58] and such is a note promising to pay a certain sum and deliver one-half the wheat grown on certain land each year as a payment.[59]

SECTION VI

THE CONTRACT MUST BE ONLY FOR THE PAYMENT OF MONEY

§ **59.** In the sixth place it is essential to the negotiability of the bill or note that it purport to be only for the payment of money.[60]

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56. Thompson v. Sloan, 23 Wend. 71.

57. Black v. Ward, 27 Mich. 193 (1873), Campbell, J., saying: "A note payable in Canada currency means no more and no less than that it is payable in Canada money at the Canada standard, and that it is governed as to the amount it calls for by the same rules as if it had been made in Canada, and payable in so many dollars, without containing any further direction." "It is evident the language was used to exclude the idea that it should be paid in dollars according to our paper standard, and to put it on the footing of a gold contract." "It is urged that this is superfluous, and that as every one is presumed to know the law, it would not have been put in except for some purpose which would change its legal import. The objection appears to us to be far-fetched and unreasonable. This case cited above sufficiently answers it. A very large proportion of the bonds and deeds drawn up in this country describe the money secured or paid as 'lawful money of the United States,' when there can be no other lawful money in the republic, and when it is clearly superfluous."

58. Appendix, sec. 5.

59. Thompson v. Kock, 62 Wash. 438, 113 Pac. 1110.

60. Fletcher v. Thompson, 55 N. H. 308; Humphrey v. Beckwith, 48 Mich. 151; Edwards v. Ramsey, 30 Minn. 91; Mast v. Matthews, 30 Minn. 442; Stevens v. Johnson, 27 Minn. 172; Killam v. Schoeps, 26 Kan. 312, citing the text; Continental Nat. Bank v. Wells, 41 N. W. 409; Ingham v. Dudley, 60 Iowa, 16; Chapman v. Steiner, 5 Kan. App. 326, 48 Pac. 607, quoting text; Chandler v.

Such at least may be stated to be the general rule, for if any other agreement of a different character be engrafted upon it it becomes a special contract clogged and involved with other matters, and has been deemed to lose thereby its character as a commercial instrument. But at the present time we think that this general rule is subject to the qualification that if the superadded agreement do not impair the certainty of the promise to pay the certain amount named, but only facilitates the means of its collection, it does not in any degree destroy the negotiability of the instrument, but is embodied in the contract of all the parties and passes as an incident of the paper itself to every holder.[61]

§ **60.** In accordance with the general rule above stated, it has been held that if a note for a certain amount be given for the hire of a negro, to which is added, "said negro to be furnished with the usual quantity of clothing," was not a negotiable promissory note, but a special contract for the hiring and clothing of the negro.[62] And this seems to us clearly the correct doctrine, though the view has been taken that such a paper is negotiable, the obligation to pay the money only passing to an indorsee.[63] So it has been held that if the instrument be to pay money, and also "to deliver up horses and a wharf;"[64] or to pay money "and take up a certain outstanding note,"[65] it is not a negotiable note. So if it be to pay money "and all fines according to

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Calvert, 87 Mo. App. 368. In First Nat. Bank of San Francisco v. Golden (Cal. App.), 126 P. 498, an order on its face payable upon demand, but which was in fact not to be paid until 30 days notice was given to the drawee, and its payment was also conditional upon its being accompanied by the drawer's pass-book, was held to be nonnegotiable.

61. National Bank v. Gray, 18 S. C. 286, citing text. But see Warren v. Gruwell, 5 Kan. App. 523, 48 Pac. 205. Checks issued to employees and redeemable only in merchandise, are not negotiable. Attoyac River Lumber Co. v. Payne (Tex. Civ. App.), 122 S. W. 278. Memoranda "non-negotiable or transferable" appearing on the face of a note, and "this note is not transferable nor to be used as collateral without the written consent of principal and indorsers," appearing on the back thereof, destroy its negotiability. And a further memorandum "And if so used shall be absolutely void," is noneffective. Such a note is assignable as any nonnegotiable paper. Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466.

62. Barnes v. Gorman, 9 Rich. 297.

63. Baxter v. Stewart, 4 Sneed, 213; Gaines v. Shelton, 47 Ala. 413; Woodruff v. Mississippi, 162 U. S. 291.

64. Martin v. Chauntry, 2 Stra. 1271.

65. Cook v. Satterlee, 6 Cow. 108. Or "to pay the taxes on the property, assessments, insurance, and waste." Donaldson v. Grant, 15 Utah, 231, 49 Pac. 779.

rule," it is not a negotiable note, and the additional words cannot be construed as insensible surplusage. "It is quite possible," said Parke, B., "that they have a meaning, and may import that certain pecuniary fines or forfeitures are to be paid by the defendants; and, if so, this is certainly no promissory note within the statute, but is a specific agreement to do certain things." [66]

So likewise where the following words were added the instruments were held special agreements and not negotiable: "If any dispute should arise about the sale of goods for which the note is given, it is to be void,[67] or it is 'only a security for all balances up to its amount.'[68] So if it provide that the payee is to receive less than the principal sum if it be paid before maturity.[69] So, where the promise was to pay H. a certain amount, adding, 'and said H. is to build a barn and fence, and said P. (the promisor) is to have all the land back of the house.'" [70] So, where the note contained a condition that if not paid when due, the penalty for which it was given should belong to the payee.[71] Where the promise is coupled with a condition that the sale or removal of the property for which it was given shall cause the debt to mature at once, the objection prevails.[72] Where a note contained a provision making it in effect a chattel mortgage without power of sale before maturity, it was held negotiable, since the debt evidenced thereby was not subject to be diminished before maturity.[73]

In Rhode Island where there was a memorandum on the note "issued as collateral to A. & W. Sprague Mfg. Co.'s draft accepted

66. Ayrey v. Fearnsides, 4 M. & W. 168.

67. Hartley v. Wilkinson, 4 Campb. 127.

68. Leeds v. Lancashire, 2 Campb. 205.

69. Fralick v. Norton, 2 Mich. 130.

70. Fletcher v. Thompson, 55 N. H. 208.

71. Wright v. Travers, 73 Mich. 494.

72. First Nat. Bank v. Carson, 60 Mich. 433. In Schmidt v. Pegg (Mich.), 137 N. W. 524, a provision in notes given for a machine, that "if default is made in the payment of any note, or the machine is levied upon or the undersigned attempts to sell or remove the same, said company may declare all notes due," was held not to render the notes nonnegotiable on account of uncertainty as to time of payment—the notes having been given after the delivery of the property, and not on a conditional sale. A certificate of indebtedness which contains, in addition to a promise to pay money, an agreement to keep free from incumbrance property on which the value of collateral, pledged for the security of the certificate, depends, is not a negotiable instrument. Strickland v. National Salt Co. (N. J. L.), 81 A. 828, affirming decree 76 A. 1048, 77 N. J. Eq. 328.

73. Bank of Carroll v. Taylor, 67 Iowa, 573. See under § 52, as to conditional sale clauses.

by Hoyt, Sprague & Co., No. 6806," the court considered it not negotiable because not payable at all events, it being evident that the payment of the drafts would at once discharge both the makers and indorsers of the note and render said note null and void.[74]

§ 61. Additions (1) of power to confess judgments; (2) of waivers of exemptions; and (3) of stipulations to pay collection or attorney's fees.—Sometimes it is stated in the note that (1) the promisor appoints the payee, or order, or holder to confess judgment for him when the note is payable; or (2) waives benefit of appraisement laws, or homestead exemptions, where such laws or exemptions exist, or (3) stipulates for payment of collection and attorney's fees. The authorities differ as to the negotiability of such instruments; but the later cases maintain that they are negotiable, and the principle is becoming established that, if the note is in itself certain and perfect without conditions, and there is merely superadded the provision or declaration that the payee or holder may confess judgment for the maker; or that certain rights are waived in respect to its collection, then the negotiability of the paper is not destroyed.[75] In Pennsylvania, when a note contains a power to confess judgment, it has been the practice to allow judgment to be taken before maturity in order to obtain a lien upon real estate, but to delay issuing execution thereon until after maturity, and a stipulation in a note of the above kind under that practice, is held to render such a note nonnegotiable.[76]

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74. American Nat. Bank v. Sprague, 14 R. I. 411; Gibson v. Hawkins, 69 Ga. 354; Haskell v. Lambert, 16 Gray, 592. See *post*, § 150.

75. See Ohio case, cited end of note 5. 2 Parsons on Notes and Bills, 147; Walker v. Woollen, 54 Ind. 164; Lyon v. Martin, 31 Kan. 412, citing the text; Hughlitt v. Johnson, 28 Fed. 865. In Clements v. Hull, 35 Ohio St. 141, it was held that power to any attorney of record to appear and confess judgment in favor of *any* holder did not affect negotiability of the note, and might be executed in favor of any holder, even if he had only the equitable title. And where a promissory note contains a clause waiving "all differences on the ground of any extension of the time of its payment, that may be given by its holders to them (the makers) or either of them," such stipulation destroys the negotiability of the note. See Merchants & Mechanics' Sav. Bank v. Fraze, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341; Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603, citing text; Mumford v. Tolman, 157 Ill. 258, 41 N. E. 617; First Nat. Bank v. Alexander, 161 Ala. 580, 50 So. 45; Osborn v. Hawley, 19 Ohio, 130. The negotiability of a note is not affected by a mortgage provision that the note may be declared due before the day fixed for payment, upon the happening of some contingency. Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160.

76. Sweeney v. Thickstun, 77 Pa. St. 131; Overton v. Tyler, 3 Barr, 346. In

Under Negotiable Instrument statute.—Under the statute,[77] it has been held that when the time of payment depends upon the will of the holder and is uncertain, the instrument is not negotiable, as when a note contains a power of attorney by which judgment may be entered upon it at any time after its date whether due or not.

§ 62. Addition in bills and notes of stipulations to pay collection or attorney's fees.—Quite frequently in recent years bills and notes are met with, framed in other respects in the usual negotiable forms, but containing the additional stipulation on the part of the drawer or maker to pay collection or attorney's fees, and they have elicited from the courts various and conflicting decisions. The cases may be divided into four classes.

First. Those which sustain both the validity of the stipulation and the negotiability of the instrument.[78]

Zimmerman v. Anderson, 67 Pa. St. 421, it was held that a note in the following terms was negotiable: "Six months after date I promise to pay to E. W. Lowe, or order, one hundred and twenty-five dollars, for value received, with interest, waiving the right of appeal, and of all valuation, appraisement, stay, and exemption laws."

77. Appendix, sec. 1 (3); Wisconsin Yearly Meeting v. Babler, 115 Wis. 189, 91 N. W. 678.

78. Lockwood v. Lindsey, 6 App. Cas. (D. C.) 396 (as to law of Texas); *In re* Keeton, Stell & Co., 126 Fed. 426 (under the law of Texas); Schlesinger v. Arline, 31 Fed. 648; Wilson Sewing Machine Co. v. Moreno, 29 Am. Rep. 406; First Nat. Bank v. Slaughter, 98 Ala. 602, 14 So. 545, 39 Am. St. Rep. 88; Farmers' Nat. Bank v. Rasmessen, 1 Dak. 60; Smith v. Baker, 137 Ga. 298, 72 S. E. 1093, upon giving statutory notice; Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, quoting text; Shenandoah Nat. Bank v. Marsh, 89 Iowa, 273, 56 N. W. 458, 48 Am. St. Rep. 381; Sperry v. Horr, 32 Iowa, 184 (1871); Seaton v. Scovill, 18 Kan. 435; Deitrich v. Baylie, 23 La. Ann. 767 (1871); Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 So. 394, text cited; Brahan v. First Nat. Bank of Clarksville, 72 Miss. 266, 16 So. 203; Bank of Commerce v. Fuqua, 11 Mont. 285, 28 Pac. 291, 28 Am. St. Rep. 461, text cited; Stark v. Olsen, 44 Nebr. 646, 63 N. W. 473; Roberts v. Snow, 27 Nebr. 425, 43 N. W. 241; Kemp v. Claus, 8 Nebr. 24; Heard v. Dubuque Bank, 8 Nebr. 10 (1878); Oppenheimer v. Bank, 97 Tenn. 19, 36 S. W. 705, 56 Am. St. Rep. 778, quoting and approving text; Tyler v. Walker, 101 Tenn. 306, 47 S. W. 424; Hamilton Gin Co. v. Sinker, 74 Tex. 52, citing the text; Tomlinson v. H. P. Drought & Co. (Tex. Civ. App.), 127 S. W. 262; Elmore v. Rugely (Tex. Civ. App.), 107 S. W. 151; Ramsey v. Thomas, 14 Tex. Civ. App. 431, 38 S. W. 259; Hopkins v. Halliburton & Parr, 6 Tex. Civ. App. 451, 25 S. W. 1005; Salisbury v. Stewart, 15 Utah, 308, 49 Pac. 777, 62 Am. St. Rep. 934; Second Nat. Bank v. Auglin, 6 Wash. 403, 33 Pac. 1056. See Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598. In the following cases, such instruments were held valid but the question of negotiability was

These cases consider that the stipulation is valid because it is an indemnification assured by the maker against the consequences of his own act, for, unless in default, he will not have to pay the addi-

not raised: Rinker v. Lauer, 13 Idaho, 163, 88 Pac. 1057; Harris Mfg. Co. v. Anfinson, 31 Minn. 182; Johnston Harvester Co. v. Clark, 30 Minn. 308, citing the text; Bank of Duncan v. Brittain, 92 Miss. 545, 46 So. 163; Duggan v. Champlin, 75 Miss. 441, 23 So. 179; Meacham v. Pinson, 60 Miss. 217; Eyrich v. Capital State Bank (Miss.), 6 So. 615; Howey v. Gessler, 16 N. Mex. 319, 117 Pac. 734; Peyser v. Cole, 11 Oreg. 39; Bank of California v. Union Packing Co., 60 Wash. 456, 111 Pac. 573. In Garretson v. Purdy, 3 Dak. Ter. 178, it was held that negotiability was destroyed when the note contained a stipulation, not for a definite sum as attorney's fee, but for payment of reasonable fees. In Holston Nat. Bank v. Wood, 125 Tenn. 6, 140 S. W. 31, it was held that while a stipulation in a note for attorney's fees is valid and will be enforced, the provision as to any particular amount is not binding, and will not be enforced unless it appears reasonable to the court. After quoting and approving text, the Supreme Court of Oregon said: "A careful examination has satisfied us that the weight of authority, and especially the more recent decisions is strongly in favor of the doctrine that the negotiability of a promissory note is in no way affected by a stipulation for a reasonable attorney's fee" (citing numerous cases). Benn v. Kutzschan, 24 Oreg. 28, 32 Pac. 763. On the other hand, the Oregon Supreme Court, in an earlier case, held that a provision in a note to pay a stipulated allowance of 10 per cent. attorney's fees, was void, as oppressive and unconscionable, the court stating that a provision for "a reasonable attorney's fee" was unobjectionable. Levens v. Briggs, 21 Oreg. 333, 28 Pac. 15. In Indiana a note containing a stipulation for attorney's fee on nonpayment at maturity is valid and negotiable. Proctor v. Baldwin, 82 Ind. 370; Johnson v. Crossland, 34 Ind. 334; Smith v. Silvers, 32 Ind. 321; Smith v. Muncie Nat. Bank, 29 Ind. 159. In First Nat. Bank v. Canatsey, 34 Ind. 149, drawers, indorsers, and acceptor were held liable where the bill agreed to pay reasonable attorney's fees. See also Hubbard v. Harrison, 38 Ind. 323. In that state a statute provided (1 Rev. Stat. 1876, p. 149), "that any and all agreements to pay attorney's fees, depending upon any condition therein set forth, and made part of any bill of exchange, acceptance, draft, promissory note, or other written evidence of indebtedness, are hereby declared illegal and void, provided that nothing in this section shall be construed as applying to contracts made previous to the taking effect of this act." After this act it was held that the stipulation in a note to pay attorney's fees "if suit be brought" was conditional and void. Churchman v. Martin, 54 Ind. 380, the court also holding that an unconditional stipulation to pay five per cent. attorney's fees was valid. That under the statute an unconditional stipulation would be valid, see Brown v. Barber, 59 Ind. 533; Smock v. Ripley, 62 Ind. 81; Garver v. Pontius, 66 Ind. 191; Maxwell v. Morehart, 66 Ind. 301; Farmers' Nat. Bank v. Sutton Mfg. Co., 52 Fed. 191. A statute providing that a negotiable instrument may contain a provision for reasonable attorney's fee, in effect takes away from the maker of a note a defense he might have asserted against it as a nonnegotiable instrument, which defense is simply one on the remedy, and though applied to a note executed before the enactment of the statute is not unconstitutional. Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

tional amount;[79] that it is consonant with public policy because it adds to the value of the paper; has a tendency to lower the rate of discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit;[80] and that it does not impair the negotiability of the instrument, for the reasons: that the sum to be paid at maturity is certain; that commercial paper is expected to be paid promptly; that if so paid, no element of uncertainty enters into the contract; that it ceases to be negotiable, in the full sense of the term, if not paid at maturity, and that the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay; and that it is not different in its character from a cognovit, which, when attached to promissory notes, does not destroy their negotiability.[81]

Second. The second class of cases enforce the stipulation, but deny the negotiability of the instrument.[82] They rest on the consid-

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79. Moore v. Staser, 6 Ind. App. 364, 32 N. E. 563, 33 N. E. 563, 33 N. E. 665.

80. Stapleton v. Louisville Banking Co., 95 Ga. 802, 23 S. E. 81, citing text; Heard v. Dubuque Bank, 8 Nebr. 10 (1878).

81. Nicely *et al.* v. Winnebago Nat. Bank of Rockford, Ill., 18 Ind. App. 30, 47 N. E. 476, quoting text; Stoneman v. Pyle, 35 Ind. 103 (1871); Proctor v. Baldwin, 82 Ind. 370; Sperry v. Horr, 32 Iowa, 184 (1871); Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33, 105 Am. St. Rep. 381; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554, affirming 79 N. J. L. 40, 74 Atl. 708. In Cudahy Packing Co. v. State Nat. Bank, 134 Fed. 538, the court said that the general rule of certainty requires commercial and not mathematical certainty. Following the reasoning underlying the classes of cases referred to in the text and upholding the validity and negotiability of contracts containing such provisions, the Supreme Court of Washington has decided that attorney's fees are not collectible except in case of default in payment of the principal debt, and that a suit to collect an installment of interest due does not warrant an allowance of a fee to the attorney for plaintiff. Merrill v. Muzzy, 11 Wash. 16, 39 Pac. 279. Where a note stipulated that upon default the holder might sell collateral, and after the process had been applied to the payment of the note, and after charging all costs and attorney's fees, any excess was to be paid to the maker of the note, a sale of the collateral by the holder was contemplated, and the holder was not entitled to attorney's fees when the collateral was sold by receivers and the holder merely proved his claim and received payment. Merchants' Nat. Bank of Baltimore v. Roxbury Distilling Co., 196 F. 76.

82. Chestertown Bank of Maryland v. Walker, 163 Fed. 510 (in Maryland); Hardin v. Olson, 14 Fed. 705 (in Minnesota); Findlay v. Pott, 131 Cal. 385, 63 Pac. 694; Kendall v. Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; Harber v. Brown, 101 Cal. 445, 35 Pac. 1035; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866; First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 94; Adams v. Seaman, 82 Cal. 637; Chase v. Whitmore, 68 Cal. 545;

erations as stated in Pennsylvania, by Sharswood, J. (in Woods v. North), where to the note was added, "and five per cent. collection fees if not paid when due," that "it is a necessary quality of negotiable paper, that it should be simple, certain, unconditional and not subject to any contingency. * * * Interest and costs of protest after nonpayment at maturity are necessary legal incidents of the contract, and the insertion of them in the body of the note would not alter its negotiability. Neither does a clause waiving exemption, for that in no way touches the implicity and certainty of the paper. But a collateral agreement as here, depending too, as it does, upon its reasonableness, to be determined by the verdict of a jury, is entirely different."

Bowie v. Hall, 69 Md. 433; Maryland Fertilizing Co. v. Newman, 60 Md. 584, 45 Am. Rep. 750; Jones v. Radatz, 27 Minn. 240; German-American Bank v. Martin, 129 Mo. App. 484, 107 S. W. 1108; Johnston v. Speer, 92 Pa. St. 227; Woods v. North, 84 Pa. St. 407 (1877); Sweeney v. Thickstun, 77 Pa. St. 131; Sylvester Beckley Co. v. Alewine, 48 S. C. 308, 26 S. E. 607; Savings Bank v. Strother, 28 S. C. 504; Kimball v. Mellon, 80 Wis. 133, 48 N. W. 1100; Continental Nat. Bank v. McGeoch, 73 Wis. 332, 41 N. W. 409; Vipond v. Townsend, 88 Wis. 285, 60 N. W. 430; Peterson v. State Bank, 78 Wis. 113, 47 N. W. 368; First Nat. Bank v. Larsen, 60 Wis. 206. In the following cases such instruments were held to be nonnegotiable, but the question whether the stipulation was enforceable was not raised: Garretson v. Purdy, 3 Dak. Ter. 178; Roads v. Webb, 91 Me. 406, 40 Am. Rep. 128; McCoy v. Green, 83 Mo. 626; Storr v. Wakefield, 71 Mo. 622; First Nat. Bank v. Marlow, 71 Mo. 618; First Nat. Bank v. Gay, 71 Mo. 627; Samstag v. Conley, 64 Mo. 476; First Nat. Bank v. Gay, 63 Mo. 33; Ruck v. Harris, 125 Mo. App. 365, 102 S. W. 640; Pace v. Gilbert School, 118 Mo. App. 369, 93 S. W. 1124; Creasy v. Gray, 88 Mo. App. 454; Clark v. Barnes, 58 Mo. App. 667; First Nat. Bank v. Bynum, 84 N. C. 25; Clevenger v. Lewis, 20 Okla. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410; American Machinery & Export Co. v. Druge Bros., 82 Vt. 476, 74 Atl. 84. In Michigan, a note containing such a provision is not negotiable. Strawberry Point Bank v. Lee, 117 Mich. 122, 77 N. W. 444; Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191; Altman v. Fowler, 70 Mich. 58; Altman v. Rittershoeffer, 68 Mich. 287; Cayuga Nat. Bank v. Purdy, 56 Mich. 6. But in Wright v. Traver, 73 Mich. 493, it was held that a provision in a note carrying interest at 6 per cent. to pay "ten per cent. attorney fees," is in effect the same as 16 per cent. interest, and void. A stipulation "to pay fifteen dollars attorney's fees, over and above all taxable costs, should any proceeding be instituted to collect," being out of proportion to the amount of the note, is void. Bullock v. Taylor, 39 Mich. 137. See also Myer v. Hart, 40 Mich. 517. In Morgan v. Edwards, 53 Wis. 599, the note was payable with "all expenses, including attorney's fees, incurred in collecting." Held not negotiable, the court pointing out that the additional amounts were not payable only upon the contingency of default in payment at maturity. A note negotiable on its face does not become nonnegotiable on account of a stipulation in a mortgage securing the

Third. The third class of cases maintain the negotiability of the instrument, but regard the stipulation as penal and void. They proceed on the ground that the paper is negotiable, because as long as current the amount contemplated to be paid is certain, and that after that its negotiable office is performed; but that the insertion of such provisions tends to encourage litigation, to oppress debtors, and is against the policy of the law and void.[83]

Fourth. The fourth class of cases hold that the stipulation to pay the additional amount renders the transaction usurious, and subjects the instrument to the operation of the statutes against usury.[84]

§ 62a. **Considerations in favor of negotiability.**—Such instruments should, we think, be upheld as negotiable. They are not like contracts to pay money and do some other thing. They are simply for the payment of a certain sum of money at a certain time, and the additional stipulations as to attorney's fees can never go into effect if the terms of the bill or note are complied with. They are therefore incidental and ancillary to the main engagement, intended to assure its performance, or to compensate for trouble and expense entailed by its breach. At maturity, negotiable paper ceases to be negotiable in the full commercial sense of the term, as heretofore explained,[85] though it still passes from hand to hand by the negotiable forms of transfer; and it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency, because when they cease to be current they contain a stipulation to defray the expenses of collection.[86]

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same providing for an attorney's fee in the event of foreclosure. Farmer's Nat. Bank v. McCall, 25 Okl. 600, 106 Pac. 866.

83. Boozer v. Anderson, 42 Ark. 167; Trader v. Chichester, 41 Ark. 242; Overton v. Mathews, 35 Ark. 147; Witherspoon v. Musselman, 14 Bush, 214; Garr v. Louisville Banking Co., 11 Bush, 182; Exchange Bank v. Appalachian Land & Lumber Co., 128 N. C. 193, 38 S. E. 813; Tinsley v. Hoskins, 111 N. C. 340, 16 S. E. 174, 32 Am. St. Rep. 801, citing text; Baird v. Vines, 18 S. D. 52, 99 N. W. 89; Chandler v. Kennedy, 8 S. D. 56, 65 N. W. 439. In Virginia it has been held that such a stipulation is a penalty and not enforceable. Fields v. Fields, 105 Va. 714, 54 S. E. 888. The negotiability seems to have been assumed in Rixey v. Pearre, 89 Va. 117, 15 S. E. 498, and in Ronald v. Bank of Princeton, 90 Va. 813, 20 S. E. 780, the question of negotiability raised was not distinctly decided.

84. Merchants' Nat. Bank v. Sevier, 14 Fed. 662; Shelton v. Gill, 11 Ohio, 417; State v. Taylor, 10 Ohio, 378.

85. Dorsey v. Wolff, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, citing text. See *ante*, §§ 1, 1*a*.

86. Benjamin's Chalmers' Digest, 17; Stapleton v. Louisville Banking Co.,

Such stipulations do not, we think, render such instruments usurious. The additional amounts are in consideration of additional trouble and expense inflicted on the holder, and not excessive interest for the loan or forbearance of money.[87]

If the additional stipulations be regarded as in the nature of penalties, and therefore void, they would simply be surplusage, and would not impair the negotiability of the paper. And this is the view which commends itself, as it seems to us, to judicial favor.[88] Unless there be some statute under which such stipulations are permissive, it certainly tends to the oppression of debtors to sanction their incorporation in commercial instruments; and they are therefore against the policy of the law and void. But when the added stipulation is deemed valid, and the bill or note negotiable, such stipulation becomes a part of the acceptor's or indorser's contract,[89] and need not be sued for by the attorney but are recoverable by the holder of the instrument.[90] When the amount of fees is fixed by a certain percent-

95 Ga. 802, 23 S. E. 81, quoting text; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; Clifton v. Bank of Aberdeen, 75 Miss. 929, 23 So. 394, text cited; First Nat. Bank v. Badham, 86 S. C. 170, 68 S. E. 536, 138 Am. St. Rep. 1043; (divided court to the contrary in Smith Sons Gin & Machine Co. v. Badham, 81 S. C. 63, 61 S. E. 1031 and Green v. Spires, 71 S. C. 107, 50 S. E. 554); Tyler v. Walker, 101 Tenn. 306, 47 S. W. 424; Salisbury v. Stewart, 15 Utah, 308, 49 Pac. 777, 62 Am. St. Rep. 934, citing and approving text. In Sperry v. Horr, 23 Iowa, 184, negotiability of the note was maintained, not on the idea that the amount was definite, but that the liability was not incurred until maturity and was part of the remedy.

87. Barton v. Farmers' Nat. Bank, 122 Ill. 352; Moore v. Staser, 6 Ind. App. 364, 23 N. E. 563, 33 N. E. 665.

88. Hamilton Gin Co. v. Sinker, 74 Tex. 52, citing the text. See Ward v. Cornett, 91 Va. 676, 22 S. E. 494, case of alleged usury. In Rixey v. Pearre, 89 Va. 117, 15 S. E. 498 (1892), the court, by Lewis, P., said: "In each of the negotiable notes held by the bank, there is a stipulation 'to pay on default of payment at maturity 10 per cent. on the face of this note for attorney's fee for collection.' This was held by the Circuit Court (of Fauquier county) a penalty, and, as such not enforceable, and in this view we concur." To the same effect, see Ronald v. Bank of Princeton, 90 Va. 813, 20 S. E. 780 (1894).

89. Bank v. Ellis, 2 Fed. 44 (accommodation indorser); Hubbard v. Harrison, 38 Ind. 323; First Nat. Bank v. Canatsey, 34 Ind. 149; Smith v. Muncie Nat. Bank, 29 Ind. 158.

90. Adams v. Addington, 16 Fed. 92, citing the text; Bank v. Ellis, 2 Fed. 44; Rylee v. Bank of Statham, 7 Ga. App. 489, 67 S. E. 383; Dorsey v. Wolf, 142 Ill. 589, 32 N. E. 495, 34 Am. St. Rep. 99, quoting text; Walker v. Woollen, 54 Ind. 164; Jones v. Smith, 4 Tex. Civ. App. 353, 26 S. W. 240. See Ware v. City Bank 59 Ga. 848, that a stipulation in a draft for attorney's fees is a contract between the drawer and the acceptor, and not recoverable by a holder.

age, or certain sum, as in many cases,[91] the objection to negotiability of the paper becomes extremely technical and sophistical, if the validity of the additional stipulation is supported, and it is only when their amount is left undetermined that such objection seems to be forcible. The holder, it has been held, must prove the amount of the attorney's fees in order to recover them.[92]

Under Negotiable Instrument statute.—The conflict of authority on the question whether a provision for the payment of an attorney's fee impairs the negotiability of an instrument containing such a clause, has been settled in those states which have adopted the Negotiable Instrument law, by the section that "The sum payable is a sum certain within the meaning of this act, although it is to be paid with costs of collection or an attorney's fee, in case payment shall not be made at maturity."[93] And it has been held, under the

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91. Sperry v. Horr, 32 Iowa, 184, 10 per cent.; Dietrich v. Baylie, 23 La. Ann. 767, 10 per cent.; Overton v. Mathews, 35 Ark. 147, 10 per cent.; Farmers' Nat. Bank v. Rasmussen, 1 Dak. 60, § 10, and cases cited *ante*, § 62.

92. Orr v. Sparkman, 120 Ala. 9, 23 So. 829; Lindley v. Sullivan, 133 Ind. 588, 32 N. E. 738, 33 N. E. 561. Wyant v. Pattorf, 37 Ind. 512. See Hopkins v. Halliburton & Parr, 6 Tex. Civ. App. 451, 25 S. W. 1005. But not where judgment is procured by default. Alexander v. McDow, 108 Cal. 25, 41 Pac. 24. In Illinois recovery cannot be had in same action. Dearlove v. Edwards, 166 Ill. 619, 46 N. E. 1081. Where a promissory note, in addition to principal and interest, provided for the payment of "reasonable attorney's fees in collecting by suit or otherwise," the presiding judge was not authorized to direct a verdict for a certain amount as attorney's fees because of the testimony of a number of the bar that such amount would be reasonable, although there was no conflicting evidence on the subject. Finleyson v. International Harvester Co. of America (Ga.), 75 S. E. 103. Where a note contains an agreement to pay "all legal expenses and attorney's fees which may be incurred in the collection of this note," it is not incumbent upon the plaintiff to allege and show by express proof that an attorney had been employed and an agreement had been made to pay him, before the court was authorized to make an allowance for attorney's fees as having been "incurred" by the plaintiff. Conner v. Blodget (Cal. App.), 124 P. 733. A stipulation in a note or 10 per cent. attorney's fees, if the note is placed in the hands of an attorney for collection, is a stipulation for liquidated damages, and the fees are recoverable in an action on the note without any proof that they were incurred. First Nat. Bank of Vicksburg v. Mayer, 57 So. 308, 129 La. 981.

93. Appendix, sec. 2 (5). See Farmers' Nat. Bank v. McCall (Okl.), 106 Pac. 866; McCormick v. Swem, 36 Utah, 6, 102 Pac. 626; First Nat. Bank v. Miller, 139 Wis. 126, 120 N. W. 820. A note with a clause "and 10 per cent. attorney's fees if collected by attorney, or if suit is brought upon this note," provides for payment of attorney's fees only on collection by an attorney after dishonor. First Nat. Bank v. Miller, 139 Wis. 126, 120 N. W. 820, 131 Am. St. Rep. 1040. Where a note was made payable "with reasonable attorney's fees," a reasonable attorney's fee may be demanded when the note has been placed in the hands of

statute, that where the amount is left blank in an attorney's fee clause, it is tantamount to a promise to pay a reasonable sum as an attorney's fee.[94] On the question as to the effect of the statute in those states which hold such a stipulation in an instrument to be contrary to public policy and void, it has been held that the statute does not give validity to such stipulations, but provides only that they shall not destroy the negotiable character of instruments in which they are incorporated.[95]

SECTION VII

DELIVERY

§ 63. In the seventh place the instrument must be delivered.—Delivery is the final step necessary to perfect the existence of any written contract, and therefore as long as a bill or note remains in the hands of the drawer or maker it is a nullity; [96] and a note, to be

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an attorney for collection though suit has not been brought thereon. Morrison v. Ornbaun, 30 Mont. 111, 75 Pac. 953.

94. McCormick v. Swem, 36 Utah, 6, 102 Pac. 626.

95. Miller v. Kyle (Ohio), 97 N. E. 372. See Mackintosh v. Gibbs, 79 N. J. L. 40, 74 Atl. 708, holding that such a stipulation does not render a note nonnegotiable. In North Carolina, an additional section was added to the statute, as follows: "Nothing in this chapter shall authorize the enforcement of an authorization to confess judgment of a waiver of homestead and personal property exemptions or a provision to pay counsel fees for collection incorporated in any of the instruments mentioned in this chapter; but the mention of such provisions in such instruments shall not affect the other terms of such instruments of the negotiability thereof." Revisal of North Carolina of 1905, sec. 2346.

96. Bailey v. Taber, 5 Mass. 286; Marvin v. McCullum, 20 Johns. 288; Freeman v. Ellison, 37 Mich. 459; Lansing v. Caine, 2 Johns. 300; Woodford v. Dorwin, 3 Vt. 82; Ward v. Churn, 18 Gratt. 801; Hopper v. Eiland, 21 Ala. 714; Richards v. Darst, 51 Ill. 141; Roberts v. Bethell, 12 C. B. 778; Cox v. Troy, 5 B. & Ald. 474; Howe v. Ould, 28 Gratt. 7; Bartlett v. Same, 28 Gratt. 7; Devries v. Shumate, 53 Md. 216; Smith v. Foster, 41 N. H. 215; Dexter Sav. Bank v. Copeland, 77 Me. 269; McFarland v. Sikes, 54 Conn. 250; Palmer v. Poor, 121 Ind. 138, citing the text; Purviance v. Jones, 120 Ind. 164, citing the text; Stringer v. Adams, 98 Ind. 539; Morris v. Morton, 14 Nebr. 360, citing the text; Mattix v. Leach, 16 Ind. App. 113; Nicely *et al.* v. Winnebago Nat. Bank of Rockford, Ill., 18 Ind. App. 30, 47 N. E. 476, citing text; Johnson v. Eaton, 51 Kan. 708, 33 Pac. 597; Polhemus v. Prudential Realty Corp., 74 N. J. Eq. 570, 67 Atl. 303, citing text; *In re* Reeve's Estate, 111 Iowa, 260, 82 N. W. 912, quoting text. An indorsement on a note that it was given in connection with a contract for a deed to certain land does not make the note a part of another

a binding obligation, must be accepted by the payee.[97] The controlling element in determining the delivery of a note is the intention of the parties,[98] and a negotiable instrument stolen from the maker before it has become effective as an obligation by actual or constructive delivery cannot be enforced by any subsequent innocent holder.[99] And even though it be placed by the drawer or maker in the hands of his agent for delivery, it is still undelivered as long as it remains in his hands, and may be recalled; and, while there, the payee has no right to it, unless it be wrongfully withheld by the agent.[1] If the agent to whom a note is delivered, to be issued on condition, refuses to return it to the party who has executed it upon the failure of that condition, such party may restrain him from its negotiation, and compel the cancellation of his signature thereon.[2] If he wrongfully delivers the note the maker is not bound, unless it comes to the hands of a *bona fide* holder under the rules entitling him to protection.[3] It is not necessary to aver the delivery of a bill or note, for the averment that a bill was drawn or a note made includes the idea of a

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written instrument, delivery of which must be proved to sustain an action on the note. Lachenmaier v. Hanson, 196 F. 773.

97. O'Meara v. McDermott, 43 Mont. 189, 115 P. 912.

98. Barber v. McHenry County Hedge Fence Co., 129 Ill. App. 45; Enneking v. Woebkenberg, 88 Minn. 259, 92 N. W. 932; Streissguth v. Kroll, 86 Minn. 325, 90 N. W. 577. Delivery is, normally, to be in accordance with the purpose and intent of the parties to a note; but this is subject to exceptions of which one obtains when the departure from the intent of the parties is one of mode only. Polhemus v. Prudential Realty Corp., 74 N. J. 570, 67 Atl. 303.

99. Salley v. Terrill, 95 Me. 553, 50 Atl. 896, 55 L. R. A. 730, 85 Am. St. Rep. 433.

1. Thompson on Bills, 90–91; The King v. Lambton, 5 Price, 428; Byles [*146], 265; Edwards on Bills, 186; 1 Parsons on Notes and Bills, 48–50; Devries v. Shumate, 53 Md. 216. The delivery of a check by the maker to his own agent for delivery to the payee does not constitute delivery to the payee, though the agent procures his indorsement upon the check by fraudulently representing it to be a voucher. Barry v. Mutual Life Ins. Co. of New York, 211 Mass. 306, 97 N. E. 779.

2. Devries v. Shumate, 53 Md. 212; Eppert v. Hall, 133 Ind. 418, 31 N. E. 74, 32 N. E. 713, citing the text; Gross v. Arnold, 177 Ill. 575, 52 N. E. 867.

3. Ware v. Smith, 62 Iowa, 159; Mercer County v. Life & Trust Co., 19 C. C. A. 44, 72 Fed. 623, citing text. Where money, deposited with a banker to be loaned by him for the owner on real estate security, was loaned on other kind of security, the transaction was unauthorized and such banker was not authorized to receive a delivery of the notes as agent of the lender, and the person who deposited the money was not entitled to possession of the notes as against the receiver in bankruptcy of the banker. Morris v. Butler, 138 Mo. App. 378, 122 S. W. 377.

delivery, without which the drawing or making is not complete.[4] So essential is delivery, that it has been held that where a promissory note, the writing of which was unknown to the grantee, lay in the grantor's possession, and was found among his papers after death, the payee could not claim or sue upon it;[5] and though such a note should be found, accompanied with written directions to deliver it to the payee, the payee will still have no right of action, unless the directions be valid as a testament.[6]

§ 63a. Constructive delivery.—It is to be observed however that delivery may be constructive as well as actual, by manual passing of the instrument. A direction to a third person who is in actual custody thereof, to hold it subject to the payee's or transferee's order; or an order to the depositary to deliver it, or a delivery to a third person for the payee without condition,[7] is sufficient in legal contemplation.[8] Where the plaintiff's bankers indorsed a note to him

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4. Churchill v. Gardner, 7 T. R. 596; Smith v. McClure, 5 East, 477; Binney v. Plumley, 5 Vt. 500; Peets v. Bratt, 6 Barb. 662; Chester, etc., R. Co. v. Lickiss, 72 Ill. 521; Black v. Duncan, 60 Ind. 522; Lord v. Russell, 64 Conn. 86, 29 Am. Rep. 242; Smith v. Thurston, 8 Ind. App. 105, 35 N. E. 520; Bank v. Simmons, 43 W. Va. 79, 27 S. E. 299; Welch v. Dameron, 47 Mo. App. 221, citing text.

5. Disher v. Disher, 1 P. Wms. 204, Chitty, Jr., 230. Where a testatrix, three days before her death, signed her name to notes payable on demand after her demise, in stated amounts, placed the notes with bankbooks and other documents of her own in the pocket of a skirt belonging to herself, had the pocket sewn up, and intrusted the skirt and its contents as her own to one of the persons named as payee in one of the notes for safe-keeping only at night, and with the understanding, that the whole package was, upon her death, to be given up to the person named in her will as executor, there was no delivery of the notes during the lifetime of the promisor. Mason v. Gardiner, 186 Mass. 515, 71 N. E. 952.

6. Gough v. Findon, 7 Exch. 48; Gammon Theological Seminary v. Robbins, 128 Ind. 85, 27 N. E. 341; Taylor v. Harmison, 179 Ill. 137, 53 N. E. 584.

7. Gordon v. Adams, 127 Ill. 225; School District v. Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576, citing text. Where the maker of a note had been the agent of the payee for many years and had been her agent in handling her investments, and, after making the note, retained it among other papers belonging to her, and made statements periodically of amounts due her and indorsed payments on the note, this is sufficient to show a delivery of the note to the payee. Indiana Trust Co. v. Byram, 36 Ind. App. 6, 72 N. E. 670, petition to rehear denied, 73 N. E. 1094.

8. Howe v. Ould, 28 Gratt. 7; Bartlett v. Same, 28 Gratt. 7; Fisher v. Bradford, 7 Greenl. 28; Richardson v. Lincoln, 5 Metc. (Mass.) 201; Mitchell v. Byrne, 6 Rich. 171. In Howe, Knox & Co. v. Ould & Carrington, 28 Gratt., it appeared that Samuel Strong, the owner of a note executed to him by Samuel Myers, indorsed it, and deposited it with the First National Bank of Richmond, Va., as

and put it in an envelope with his papers, at the same time, making appropriate entries of the transaction on their books, it was held a sufficient delivery to him; and that a subsequent assignment of the bankers could not defeat it.[9]

§ 64. If the party who has signed or indorsed the instrument die before delivery, it is a nullity, and cannot be delivered by his personal representative; [10] but if advances had been made on the faith of a delivery, then the promisee or indorsee would be entitled to a delivery.[11]

It is said by Mr. Chitty, in respect to a bill, that delivery (by the acceptor) is not essential to vest the legal interest in the payee.[12] But the doctrine sustained by the authorities goes only to the extent that if the drawee actually accepts the bill, and improperly detains

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collateral for a loan obtained from the bank by Betz, Youngaling & Byer. Strong sold the note to Ould, and gave him an order on the bank for it, who at once presented the order at the bank, but was informed that the president was out of town. A few days afterward the president informed him that the debt for which the note was pledged was nearly paid, and that he would deliver him the note but for the fact that an attachment had been issued against it—of the attachment, which antedated the sale of the note, Ould & Carrington had no notice. It was held that they were entitled to it—were not affected by the attachment of which they had no notice at time of purchase, and that the constructive delivery of the note was sufficient. Gammon Theological Seminary v. Robbins, 128 Ind. 85, 27 N. E. 341; Welch v. Dameron, 47 Mo. App. 221, citing text.

9. Williams v. Galt, 65 Ill. 172. When a banker executed a note payable by himself in the presence and with the consent of the payee, and kept it thereafter for her as her banker, for safe-keeping, and for the collection of collaterals and the crediting of the proceeds thereof upon the note, this constituted a constructive delivery. *In re* Reeve's Estate, 111 Ia. 260, 82 N. W. 912.

10. Clark v. Boyd, 2 Ohio, 56; Clark v. Sigourney, 17 Conn. 511; Bromage v. Lloyd, 1 Exch. 32; Byles [*56], 242; Drum v. Benton, 13 App. D. C. 245. When the maker places the note in the hands of a third person merely for delivery to the payee, such third person is the agent of the maker, and not of the payee. And if the maker dies before delivery by the agent, the agent's authority is thereby revoked, and a subsequent delivery by him is ineffectual to create a liability. Jones v. Jones, 101 Me. 447, 64 Atl. 815, 115 Am. St. Rep. 328. But in Rowan v. Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796, recognizing the rule that delivery of a promissory note is indispensable to its efficacy, and, if not delivered in the lifetime of its maker, it cannot be delivered after his death, the court said that delivery may be actual or constructive, and that if it is clear that the maker of the note intended it to be a finished note, and binding on him, without further act on his part, it will so operate, though not actually delivered in his lifetime.

11. Perry v. Crammond, 1 Wash. C. C. 100, 1 Parsons on Notes and Bills, 49.

12. Chitty on Bills [*172], 198

it in his hands, an averment that the bill was accepted is sufficient, without averment of a delivery by the acceptor.[13]

§ 65. Whenever a bill or note is found in the hands of the payee, it will be presumed that it was delivered to him,[14] and that the delivery took place on the day of its date, if it be dated,[15] and, at any rate, before the day of its maturity.[16] But the presumption both as to the fact and the time of delivery may be rebutted.[17]

As a bill or note takes effect only by delivery, so it takes effect only on delivery; and if this be subsequent to its date, it will be binding only from that day.[18] But still, when delivered, if it bear an anterior date, and be payable at some future day from date, the time will be computed according to its terms, and therefore by relation from its date; for it is competent for the parties to frame their contracts to suit themselves.[19] And it will be proper to describe it as drawn on the day it bears date.[20]

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13. Smith v. McClure, 5 East, 476; Story on Bills, § 203, note 2; Thompson on Bills, 90.

14. Lachenmaier v. Hanson, 196 Fed. 773; Pastene v. Pardini, 135 Cal. 431, 67 Pac. 861; Griswold v. Davis, 31 Vt. 390; Woodford v. Dorwin, 3 Vt. 82; Garrigus, Admr. v. The Home Frontier & Foreign Missionary Society, 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262; Knapstein v. Tinnette, 156 Ill. 322, 40 N. E. 947. Winfrey v. Ragan, 136 Mo. App. 250, 117 S. W. 83; Gandy v. Bissell, 72 Nebr. 356, 100 N. W. 803. See § 812. The possession of a note by one claiming to be the real and intended payee, but alleged to have been made payable to another by mistake, affords no basis for the inference that the note was fully executed by delivery. Digan v. Mandel, 167 Ind. 586, 79 N. E. 899, the court saying: "Delivery involves both an act and an intention, and where the contest is waged with respect to the act and purpose necessary to create the article, and give it existence and legal force, there can be no presumption of law or foundation for an inference of fact in favor of one not in terms a party to the disputed instrument. It was incumbent on appellee to prove delivery, or to prove such facts as warranted the inference of delivery by the trial court."

15. Cranston v. Goss, 107 Mass. 439; Sinclair v. Baggaley, 4 M. & W. 312; Anderson v. Weston, 6 Bing. N. C. 296; Emery v. Vinall, 26 Me. 295.

16. Churchill v. Gardiner, 7 T. R. 596; Smith v. McClure, 5 East, 477; Exchange Bank v. Veirs, 3 Cal. App. 71, 84 Pac. 455, citing text; Binney v. Plumley, 5 Vt. 500. See chapter XXI, on transfer by Indorsement, § 6.

17. Lachenmaier v. Hanson, 196 Fed. 773; Gandy v. Bissell's Estate, 81 Nebr. 102, 117 N. W. 349, 115 N. W. 571; Woodford v. Dorwin, 3 Vt. 82; Scaife v. Byrd, 39 Ark. 568; Wickhizer *et al.* v. Bolin, 22 Ind. App. 1, 53 N. E. 238.

18. Lovejoy v. Whipple, 18 Vt. 379.

19. Powell v. Waters, 8 Cow. 669; Bumpass v. Timms, 3 Sneed, 459; Snaith v. Mingay, 1 Maule & S. 87; Barker v. Sterne, 9 Exch. 684.

20. Snaith v. Mingay, 1 Maule & S. 89.

Under Negotiable Instrument statute.—Following the rule of the general law, the statute declares a contract on a negotiable instrument incomplete until delivery.[21] An instrument in the form of a bill of exchange payable to the order of the drawer does not come into existence as a bill of exchange until it is delivered as well as indorsed by the payee,[22] but the production of an instrument raises the presumption of a valid and intentional delivery by the maker.[23]

§ 66. If the bill or note bear no date, the time must be computed from its delivery; and if the day of actual delivery cannot be proved, it will be computed from the earliest day on which it appears to have been in the hands of the payee or any holder.[24] It is not necessary to aver a date to the bill or note, but it is sufficient to aver that it was drawn or made a certain day.[25]

§ 67. Delivery to a father of an order for an amount due his minor son is sufficient delivery in law;[26] and so delivery to a trustee is sufficient as delivery to the *cestui que trust;*[27] and delivery may be made to one person for another.[28] Delivery by one of two joint makers will be conclusively presumed to be the act of both.[29]

It is essential to delivery that the minds of both parties should assent, in order to bind them; and if, through inattention, infirmity, or otherwise, one does not assent, the act of the other is nugatory.[30]

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21. Appendix, sec. 16. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Viets v. Silver, 15 N. D. 51, 106 S. W. 35.

22. Stouffer v. Curtis, 198 Mass. 560, 85 N. E. 180.

23. Madden v. Gaston, 121 N. Y. S. 951, 137 App. Div. 294 (as to checks).

24. Clark v. Sigourney, 17 Conn. 511; Richardson v. Lincoln, 5 Metc. (Mass.) 201; Woodford v. Dorwin, 3 Vt. 82.

25. De La Coutier v. Bellamy, 2 Show. 422 (1683); Hague v. French, 3 Bros. & P. 173; Giles v. Bourne, 6 Maule & S. 73.

26. Mason v. Hyde, 41 Vt. 432. See also Enneking v. Woebkenberg, 88 Minn. 259, 92 N. W. 932, holding that it was a sufficient delivery when the maker left the note with the father of the payee, when he understood that he had parted with all interest therein.

27. Tucker v. Bradley, 33 Vt. 325.

28. Elliott v. Deason, 64 Ga. 63. Delivery to the husband for the wife has been held insufficient. Wright v. Smith, 81 Va. 777. A delivery made to the agent of the person is equivalent in law to the principal. See Callahan v. Crow, 91 Hun, 346, 36 N. Y. Supp. 225. Compare Giselman v. Starr, 106 Cal. 651, 40 Pac. 8.

29. Beman v. Wessels, 53 Mich. 549; Carter v. Moulton, 51 Kan. 9, 32 Pac. 633, 37 Am. St. Rep. 259.

30. *In re* Reeve's Estate, 111 La. 260, 82 N. W. 912, quoting text. Where

Therefore, leaving a check on the desk of a clerk,[31] or the counter of a bank,[32] without the knowledge of such clerk or the bank officer, is not delivery. Where papers were taken up in the presence of the party sought to be charged, and placed in the safe of a third person, it was held no delivery on his part, as between the immediate parties, when he had done or said nothing to indicate an intention to deliver.[33]

Where notes were executed and left with the payee's agent, who objected only to their form, but retained them, agreeing to accept them, if the form could not be changed, and it was not, it was held to be sufficient delivery.[34] Placing bills or notes, signed or indorsed, in the custody of the postman, addressed to the payee or indorsee—that being the course of business between the parties—has been held, in England, a sufficient delivery;[35] and so depositing them in the post-office, with the assent of the payee or indorsee, is considered sufficient in the United States.[36] And if a bill or note so deposited be lost on

notes, which had been executed before an order was signed for goods, were laid on the counter while the maker went to wait on a customer, and the agent of the seller took up the notes and papers and left the store, there was no proper delivery of the notes. Sheffer v. Fleischer, 158 Mich. 270, 122 N. W. 543.

31. Kinney v. Ford, 52 Barb. 194.

32. Chicopee Bank v. Philadelphia Bank, 8 Wall. 641.

33. Stokes v. Anderson, 118 Ind. 533.

34. Bodley v. Higgins, 73 Ill. 375.

35. Rex v. Lambton, 5 Price, 428.

36. Kirkman v. Bank of America, 2 Coldw. 397; Canterbury v. Bank of Sparta, 91 Wis. 53, 64 N. W. 311, 51 Am. St. Rep. 870. If a check has been sent by mail, but has never been received by the payee, it remained the property of the sender. Garthwaite v. Bank of Tulare, 134 Cal. 237, 66 Pac. 326. Where a debtor sends by mail a check to pay a debt, the title to the check remains in the sender until it is received by the creditor, unless the creditor instructs the debtor to send a check by mail in settlement of the debt. In the latter case, the title to the check vests in the creditor or payee when the check is placed in the mail according to his instructions. Watt-Harley-Holmes Hardware Co. v. Day, 1 Ga. App. 646, 57 S. E. 1033. Where a person agrees to accept a note signed by two persons in his own state and by one person in another state, and the note is signed by the two who send it to the third person for signature, the note was delivered in another state when such third person signed the note and deposited it in the post-office addressed direct to the payee. Loud v. Collins, 12 Cal. App. 786, 108 Pac. 880, citing text. Where a note, blank as to date of payment, was sent by mail, and returned by payee who stated that it could not be accepted in that form, and the maker sent it again with a letter stating that he could not tell when he would be able to pay it and asking the payee to hold it, and he would pay it as soon as he was able, the note was not finally delivered until it was sent the second time with the letter, and the note and letter formed a single transaction. Glass v. Adone, 39 Tex. Civ. App. 21, 86 S. W. 798.

the way, and the creditor obtain a duplicate, and cause it to be demanded and protested, he may recover.[37] The vendor of negotiable paper has the right of stoppage *in transitu* to the same extent as the vendor of other species of personal property; and the right to the remedy applies not only as against the vendee, but as well against a creditor of the vendee who has made a loan upon the promise of the vendee to transfer the paper to him on its arrival.[38]

§ **67a.** One who becomes a party to a note after delivery, and the consideration has passed between the original parties, incurs no liability to the payee unless there be a new consideration and a redelivery of the note; and merely signing the note in the presence of the payee does not amount to a redelivery.[39]

§ **68. Escrows.**—A bill or note, as well as a deed, may be delivered as an escrow—that is, delivered to a third party (but not to the payee),[40] to hold until a certain event happens, or certain conditions are complied with—and then the liability of the party commences as soon as the event happens or the conditions are fulfilled, without actual delivery by the depositary to the promisee,[41] but

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37. Kirkman v. Bank of America, 2 Coldw. 397.

38. Muller v. Pondir, 55 N. Y. 325.

39. Williams v. Williams, 67 Mo. 661. To same effect, see Briggs v. Downing, 48 Iowa, 550; Brant v. Barnett *et al.*, 10 Ind. App. 653, 38 N. E. 441; Messenger v. Vaughan, 45 Mo. App. 15. But when it was the original understanding that the further security would be given, if such additional security is given, pursuant to the original agreement, then it relates back to the inception of the first contract; and in such cases no new consideration is required. Montgomery County v. Auchley, 92 Mo. 126, 4 S. W. 425.

40. Clanin v. Esterly Harv. Mach. Co., 118 Ind. 374; Murray *et al.* v. W. W. Kimball Co., 10 Ind. App. 184, 37 N. E. 734; Garner v. Fite *et al.*, 93 Ala. 405, 9 So. 367, citing text. A delivery of a note to the payee's attorney is a complete delivery. Schultz v. Kosbab, 125 Wis. 157, 103 N. W. 237. The burden is upon the plaintiff to show that a note was left with a third person to be delivered to the payee upon the happening of a contingency. Jones v. Jones, 101 Me. 447, 64 Atl. 815. In Nichols & Shepard Co. v. First Nat. Bank, 6 N. Dak. 404, 71 N. W. 135, it was held that where promissory notes were placed by the parties thereto in the hands of a third party, with instructions not to deliver the same until the maker so directed, the transaction did not constitute an escrow. The notes still remained in the control of the maker. There was no delivery in law, and no title to the notes vested in the payee.

41. Bradbury v. Davenport, 120 Cal. 152, 52 Pac. 301; Witmer Bros. v. Weid, 108 Cal. 569, 41 Pac. 491; Couch v. Meeker, 2 Conn. 302; Smith v. Goodrich, 167 Ill. 46, 47 N. E. 316; Taylor v. Thomas, 13 Kan. 217; Missouri Pac. R. Co. v. Atkinson, 17 Mo. App. 492, citing the text; Parker v. Young, 73 N. J. L. 774,

delivery by such third party contrary to agreement would not constitute a delivery.[42] And it matters not that the actual delivery is not designed to take place until after the death of the promisor; the instrument, whether negotiable or otherwise, is nevertheless valid.[43]

But there is this distinction between negotiable and sealed instruments: If the custodian of the former betrays his trust, and passes off the negotiable instrument to a *bona fide* holder before maturity, and without notice, all parties are bound; but if the instrument be sealed, the rule is otherwise.[44]

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65 Atl. 194 (as to waiver of the condition of a check being held in escrow); Ketterson v. Inscho, 55 Tex. Civ. App. 150, 118 S. W. 626, citing text; Alexander v. Wilkes, 11 Lea (Tenn.), 221; Glenn v. Hill, 11 Wash. 541, 40 Pac. 141, citing and approving text; Lehigh Coal & Iron Co. v. West Superior Iron & Steel Co., 91 Wis. 221, 64 N. W. 346; 1 Parsons on Notes and Bills, 51; and see chapter on *Bona Fide Holder*, §§ 855, 856. Where a note made for the purchase price of stock and the certificates of stock were placed in escrow under an agreement that the stock should be delivered to the maker of the note if he paid the note within a year, but no provision was made for the disposition of the stock or the note in default of payment, the payee of the note cannot sue thereon when the stock and note are still in the hands the escrow of holder; the payee's remedy would be for a breach of contract. Gray v. Baron (Ariz.), 108 Pac. 229. When the maker of a check has deposited it in escrow, the depositary is bound to account to the payee for his property, and is entitled to prove any facts which would defeat the maker's claim thereto. Brockway v. Reynolds, 77 Nebr. 225, 109 N. W. 154. When a note, whose validity depends upon the delivery, is left with a third person to be delivered to the payee, on the happening of a contingency, the first delivery is complete, and irrevocable by death or otherwise. Jones v. Jones, 101 Me. 447, 64 Atl. 815, 115 Am. St. Rep. 328. If a promissory note when executed is by agreement of the parties delivered to a third person, to be by him delivered to the payee upon the performance of a condition precedent, and the condition is performed after the death of the maker of the note, the delivery becomes complete by the performance of the condition. Gandy v. Bissell, 72 Nebr. 356, 100 N. W. 803, reversing on rehearing 5 Nebr. (Unof.) 184, 97 N. W. 632.

42. Settles v. Moore, 149 Mo. App. 724, 129 S. W. 455, and when the cashier of a bank held the note as cashier under the escrow agreement, the bank is liable. Brown v. Citizens' State Bank, 17 Idaho, 716, 107 Pac. 405. Compare § 855.

43. Giddings v. Giddings, 51 Vt. 227; Belden v. Carter, 4 Day, 66; Glenn v. Hill, 11 Wash. 541, 40 Pac. 141, citing and approving text; Wood v. Flanery, 89 Mo. App. 632, citing text. If the maker of a note delivered it to a third person, to be held by him and delivered to the payee on condition that the maker died without recalling it, the happening of the condition left the holder with authority to deliver it to the payee and thereby to give him a good title. But if such person was simply to take the note into his custody, and to hold it as the servant of the maker, under his orders, it could not be effectually delivered to the payee after the death of the maker. Daggett v. Simonds, 173 Mass. 340, 53 N. E. 907, 46 L. R. A. 332.

44. Hutchinson v. Brown, 19 D. C. 136; Provident Trust Co. v. Mercer County,

§ 68a. Can delivery to payee be upon condition precedent?—It has been said that a bill or note cannot be shown to have been delivered to the promisee as an escrow, for the evidence would be repugnant to the act.[45] These questions are elsewhere more fully considered.[46] It has been said however by the Court of Appeals of New York, that "instruments not under seal may be delivered to the one to whom on their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions, the observance of which is essential to their validity. And the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable as between the parties to it, or others having notice. It needs a delivery to make the obligation operative at all, and the effect of the delivery and the extent of the operation of the instrument may be limited by the conditions with which the delivery is made." [47] This view is now taken by the

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170 U. S. 607, 18 Sup. Ct. Rep. 788; Fearing v. Clark, 16 Gray, 74; Long Island L. & T. Co. v. Columbus R. Co., 65 Fed. 458; Barson v. Huntington, 21 Mich. 415; Galvin v. Lyfers, 22 Ind. App. 43, 52 N. E. 96; North Atchison Bank v. Gay, 114 Mo. 203, 21 S. W. 479; Joyce v. Cockrill, 35 C. C. A. 38, 92 Fed. 838. Compare § 855.

45. 1 Parsons on Notes and Bills, 51; Scott v. State Bank, 9 Ark. 36; Massman v. Holscher, 49 Mo. 87; Badcock v. Steadman, 1 Root (Conn.), 87; Jones v. Shaw, 67 Mo. 667. See *post*, §§ 79, 81.

46. See chapter XXVI, on Rights of *Bona Fide* Holder or Purchaser, § 855. Henshaw v. Dutton, 59 Mo. 139.

47. Benton v. Martin, 52 N. Y. 574, Folger, J.; Belleville Bank v. Borneman, 124 Ill. 205. In Merchants' Exch. Bank v. Luckow, 37 Minn. 542, Gilfillan, J., said: "It was held in Westman v. Krumweide, 30 Minn. 314, and Skaaraas v. Finnegan, 31 Minn. 48, that in the case of an instrument not under seal it is competent to show by parol that notwithstanding its delivery, it was intended by the parties that it should become operative as a contract only upon the happening of a future contingent event, such as that it should be first executed by some other person. It is claimed that the rule ought not to apply to negotiable paper, but we can see no reason why, as between the original parties, it should not apply to such instruments, as well as any other, nor why a transferee with notice, or without valuable consideration, or after maturity, should not take such negotiable paper subject to that defense as well as to any other." The cases cited above appear to have been instances of delivery to the payee himself, or to his agent. Where the delivery is made by a surety to his principal upon conditions to be observed before the final promulgation of the paper, the liabilities of the parties, as between themselves, present a different question, some authorities contending that the payee taking such paper without notice of the condition is not affected thereby, and others maintaining that where the paper is nonnegotiable, or still in the hands of an original party, the surety may avail himself of the violation or nonobserv-

Supreme Court of the United States.[48] And it is now generally held that a note may be delivered to the payee to take effect only upon a

ance of the condition. That the payee should take the paper free from any secret or private understanding existing between parties occupying the relations of principal and surety, seems to us the better doctrine. It is well presented by McIver, J., in an opinion delivered in the case of Fowler v. Allen (S. C.), 10 S. E. 947, where, after stating the facts, he said: "As to the second question, while it is not to be denied that there is some conflict in the cases elsewhere, we think the decided weight of authority as well as of argument, is in favor of the proposition that where one signs a negotiable note, perfect on its face, as surety for another upon the condition known only to the principal that it is not to be delivered to the payee until something else is done, the surety will be liable, even if such condition be not complied with, unless notice of such condition is brought home to the payee. This proposition does not rest alone upon the peculiar character of negotiable paper, but upon the well-settled principle that where one of two innocent persons must suffer, the loss should fall upon him who put it in the power of a third person to cause such loss, as well as upon the principle that where an agent is clothed with apparent authority to do an act, he may bind his principal within the limits of that authority, whatever may have been his private instructions. Here the principal debtor, after signing the notes, takes them to the defendant for the purpose of procuring her signature as his surety, in accordance with the agreement made by him with the plaintiffs; and, when he delivers them properly signed, surely the payees cannot be affected by any private instructions which the surety may have given to his principal, unless the same were communicated to the payees. The surety by signing the notes complete in form, and placing them in the hands of her principal to be delivered to the payees, even though upon a condition, has placed it in the power of her principal to deceive the payees; and if loss ensues it must fall upon the one who contributed to that loss, rather than upon the innocent payees, who were left in ignorance of the conditions upon which the notes were signed. The principal debtor was the agent of the surety, and not of the creditor; and if he has done an act, for the doing of which he was clothed with apparent authority, even though it may have been done in violation of his private instructions, the person who invested him with such apparent authority, must take the consequences." See also Jordan v. Jordan, 10 Lea, 124; Callahan v. Crow, 91 Hun, 346, 36 N. Y. Supp. 225. See also authorities cited in note 92 to § 81*a*; Wickhizer *et al.* v. Bolin, 22 Ind. App. 1, 53 N. E. 238. And the motive of the maker of a note in delivering the same is immaterial in an action against the sureties thereon. Weis v. Morris Bros., 102 Iowa, 327, 71 N. W. 208. See also Juilliard v. Chaffee, 92 N. Y. 529; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; McFraland v. Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111.

48. In Burke v. Dulaney, 153 U. S. 228 (1893), 14 Sup. Ct. Rep. 816, the court held that in an action by the payee against the maker of a note evidence is admissible to show a parol agreement between them, and at the time of making the note that it should not become operative as a note until the maker could examine the property (which consisted of a group of mines) for which the note was to be given, and determine whether he would take them. Harlan, J., cited Ware v. Allen, 128 U. S. 595, 9 Sup. Ct. Rep. 174; Pym v. Campbell, 6 El. & Bl. 370;

condition precedent.[49] And so, where a person signed a note under an express agreement that it was not to become obligatory until certain other persons had signed it, and the payee received it with this under-

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Davis v. Jones, 17 C. B. (N. S.) 625; Wilson v. Powers, 131 Mass. 539; Pawling v. United States, 4 Cranch, 219, and approving Benton v. Martin, 52 N. Y. 574. This decision goes to the consideration of the instrument, for unless the property was purchased it was without valuable consideration, the option to purchase it not having been the value given for the note. It is therefore in accordance with the views set forth in § 81*a*.

49. Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 S. E. 138; Hunter v. First Nat. Bank, 172 Ind. 62, 87 N. E. 734; Streissguth v. Kroll, 86 Minn. 325, 90 N. W. 577; Niblock v. Sprague, 93 N. E. 1105, 200 N. Y. 390, reversing judgment 118 N. Y. 1127, 134 App. Div. 910; Smith v. Dotterweich, 93 N. E. 985, 200 N. Y. 299, 33 L. R. A. (N. S.) 892, reversing judgment 116 N. Y. 896, 132 App. Div. 489; Stoughton v. Chu Fong, 130 N. Y. S. 228; Newgrass v. Shulhof, 128 N. Y. S. 664; Shulman v. Damico, 123 N. Y. S. 61, 138 App. Div. 191. A promissory note may, in this state, be delivered to the payee in escrow, to become effective if certain conditions are fulfilled; otherwise to remain ineffective, and the fact that the escrow holder was the agent of the maker in other matters does not preclude his being the depositary of the note in escrow, provided he received it not in his capacity as agent, but in his individual capacity. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145. In the case of delivery to an agent of the payee, the court said that the better authority is to the effect that when the rights of no third parties intervene, and there is nothing inconsistent with the agent's duty to his principal in holding the paper subject to the conditions agreed upon when it was executed, the writing may be delivered to the agent of the adverse party to be held by him until he receives instructions to deliver it to his principal. This was a case of a purchase of machinery and delivery of a note to the agent to be held by him until the machinery could be tested, and the court held that the holder was acting as the agent of the purchaser in holding the note. Case Threshing Mach. Co. v. Barnes, 133 Ky. 321, 117 S. W. 418. Where a note was given on an account, and the maker said that there must be an adjustment of the account as to over-charges before the note was paid, but the person taking the note stated that he had no authority as to that, there was no condition attached to the delivery of the note. Conditions as to delivery may be shown, but not conditions which change or modify the character of the obligation. Pratt & Whitney Co. v. American Pneumatic Tool Co., 63 N. Y. S. 1062, 50 App. Div. 369, affirmed 166 N. Y. 588, 59 N. E. 1129. The maker of a promissory note, delivered on condition precedent to the payee, may recover the note in trover from the payee, where there has been a breach of condition by the latter; the fact that the payee in violation of the condition has indorsed the note to an innocent holder for value does not defeat the maker's cause of action as the unauthorized transfer, being a conversion, cannot be a defense to a suit in trover. Thompson v. Carter, 6 Ga. App. 604, 65 S. E. 599. Performance of a condition precedent may be waived or the party for whose benefit it operates may be estopped from complaining of its nonperformance. Heitman v. Commercial Bank, 6 Ga. App. 584, 65 S. E. 590.

standing and without procuring such other persons to sign it, the person signing it is not liable.[50] But, of course, such an agreement between the parties to a note relating to its conditional delivery could not be available as against an indorsee in good faith.[51]

Under Negotiable Instrument statute.—The conflict of authority on the question whether a bill or note can be shown to have been delivered upon a condition precedent, is settled in those states which have adopted the statute,[52] whereunder the rule is recognized that a person may manually deliver an instrument, though it be in the form of commercial paper, to another, on its face containing a binding obligation *in præsenti* of such person to such other, with a contemporaneous verbal agreement that it shall not take effect until the happening of some specified event, and that the paper as between the

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50. Hakes v. Russ, 175 Fed. 751; Young v. Hayes (Mass.), 99 N. E. 327; International Bank v. Enderle, 133 Mo. App. 222, 113 S. W. 262; Seattle v. L. H. Griffith Realty, etc., Co., 28 Wash. 605, 68 Pac. 1036. See also as to parol evidence, *post*, § 81*a*. A surety who signs an unconditional promise is not discharged from liability thereon by reason of any expectation, reliance or condition, unless notice thereof be given to the promisee; or in other words, that the contract stands as expressed in the writing in the absence of conditions which are known to the recipient of the promise. In this case, the fact that the surety signed on condition that another surety would be obtained was not known to the payee. Joyce v. Auten, 179 U. S. 591, 21 S. Ct. 227, 45 L. Ed. 332. The fact that a surety signed the note upon an agreement that it should be signed by another person also as surety, is available as a defense. Hunter v. First Nat. Bank, 172 Ind. 62, 87 N. E. 734; Smith v. Bales (Ky.), 99 S. W. 672; That it should not be delivered until another had signed it. See also Bank of Benson v. Jones, 147 N. C. 419, 61 N. E. 193, 16 L. R. A. (N. S.) 343. In Smith v. Bales (Ky.), 99 S. W. 672, it was so held under an agreement that the note should not be delivered until another had signed it. But in Dils v. Bank of Pikeville, 109 Ky. 757, 60 S. W. 715, it was held that a contemporaneous condition in parol, on delivery by a surety, that an additional name would be secured as co-indorser, could not operate to vary the terms of the contract, though it might be available upon proper allegations of facts showing damage as a basis for a counterclaim.

51. Gilette v. Hodge, 170 Fed. 313; Norris v. Merchants' Nat. Bank, 2 Ala. App. 434, 57 So. 71. Where there was a collateral agreement between the maker of a promissory note and a third person, on failure of which the payee promised that the note should be returned, the maker of the note has no defense to the note in the hands of a purchaser notwithstanding his full knowledge of the equities between the parties to the note, when the default of the maker, without any fault on the part of the third person, occasioned the failure of performance of the agreement between the maker of the note and such third person. Case v. Beyer, 142 Wis. 496, 125 N. W. 947.

52. Appendix, sec. 16.

parties will have no validity as a binding contract till the condition shall have been satisfied.[53]

§ 69. **Bills and notes made on Sunday.**—By the common law, there is no interdiction of secular business being conducted on Sunday, and, unless restrained by statute, a party may draw, make, indorse, or accept bills and notes on Sunday, and their acts will be as valid as if done on any other day.[54] By statute however in many of

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53. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192. In that case it was held that where some of the makers of a note were induced to sign the note upon the understanding that, although it remained in the hands of the payee to obtain other signatures, it was not to be delivered so as to take effect until signed by other responsible signers, and it has not in fact been so signed in good faith, then it has no effect or existence as a promissory note as against any of the makers. See also Bank of Cartersville v. Gunter (Ala. App.), 58 So. 757; Citizens' State Bank of Lankin v. Gareeau (M. D.), 134 N. W. 882; English v. Schlesinger, 105 N. Y. S. 989, 55 Misc. 584; Morris-Miller Co. v. Von Pressentin, 63 Wash. 74, 114 Pac. 912 (as to a check); Swanke v. Herdemann, 138 Wis. 654, 120 N. W. 414. In Zimbleman v. Finnegan, 141 Ia. 358, 118 N. W. 312, the court said that if there was an understanding between the parties to a note that it was not to become binding on the maker until others had signed it, such understanding would have to be based on a mutual agreement between them, and an understanding by either, not based on an agreement, would not bind the other. Where defendant and B. made a note for the price of corporate stock, with an understanding that neither the sale nor the note should be effective unless M. should sign the note and take part of the stock, the payee could not recover from defendant unless M. was willing to sign the note and was prevented from doing so by defendant's wrongful act. Key v. Usher (Ky.), 99 S. W. 324. Under this rule, it has been held, in an action on a note given for the price of corporate stock, that evidence was competent to show that it was delivered to the payee upon the condition that if the maker paid interest on the sum for 18 months, the payee was to renew the notes, and if the maker did not want the stock he might elect to terminate the purchase and have the notes canceled, and that the evidence showed that it was not intended that the note should be a present binding agreement. Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841, to which there were three dissents, mainly on the ground that the evidence showed that the note was to take effect on delivery, and that the agreement was with reference to a contingency which might enable the payor to discharge his obligation otherwise than according to its tenor. In the above case it was held further that where a bank held a note with notice of an arrangement between the parties to the note that it should not become a completed contract *in præsenti* but was to take effect only upon condition, a new bank which took a transfer of the assets of such holding bank under a condition that the new bank "assume the liabilities of the private bank * * * in consideration of the transfer" of its assets to the new bank, the new bank held such note subject to the defense that its delivery was conditional.

54. Hooks v. State, 58 Fla. 57, 50 So. 586; Bigbie v. Levy, 1 Cromp. & J. 180,

the States of the United States, no contract can be entered into on Sunday, or secular business legally conducted; bills and notes executed and delivered on Sunday are held in many cases to fall within the interdiction of such general laws, and the rule applicable to such instruments is, that the plaintiff cannot recover when, in order to sustain his supposed claim, he must set up an illegal agreement, to which he himself is a party.[55] In some cases the question is made to depend upon the terms and provisions of the statutes, and consequently it has been held that statutes prohibiting labor or the performance of any work do not extend to the making of contracts.[56] But it is delivery that completes a contract, and if the bill or note be delivered on another day, it will be valid, though dated and signed on Sunday;[57] and parol evidence is competent to show that it was so delivered on a different day, notwithstanding its date as of Sunday;[58] and *e con-*

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1 Tyrw. 130; O'Rourke v. O'Rourke, 43 Mich. 58; Chitty, Jr., 1516; Chitty on Bills [*148], 171; Thompson on Bills, 171.

55. Hauerwas *et al.* v. Goodloe, Recr., 101 Ala. 162, 13 So. 567; Ball v. Powers, 62 Ga. 757; Pope v. Linn, 50 Me. 83; Bank of Cumberland v. Mayberry, 48 Me. 198; Finney v. Callendar, 8 Minn. 41; Bramhall v. Van Campen, 8 Minn. 13; Hartshorn v. Hartshorn, 67 N. H. 163; State Capitol Bank v. Thompson, 42 N. H. 370; Smith v. Case, 2 Oreg. 190; Furz v. Nicholls, 2 M. G. & S. 500. A note executed on Sunday by one as a part of a transaction connected with his usual or ordinary calling is void. Smith v. Christian, 6 Ga. App. 259, 64 S. E. 1002.

56. Glover v. Cheatham, 19 Mo. App. 658. "The" purpose of our statute, when all of its provisions are considered, seems to be to prohibit the performance on Sunday only of those works or pursuits that from their nature have to be performed in public, and that may, therefore, be offensive to the sensibilities of the Christian community in which they are carried on, if followed on the Lord's Day. Hooks v. State, 58 Fla. 57, 50 So. 586. The casual execution and delivery of a promissory note does not come within the prohibition, and is not illegal and void, under statutes the manifest purpose of which was to prohibit the carrying on of any business or traffic to the extent of seriously interrupting the religious observances of Sunday. Holden v. O'Brien, 86 Minn. 297, 90 N. W. 531.

57. Terry v. Platt, 1 Pennewill (Del.), 185, 40 Atl. 243; Conrad v. Kinzie, 105 Ind. 281; Hofer v. Cowan McClung & Co. (Ky.), 68 S. W. 438; Barger v. Farnham, 130 Mich. 487, 90 N. W. 281; Bank of Cumberland v. Mayberry, 48 Me. 198; Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909.

58. Flanagan v. Meyer, 41 Ala. 133; Aldridge v. Branch Bank, 17 Ala. 45; Trieber v. Commercial Bank, 31 Ark. 128; Vinton v. Peck, 15 Mich. 287; Drake v. Rogers, 32 Me. 524; Fritsch v. Heesless, 40 Me. 556; Lovejoy v. Whipple, 18 Vt. 379; State Capitol Bank v. Thompson, 42 N. H. 376; Dohoney v. Dohoney, 7 Bush, 217; King v. Fleming, 72 Ill. 21; Love v. Wells, 25 Ind. 503 (a deed); Burns v. Moore, 76 Ala. 339; Goss v. Whitney, 24 Vt. 187; Hill v. Dunham, 7 Gray, 543; Stacy v. Kemp, 97 Mass. 166; Hauerwas *et al.* v. Goodloe, Recr., 101 Ala. 162, 13 So. 567.

verso, that it was delivered on Sunday though dated as of a secular day.[59] And when so delivered on a different day, it is no objection to it that interest commences to run on Sunday.[60] Though the note made and delivered on Sunday be void, the payee may recover upon the original consideration,[61] and it has been held that though a transaction had all taken place on Sunday, the maker cannot avoid payment of a note given on that day without restoring to the holder the money he received upon it.[62] The weight of authority seems to be, that, although a contract be entirely closed up on Sunday, yet, if ratified by the parties upon a subsequent day, it is valid.[63]

§ 70. Rights of indorsee on contracts made on Sunday.—The indorsement of a bill or note on Sunday stands on the same footing as drawing a bill or making a note, and the indorsee cannot sue upon such an indorsement, either in his own name or in another's, for his benefit.[64] But the defense that a note was made and delivered on Sunday cannot avail in a suit by an indorsee against the indorser, if the contract of indorsement was not entered into on Sunday.[65] And if the bill or note bear a certain date, or it appears that it was executed upon a certain day of the month, the court will take judicial notice of the fact, if such day were Sunday. The almanac has long been regarded and held as a part of the law of the land.[66] And an indorsee would, doubtless, be chargeable with notice from the face of the paper, if the day of the date it bears was Sunday.

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59. Allen v. Deming, 14 N. H. 133; Bank of Cumberland v. Mayberry, 48 Me. 198.

60. Marshall v. Russell, 44 N. H. 509.

61. Sayre v. Wheeler, 31 Iowa, 112; Hartshorn v. Hartshorn, 67 N. H. 163, 29 Atl. 406.

62. Hale v. Harris (Ky.), 91 S. W. 660, 5 L. R. A. (N. S.), 295.

63. King v. Fleming, 72 Ill. 21; Commonwealth v. Kendig, 2 Pa. St. 448; Clough v. Davis, 9 N. H. 500; Lovejoy v. Whipple, 18 Vt. 379; Hilton v. Houghton, 35 Me. 143; Winchell v. Carey, 115 Mass. 560; Cook v. Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699, citing text.

64. Benson v. Drake, 55 Me. 555. But see State Capitol Bank v. Thompson, 42 N. H. 370; First Natl. Bank v. Kingsley, 84 Me. 111, 24 Atl. 794; Cook v. Forker, 193 Pa. St. 461, citing text; Whitmire v. Montgomery, 165 Pa. St. 253, 30 Atl. 1016.

65. Prescott Nat. Bank v. Butler, 157 Mass. 548, 32 N. E. 909, the court saying: "The defendant by his indorsement is estopped to deny that the note is a valid contract, and as against him it must be assumed that it was made and delivered at a time when such business could be lawfully done."

66. Chrisman v. Tuttle, 59 Ind. 155; Finney v. Callendar, 8 Minn. 41.

Clearly, however, an indorsee who takes a bill or note dated as of a secular day, and without notice from its face or otherwise, that it was executed on Sunday, could recover upon it.[67] But it has been held that a note signed by a surety on Sunday, but delivered on a week day to the payee, who did not know the fact, was void.[68] This doctrine is inconsistent with the weight of authority, and with sound reason, as it is the delivery that gives significance to the act; and the paper, in the absence of notice, should always be taken to be what its face purports. If the instrument were without date, there would be nothing about it to intimate notice, or charge the indorsee with its illegality because made on Sunday.[69] It is urged by the learned editor of Ames on Bills, that while the transfer on Sunday is unlawful, it yet passes title, and that the transferee may sue prior parties.[70] An analogous question is elsewhere discussed.[71]

§ **71.** The execution of a note does not import a debt existing previous to the period of its execution; but its effect is to give the debt and the note a contemporaneous origin.[72] Proof of the giving of a

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67. Myers v. Kessler, 142 Fed. 730; Moseley v. Selma Nat. Bank (Ala. App.), 57 So. 91; Trieber v. Commercial Bank, 31 Ark. 128; Heise v. Bumpass, 40 Ark. 547; Cranson v. Goss, 107 Mass. 439; Greathead v. Walton, 40 Conn. 81; Pope v. Linn, 50 Me. 84; State Capitol Bank v. Thompson, 42 N. H. 370; Clinton Nat. Bank v. Graves, 48 Iowa, 228; Ball v. Powers, 62 Ga. 757; Knox v. Clifford, 38 Wis. 651; Nelson v. Cowing, 20 Wend. 336; Bigelow on Bills, 539; Benjamin's Chalmers' Digest, 24, 25. And though transferred after maturity, the maker has no equity against the transferee. He cannot set up its illegality to protect himself against the claim of a *bona fide* holder without notice. Leightman v. Kadetska, 58 Iowa, 676, 43 Am. Rep. 129; Harrison v. Powers, 76 Ga. 240; Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361.

68. Parker v. Pitts, 73 Ind. 598; Gilbert v. Vanchon, 69 Ind. 372. It is also held in Indiana that if a note be delivered to a comaker for the payee on Sunday it is void. Davis v. Barger, 57 Ind. 55.

69. State Capitol Bank v. Thompson, 42 N. H. 370. In Benjamin's Chalmers' Digest, p. 24, it is stated, and Bigbie v. Levy, 1 Cromp. & J. 180 (1830), "that a bill bearing date on a Sunday is not presumed to have been issued on that day." The citation does not support the text. It was the case of suit against the acceptor of a bill drawn payable to the drawer's order, the court saying that "the presumption arising from the known practice of merchants would be that the bill was not accepted on the day on which it was drawn." Chitty states that there is no objection to a bill being dated on Sunday. Chitty on Bills [*94], 114; [*148], 170 (13th Am. ed.).

70. Ames on Bills and Notes, vol. I, p. 352.

71. §§ 762, 764, *et seq.*

72. Johnson v. Lane's Trustees, 11 Gratt. 553.

promissory note by one person to another, nothing else appearing, is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker at the date of the note was indebted to the payee upon such settlement to the amount of such note.[73] But this is a mere presumption, which may be repelled by proofs of the consideration of such note, and of the occasion for and circumstances attending the giving of the same.[74] And the presumption does not apply to include notes previously given.[75]

73. Lake v. Tysen, 6 N. Y. 461; Davis v. Gallagher, 55 Hun, 595; De Freest v. Bloomingdale, 5 Den. 304; Dutcher v. Porter, 63 Barb. 20; Sherman v. McIntyre, 7 Hun, 592; Tisdale v. Maxwell, 58 Ala. 40; Graves v. Shulman, 59 Ala. 406; Challoner v. Boyington, 91 Wis. 27, 64 N. W. 422, citing and approving text; Marmion, v. McClellan, 11 App. D. C. 467.

74. Sherman v. McIntyre, 7 Hun, 592.

75. Tisdale v. Maxwell, 58 Ala. 40.

CHAPTER III

FORMAL REQUISITES OF BILLS AND NOTES

SECTION I

FORMALITY IN RESPECT TO STYLE AND MATERIAL

§ **72.** Having sufficiently treated of the elements essential to the contract in order to impart to it the character of negotiability, we now come to speak of the formal preparation and delivery of the instrument.

§ **73. As to the peculiar forms of bills and notes.**—It does not appear necessary that they should be framed in any particular form, provided they possess the essential qualities which have been mentioned. We give the forms which are usually in vogue among merchants, and it would be unwise to depart from them.[1] But the law

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1. Chitty on Bills [*128], 148.

1. *Usual Form of Bills.*

New York, Jan. 1, 1913.

$500.

On demand (or at sight—or ten days after sight—or thirty days after date) please pay to John Doe, or order (or bearer), five hundred dollars, value received, and charge the same to my account.

Richard Roe.

To David Sterling, Esq.,

Philadelphia.

2. *Form of Foreign Bill Drawn in Set of Three.*

New York, Jan. 1, 1913.

$500.

Sixty days after date, please pay to John Doe, or order, five hundred dollars,—this our first of exchange, second and third not paid.

Richard Roe.

To David Sterling, Esq.,

Edinburgh, Scotland.

3. *Usual Form of Negotiable Promissory Note.*

New York, Jan. 1, 1913.

$500.

Two months after date (or at other specified time), I promise to pay to John Doe, or order (or bearer), five hundred dollars, value received.

Richard Roe.

respects substance more than form; and where the intention appears to have assumed the obligations which devolve upon drawers and makers of negotiable instruments, it will be enforced, although not evidenced in the usual commercial form. Thus, an order written under a note, "Please pay the above note, and hold it against me in our settlement," signed by the drawer and accepted by the drawee, has been held a good bill;[2] and so also has been held a like order written under an account.[3] And where an indorsement was written on a bond, ordering the contents to be paid to order for value received it was held a good bill.[4] And an instrument of the following tenor: "Nobleboro, October 4th, 1869. Nathaniel O. Winslow, Cr. By labor $16\frac{3}{4}$ days, @ $4 per day, $67. Good to bearer. (Signed,) Wm. Vannah," has been decided to be a negotiable promissory note, payable to Winslow on demand.[5] The words "this is to certify I am to pay" are a sufficient promise.[6] But the words under an itemized account: "A. B., please pay the above bill," if naming no payee, would not be a bill;[7] and the like view was taken where under such an account was written: "Mr. Solomon, please to pay the above account to Messrs. Oliver & Son, 7 Lawrence Lane, and oblige, yours respectfully, R. Norris."[8]

§ 74. Signature.—It does not matter upon what portion of the instrument the maker or drawer affixes his name, so that he signed

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4. *Form of Joint Note.*

New York, Jan. 1, 1913.

$500.

On demand we promise to pay JOHN DOE, or order, five hundred dollars, value received.

RICHARD ROE.
RICHARD STERLING.

5. *Form of Joint and Several Note.*

New York, Jan. 1, 1913.

$500.

One month after date, I promise to pay (or we jointly and severally promise to pay) JOHN DOE, or order, five hundred dollars, value received.

RICHARD ROE.
RICHARD STERLING.

2. Leonard v. Mason, 1 Wend. 252.
3. Hoyt v. Lynch, 2 Sandf. 328.
4. Bay v. Frazer, 1 Bay, 66. But see Norris v. Solomon, 2 Moody & R. 117.
5. Hussey v. Winslow, 59 Me. 170.
6. Meyer v. Weil, 37 La. Ann. 160.
7. Platzer v. Norris, 38 Tex. 387.
8. Norris v. Solomon, 2 Moody & R. 266.

as drawer or maker.[9] In a late case, where the maker of a note, which was in printed form, by mistake signed his name above the printed line which stated the bank at which it was payable, it was held that the printed line below the signature was nevertheless part of the note, especially where it had interest coupons attached, and was indorsed in that form; these circumstances precluding all doubt of the fact that the designation of the place of payment was on the note at the time it was executed.[10] "I, A. B., promise to pay," is as good a note, if written by A. B. or his authorized agent, as "I promise to pay," subscribed "A. B."[11] And so "I, A. B., request you to pay," would be a good bill, though not undersigned.[12] Nor is it at all material whether the writing is in pencil or ink,[13] though, as a matter of permanence and security, ink is, of course, preferable. And the name may be printed as well as written, though, in such cases, it cannot prove itself and must be shown to have been adopted and used by the party as his signature.[14] If another sign the name of the party in his presence and at his request, it is the same as if

9. Hunt v. Adams, 5 Mass. 359; Clason v. Bailey, 14 Johns. 484; Schmidt v. Schmaelter, 45 Mo. 502. Where a note was signed at the foot by one person and endorsed on the back by another, they are joint makers. McGraw v. Union Trust Co., 136 Mich. 521, 99 N. W. 758. While it is true, that generally the makers' names are signed to a note at its foot, and the indorsers, if any, on its back, and without more the names of those appearing on the back would be presumed to have been placed there as indorsers, and not as makers, yet, we know of no rule of law, which requires that the makers may not place their names on any part of the note where they may prefer to write them, and thus bind themselves as makers. It is immaterial, in other words, upon what part of a note the name of a maker may be written. Endora Min. & Co. v. Barclay, 122 Ala. 506, 26 So. 113. Where a note is signed but not indorsed by the payee, and other parties sign on back thereof payee may treat such parties, in the absence of any agreement to the contrary, either as indorsers or joint makers. Miller v. Clendenin, 42 W. Va. 416, 26 S. E. 512. A note with a warrant of attorney to confess judgment is sufficiently executed though the signature of the maker is not attached to the note proper, but only to the warrant of attorney at the foot of the same sheet of paper upon which both the note and warrant of attorney were written. Heslip v. Anderson, 134 Ill. App. 8.

10. Turnbull v. Thomas, 1 Hughes, 172.

11. Taylor v. Dobbins, 1 Stra. 399.

12. Saunderson v. Jackson, 2 Bos. & P. 238; Chitty, Jr., on Bills, 10.

13. Brown v. Butchers' Bank, 6 Hill, 443; Reed v. Roark, 14 Tex. 329; Closson v. Stearns, 4 Vt. 11; Geary v. Physic, 5 B. & C. 234; Chitty on Bills [*126], 147. A deed in pencil has been deemed sufficient. McDowell v. Chambers, 1 Strobh. Eq. 347.

14. Schneider v. Norris, 2 Maule & S. 286; Brown v. Butchers' Bank, 6 Hill, 443; Pennington v. Baehr, 48 Cal. 565; Story on Bills, § 58.

he did it himself;[15] and if another sign the party's name by verbal or other authority, it is sufficient.[16] The full name may be written; and at least the surname should appear, and generally does. But this is not indispensable—the initials are sufficient,[17] and any mark which the party uses to indicate his intention to bind himself will be as effectual as his signature,[18] whether there be a certificate of witnesses on the instrument or not.[19] But of course a mark does not prove itself like a signature, although it is an adminicle of proof.[20]

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15. Sager v. Tupper, 42 Mich. 605; Crumrine v. The Estate of Crumrine, 14 Ind. App. 641, 43 N. E. 322. It is competent and legal for the surety to act as an agent for the principal in signing his name to a bond in his presence and at his request, and the fact that the principal made his mark after his surety had signed the principal's name, without witness thereto, did not take from the validity of efficacy of the execution of the contract as having his signature thereto at his instance. Wright v. Forgy, 126 Ala. 389, 28 So. 198.

16. The note in controversy was signed by a mark, and there was no evidence that the decedent touched the pen in the hand of the person who signed his name for him. It is not necessary, in the execution of a note, that the person executing it, if unable to write his own name, shall touch the pen while such person is signing for him, it is only necessary that such person be authorized by him to sign his name for him. See Kennedy v. Graham, Admr., 9 Ind. App. 624, 35 N. E. 925, 37 N. E. 25. See §§ 299, 274.

17. Merchants' Bank v. Spicer, 6 Wend. 443; Palmer v. Stephens, 1 Den. 471; 1 Parsons on Notes and Bills, 36

18. Jackson v. Tribble, 156 Ala. 480, 47 So. 310; Lyons v. Holmes, 11 S. C. 429. Under the common law rule that the execution of an instrument by mark is sufficient, and this without attestation, a promissory note is validly executed by an intended payor, who cannot write his name, by the affixing a cross mark between an initial of his name and his surname, the initials and name being written by the payee, and the name of the subscribing witness, who could not write his name, being also written by the payee. McGowan v. Collins, 154 Ala. 299, 46 So. 228.

19. Willoughby v. Moulton, 47 N. H. 205 (unwitnessed); Shank v. Butsch, 28 Ind. 19 (unwitnessed); Flint v. Flint, 6 Allen, 34; Hilborn v. Alford, 22 Cal. 482; George v. Surrey, 1 Moody & M. 516, where the indorsement was "Ann Moore X her mark." Brown v. Butchers' Bank, 6 Hill, 443, where the figures "1, 2, 8" were held sufficient.

20. Hilborn v. Alford, 22 Cal. 482; Flowers v. Billing, 45 Ala. 488. See cases *supra*, and Story on Bills, § 53, note 6. The promisee cannot become the agent of the promisor, for the purpose of signing his name to the contract, and a note is not legally proved by the evidence of the payee who testifies that he wrote the note, signed the name of the defendant, and made his mark, the defendant touching the pen. Penton v. Williams, 163 Ala. 603, 51 So. 35. When a statute prescribes the manner in which a note must be signed by mark, as, that the signature near the mark must be written by a person who writes his own name as a witness, a note must be signed in that manner to be valid. Sivils v. Taylor, 12 Okla. 47, 69 Pac. 867.

Any peculiarity in it may be shown as evidence of its genuineness: [21] but, unless there be an attesting witness, or one who saw it written, or is familiar with its characteristics, the plaintiff cannot recover.[22] Proof by subscribing witnesses is elsewhere considered.[23]

§ **75.** The name is not necessary if it be sufficiently indicated who the party is. A note signed "Steamboat Ben Lee and owners," [24] has been held sufficient; and likewise a bill drawn on "Steamer C. W. D. and owners," and accepted "Steamer C. W. D., by A. B., agent." [25]

§ **76. Manifest informalities.**—A manifest informality of expression or grammatical error, whether in respect to date, amount, time, place, or other matter, will in nowise affect the validity of a bill or note. Thus, it has been held that a note in form negotiable, but running, "sixty days after date, I promised to pay," instead of "I promise," was as good as if the promise in the past tense had been expressed in the present.[26] So the singular "pound" clearly means "pounds;" [27] the words "Fife hundred" means "five hundred,"[28] and "four hund," "four hundred." [29] A note payable "twenty-four after date,[30] and one payable "six after date," [31] have been held not void for uncertainty, but parol evidence has been admitted to ascertain the intention of the parties; and a note payable "four months after," has been held payable "four months after date," [32] and a note payable "ninety after date" at ninety days.[33] So where the note was payable "seventy-five after date" parol evidence was admitted to show that days were intended.[34] "With ten *per cent.* after

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21. George v. Surrey, 1 Moody & M. 516; Thompson on Bills, 35; 2 Parsons on Notes and Bills, 480.

22. See Thompson on Bills, 30, 31, 33. *Contra*, Staples v. Bedford Loan & Dep. Bank, 98 Ky. 451, 33 S. W. 403; Chadwell's Admr. v. Chadwell, 98 Ky. 643, 33 S. W. 1118.

23. *Post*, § 112.

24. Sanders v. Anderson, 21 Mo. 402.

25. Alabama v. Brainard, 35 Ala. 478.

26. Perkins' Case, 7 Gratt. 651; Commonwealth v. Parmenter, 5 Pick. 279.

27. Rex v. Post, Russ. & Ry., 101.

28. Ohm v. Young, 63 Ind. 412.

29. Glenn v. Porter, 72 Ind. 526.

30. Conner v. Routh, 7 How. (Miss.) 176.

31. Nichols v. Frothingham, 45 Me. 220.

32. Pearson v. Stoddard, 9 Gray, 199.

33. Deshon v. Leffler, 7 Mo. App. 595.

34. Boykin v. Bank of Mobile, 72 Ala. 262.

due," [35] or "at ten *per cent.*, value received," [36] or "with ten *per cent.*," [37] clearly means with ten *per cent.* "interest," although the word "interest" be omitted.

Where a note is dated in December, and made payable on "the 25th of December next," it is admissible to show that December instant was intended.[38] And where a bill was drawn "payable on the 6–9 Jan.," the evidence of bankers and brokers was held admissible to show that the figures were designed to deginate the days of grace.[39] The words "are to be paid," if obviously necessary to make sense, may be understood as implied, and considered as inserted.[40] A note drawn "payable at Citz. Bank," evidently means at Citizen's Bank.[41]

§ 77. **Material.**—As to the material upon which negotiable instruments should be written, it does not appear to be necessary that the substance should be paper. It is conceived that they might be written on parchment, cloth, leather, or any other convenient substitute for paper.[42] Whether a valid bill or note may be written upon metal, stone, or wood, does not seem to have been decided; but if it were distinctly proven that the instrument was intended as a bill or note, the substance could be no objection to its validity. But it is of course entirely out of the usual course of business; and it must rarely, if ever, occur that such a question is presented. Certainly, the courts would look with suspicion upon so peculiar an instrument; and its unusual form would, in itself, be a warning to all purchasers that they took it at their peril.[43] A metallic token, like an I. O. U., would seem at common law to be only evidence of a debt.[44]

§ 78. **Printed notes.**—Individuals, bankers, and others have frequently, in the United States, issued their promissory notes in

35. Higley v. Newell, 28 Iowa, 516.

36. Williams v. Baker, 67 Ill. 238; Thompson v. Hoagland, 65 Ill. 310; Cramer v. Joder, 65 Ill. 314.

37. Ohm v. Young, 63 Ind. 412.

38. McCrary v. Caskey, 27 Ga. 54.

39. Kelsey v. Hibbs, 13 Ohio (N. S.), 340.

40. Peyton v. Harman, 22 Gratt. 643.

41. Locke v. Merchants' Nat. Bank, 66 Ind. 355.

42. Byles on Bills (Sharswood's ed.), 165. A deed must be written upon parchment or paper. Coke Litt. 229.

43. 1 Parsons on Notes and Bills, 23.

44. Byles on Bills (Sharswood's ed.), 281.

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printed forms closely resembling in size, color, and texture of paper, and in mode of execution, bank notes. They are intended to circulate as money, and very often constitute a currency in themselves, when no National or State law prohibits them. They are valid obligations when not so prohibited, and are enforced by the courts as the promissory notes of the parties executing them.[45]

§ 79. **Whole instrument must be in writing.**—The whole of the bill or note must be expressed in writing. But the whole of it need not be in the body of the instrument; [46] and a contemporaneous memorandum or indorsement on any part of it may qualify its terms by making it payable upon a contingency,[47] or at a particular place,[48] or providing that it may be renewed.[49] And there may be a written stipulation on a detached paper affecting the instrument, which would be admissible as between the original parties and their representatives; [50] but such stipulation would not affect a *bona fide* holder for value, who acquired it without notice.[51] But any party having notice would stand on no better footing than the original parties.[52] Whether the instrument be a bill of exchange or a promissory note or otherwise, and whether or not it be negotiable, must be determined by its face, without reference to any other source.[53]

§ 80. **Parol evidence.**—It is a general principle of law that parol evidence is inadmissible to vary or contradict a written contract. Therefore, if a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted.[54] The rule applies to the offer of parol

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45. James v. Rogers, 23 Ind. 453.

46. Goldman v. Blum, 58 Tex. 636, citing the text.

47. Beele v. Bidgood, 1 Man. & Ry. 143, 7 B. & C. 453; Hartley v. Wilkinson, 4 Maule & S. 25; Heywood v. Perrin, 10 Pick. 228; Shaw v. M. E. Society, 8 Metc. (Mass.) 226; Chitty on Bills [*126], 146; Wheelock v. Freeman, 13 Pick. 168; Byles (Sharswood's ed.) [*94], 193; Leeds v. Lancashire, 2 Campb. 205; Hughes v. Fisher, 10 Colo. 385, citing the text.

48. Ibid.

49. Hartley v. Wilkinson, 4 Maule & S. 25.

50. Bowerbank v. Monteiro, 4 Taunt. 844.

51. Hoare v. Graham, 3 Campb. 57; Gilmore v. Hirst, 56 Kan. 626, 44 Pac. 603, quoting text.

52. Gibbon v. Scott, 2 Stark. 286.

53. Strachan v. Muxton, 24 Wis. 21.

54. Burns v. Scott, 117 U. S. 582; Clark v. Gramling, 54 Ark. 525, 16 S. W. 475; Cooper v. German Nat. Bank of Denver *et al.*, 9 Colo. App. 169, 47 Pac. 1041;

evidence to vary the date of the maturity of a promissory note;[55] thus, where a note is payable on demand, it cannot be shown by verbal testimony that it was agreed that it should not be paid till after the decease of the testator;[56] nor until after sale of the maker's

Carroll v. Hutchinson, 2 Ga. App. 60, 58 S. E. 309; Davis v. Stout, 126 Ind. 12, 25 N. E. 862; Zimmerman v. Adee, 126 Ind. 15, 25 N. E. 828; Potter v. Earnest, 45 Ind. 416; Prescott v. Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291; Altman v. Anton, 91 Iowa, 612, 60 N. W. 191; Beattyville Bank v. Roberts, 117 Ky. 689, 78 S. W. 901; Whitwell v. Winslow, 133 Mass. 343; Kelsey v. Chamberlain, 47 Mich. 241; Harrison v. Morrison, 39 Minn. 319; Kessler v. Clayes, 147 Mo. App. 88, 125 S. W. 799, citing text; Chicago Cottage Organ Co. v. Smartzell, 61 Mo. App. 490; Miller v. Gunderson, 48 Nebr. 715, 67 N. W. 769; Van Etten v. Howell, 40 Nebr. 850; Stiles v. Vandewater (N. J.), 3 Cent. 485, citing the text; Beecher v. Dunlap, 52 Ohio St. 64, 38 N. E. 795; McGrath v. Barnes, 13 S. C. 328; Harwood v. Brown, 5 West. 60. In Thomas v. Scutt, 127 N. Y. 133, the court said that there are two classes of exceptions to the general rule that parol evidence cannot be received as to the contract of the parties to a negotiable instrument. The first class includes these cases in which parol evidence is received to show that a written instrument which purports to be a contract is in fact no contract at all. The second class embraces those cases which recognize the instrument as existing and valid, but regard it as incomplete, either obviously or at least possibly, and admit parol evidence, not to contradict or vary, but to complete, the entire agreement, of which the writing was only a part. And that two things are essential to bring a case within second class: 1. The writing must not appear upon inspection to be a complete contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties, for in such a case it is conclusively presumed to embrace the entire contract. 2. The parol evidence must be consistent with, and not contradictory of, the written instrument. See also Stowell v. Greenwich Ins. Co., 163 N. Y. 305. This being the rule as between the original parties to the instrument, it follows that the defense could not be set up as against a subsequent holder of the note, who took after maturity of the note. Anderson v. Mitchell, 51 Wash. 265, 98 Pac. 751. That the note simply showed the interest of the payee in certain land and is not evidence of any indebtedness on the part of the maker, cannot be proved by testimony of a contemporaneous agreement. Chapman v. Chapman, 132 Iowa, 5, 109 N. W. 300, citing text. In a suit upon a note, a plea is demurrable which alleges that the note was given in pursuance of an oral agreement that the payee employed the maker to work for him the subsequent year, and advanced to him the money for which the note was given, with the understanding that he was to pay it in certain installments out of his wages, and that the payee refused to carry out his contract of employment. Johnson v. Nisbit, 137 Ga. 150, 72 S. E. 915.

55. Crooker v. Hamilton, 3 Ga. App. 190, 59 S. E. 722; Mallory v. Fitzgerald, 69 Nebr. 312, 95 N. W. 601.

56. Woodbridge v. Spooner, 3 B. & Ald. 233; Graves v. Clark, 6 Blackf. 183. Nor that makers of a promissory note signed as sureties, especially when there is an affirmative statement in the note that the parties signed as principals. Wingate v. Blalock, 15 Wash. 45, 45 Pac. 663.

estates;[57] nor until a certain account should be adjusted and credited on its face;[58] nor until certain premises were delivered up;[59] nor until a dividend of a bankrupt's assets should have been made;[60] nor until the amount was collected from certain sources;[61] nor until a certain draft was received;[62] nor can it be shown verbally that demand of a post-dated check was not to be made at maturity;[63] nor that a note in which no time for payment is expressed, and is therefore constructively payable on demand, was to be paid at a specified time;[64] nor can it be shown that there was any agreement to prolong or vary the time of payment specified in the instrument,[65] by taking part payment and waiting for the residue, by receiving payment on installments, or otherwise than the instrument itself declares,[66] nor vary the place of payment;[67] nor that the liability of the

57. Getto v. Binkert, 55 Kan. 617, 40 Pac. 925; Free v. Hawkins, 8 Taunt. 92, 1 J. B. Moore, 535.

58. Mahan v. Sherman, 7 Blackf. 378; San José Sav. Bank v. Stone, 59 Cal. 183, citing the text.

59. Moseley v. Hanford, 10 B. & C. 729.

60. Rawson v. Walker, 1 Stark. 361.

61. Campbell v. Upshaw, 7 Humphr. 185; McClanaghan v. Hines, 2 Strobh. 122; Litchfield v. Falconer, 2 Ala. 280; De Long v. Lee, 73 Iowa, 53; Van Vechten v. Smith, 59 Iowa, 73.

62. Kincaid v. Higgins, 1 Bibb, 396.

63. Hill v. Gaw, 4 Barr, 493.

64. Thompson v. Ketchum, 8 Johns. 189.

65. Jones v. Taylor, 5 Ga. App. 161, 62 S. E. 992; Crooker v. Hamilton, 3 Ga. App. 190, 59 S. E. 722; Homewood People's Bank v. Heckert, 207 Pa. St. 231, 56 Atl. 431. An oral agreement having relation only to the time and manner of repayment, if it can be considered at all, can be given effect, not to destroy the enforceability of the notes representing the advancement, but, at best, as a basis on which to rest a claim for damages. Houts v. Sioux City Brass Works, 134 Ia. 484, 110 N. W. 166.

66. Eaton v. Emerson, 14 Me. 335; Barton v. Wilkins, 1 Mo. 74; Dawson v. Bank of Illinois, 4 Scam. 56; Walker v. Clay, 21 Ala. 797; Doss v. Peterson, 82 Ala. 256; Gardner v. Matthews, 11 Mo. App. 269; Porteous v. Muir, 8 Ont. 127; Wilse v. Whitaker, 22 Hun, 242; Blakemore v. Wood, 3 Sneed, 470; Rice v. Ragland, 10 Humphr. 545; Sturdivant v. Hull, 59 Me. 172; Roache v. Roanoke Classical Seminary, 56 Ind. 202.

67. In Atwood v. Little Bonanza Quicksilver Co., 13 Cal. App. 594, 110 Pac. 344, under a statute (Civil Code, § 3100) providing that "a negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found," it was held that a note executed by a foreign corporation, failing to show any place of payment, is payable in the place of the domicile of the maker, and evidence of a contemporaneous oral agreement that notes were to be payable within the State cannot be received.

drawer,[68] maker,[69] or other party,[70] was not to be enforced; nor that it was not to be negotiated, but renewed;[71] nor that a party joint-maker in form, supposed his liability to be that of an indorser;[72] nor that it was not to be paid in case a certain verdict was obtained,[73] or in any other event;[74] nor that it was to be paid to some person other than the payee;[75] nor that it was merely given as an indemnity against

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68. Wood v. Surrell, 89 Ill. 107; Cummings v. Kent, 44 Ohio St. 92, citing the text.

69. Payne v. Mutual Life Ins. Co., 141 Fed. 339; Armstrong v. Scott, 36 Fed. 63; Bishop v. Dillard, 49 Ark. 285; Mason v. Mason, 72 Iowa, 457; Gerth v. Engler, 71 Iowa, 616; Bank v. Manning, 60 Kan. 729, 57 Pac. 949; Lipsett v. Hassard, 158 Mich. 509, 122 N. W. 1091; Bass v. Sanborn, 119 Mo. App. 103, 95 S. W. 955; Wright v. Remington, 41 N. J. L. (13 Vroom) 48; Western Carolina Bank v. Moore, 138 N. C. 529, 51 S. E. 79; Willoughby v. Ball, 18 Okl. 535, 90 Pac. 1017; Dolson v. DeGanahl, 70 Tex. 621; Davy v. Kelley, 66 Wis. 455. In an action on a note, an accommodation maker cannot show by parol evidence that the payee agreed that he should not be held liable but that the payee would look to the one for whose accommodation the note was made. Earle v. Enos, 130 Fed. 467. Where a note upon its face is joint and several, evidence offered to show that an alleged contemporaneous oral agreement that each of the signers should be liable only for his pro rata part of the notes should be excluded. Woods v. Finley, 153 N. C. 457, 69 S. E. 502. But in O'Brien v. Patterson Brewing & Malting Co., 69 N. J. Eq. 117, 61 Atl. 437, it was held that the maker of a negotiable promissory note may show by parol that it never had any binding effect upon him in equity; that by the trade that was made he would not be called upon to pay the note; in inquiring into the objects and purposes of a writing equity is more liberal than law, and will not permit a written contract to be used for purposes for which it was not intended.

70. § 719. Rendell v. Harriman, 75 Me. 497; Davis v. England, 141 Mass. 587; Heffner v. Brownell, 75 Iowa, 341. In the absence of fraud or mistake, a surety on a note cannot be allowed to show a contemporaneous understanding that he should not be held liable on the note. Farmers' Bank v. Wickliffe, 131 Ky. 787, 116 S. W. 249. See also Fambro v. Keith (Tex. Civ. App.), 122 S. W. 40.

71. Heist v. Hart, 73 Pa. St. 286; McGrath v. Barnes, 13 S. C. 328; Thompson v. Love, 61 Ark. 81, 32 S. W. 85; Waddle v. Owen, 43 Nebr. 489, 61 N. W. 731. Where a mortgage was given to secure a note, and it was provided in the instrument that the payee of the note had agreed to renew it from time to time, it was admissible to show that a note bearing a later date was a renewal of that first given. Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669, 110 Am. St. Rep. 207.

72. Cooke v. Brown, 62 Mich. 474.

73. Foster v. Jolly, 2 Cromp., M. & R. 703.

74. Jones v. Shaw, 67 Mo. 667; *post*, § 81; Gardner v. Matthews, 81 Mo. 627; Farmer v. Perry, 70 Iowa, 358; Western Mfg. Co. v. Rogers, 54 Nebr. 456, 74 N. W. 849; Murchie v. Peck Bros., 160 Ill. 175, 43 N. E. 356.

75. Draper v. Rice, 56 Iowa, 114. A statement of the maker of a note that he did not know it was payable to the payee is not admissible unless inseparably con-

certain claims;[76] nor merely as a receipt;[77] nor merely as a matter of form;[78] nor (in case of a bill) that it was in full discharge of the debt and of liability on the bill.[79] But if a party signed a note on the false assurance that it was a receipt, instead of a note, he acting on that assurance and not reading the paper, it seems that such evidence between the parties would be admissible to show fraud.[80] On this subject the United States Supreme Court has said: "Negotiable notes are written instruments, and as such they cannot be contradicted, nor can their terms be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder. Where a bill of exchange was drawn in the usual form, and was protested for nonpayment, the court held twenty years ago that parol evidence of an understanding between the drawer and the party in whose favor the bill was drawn was inadmissible to vary the terms of the instrument."[81]

Under Negotiable Instrument statute.—In the absence of a showing of want of failure of consideration, or of fraud or mistake, it is incompetent for one who signs a promissory note as principal to set up an independent collateral agreement limiting or exempting him from liability.[82] And the rule that parol evidence cannot be received to show that the obligation of a party to a negotiable instrument was not to be enforced, is recognized by the statute in the provision declaring that an accommodation party is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party,[83] and parol evidence that there was an agreement at the time a note

nected with evidence tending to show want of consideration. Harrison v. State Bank of Monticello, 47 Ind. App. 568, 94 N. E. 1020.

76. Ridout v. Bristow, 1 Cromp. & J. 231.

77. Billings v. Billings, 10 Cush. 178; Dickson v. Harris, 60 Iowa, 727. But in Bond v. Vandergrift, 128 N. Y. S. 1078, it was held that it may be shown by parol that a note was executed as a receipt to show the amount of money advanced by the payee in the promotion of a corporation in which he was interested.

78. Wright v. Remington, 12 Vroom (N. J.), 48.

79. Martin v. Lewis, 30 Gratt. 672.

80. Stoyell v. Stoyell, 82 Me. 334, 19 Atl. 860.

81. Brown v. Spofford, 95 U. S. (5 Otto) 480 (1877). See Brown v. Wiley, 20 How. 442; Specht v. Howard, 16 Wall. 564; Forsyth v. Kimball, 91 U. S. (1 Otto) 291; Martin v. Lewis, 30 Gratt. 672; Foster v. Clifford, 44 Wis. 569; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, citing text.

82. Pitt v. Little, 58 Wash. 255, 108 Pac. 941.

83. Appendix, sec. 29.

was executed that an accommodation maker would not be called upon to pay the note cannot be received.[84]

§ 81. The principle applies to every element of the instrument. It cannot be shown by parol that the sum agreed to be paid was different;[85] nor that an additional sum was to be paid in a certain contingency;[86] nor that a certain account was to be deducted from the note,[87] or the value of certain articles credited upon it;[88] nor that a note payable in "lawful money" was to be paid in silver;[89] nor when expressed to be payable in dollars, that it was payable in bank notes, corporation or individual notes, or in any paper currency,[90] or in goods or other articles.[91] In Missouri, it has been held that if payable in the "currency of the State," it cannot be shown that anything was intended but gold and silver, or notes of the Bank of Missouri.[92] Nor can any condition be engrafted in the instrument

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84. Gerli v. National Mill Supply Co., 78 N. J. L. 1, 73 Atl. 252.

85. Beard v. White, 1 Ala. 436, 5 Port. (Ala.) 94; Carter v. Hamilton, 11 Barb. 147; Downs v. Webster, Brayt. 79; Loudermilk v. Loudermilk, 93 Ga. 443, 21 S. E. 77; Bowen v. E. A. Waxelbaum & Bro., 2 Ga. App. 521, 58 S. E. 784. In an action at law on a note, the defendant cannot show that through an oversight and accident the note by its terms was made to read with interest at 8 per cent. instead of 6 per cent. Cochran v. Zachery, 137 Iowa, 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235, 126 Am. St. Rep. 307. Contemporaneous verbal agreement that the maker declined to sign the note until the payee agreed to "knock off" the interest for the first year, cannot be allowed. Tisdale v. Mallett, 73 Ark. 431, 84 S. W. 481.

86. Gazoway v. Moore, Harp. 401.

87. Knight v. W. T. Walker Brick Co., 23 App. D. C. 519; Eaves v. Henderson, 17 Wend. 190. In Allen v. Herrick Hardware Co. (Tex. Civ. App.), 118 S. W. 1157, the court said: "If it could be held that by the strict letter of the law plaintiff in error should not be allowed to offer proof entitling him to credits on the note, because the note was evidence of a full settlement, a court of equity would come to the relief of the maker of the note, and permit him to show that the note was not intended as a full settlement between the parties, but that it had been agreed that there should be a further settlement, in which the maker of the note should have the benefit of credits claimed by him."

88. Featherston v. Wilson, 4 Ark. 154; St. Louis, etc., Ins. Co. v. Homer, 9 Metc. (Mass.) 39. Or a lesser rate of interest than that stated in the note. See Davis v. Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

89. Alsop v. Goodwin, 1 Root, 196.

90. Noe v. Hodges, 3 Humphr. 162; Cole v. Handley, 8 Smedes & M. 473; Pack v. Thomas, 13 Smedes & M. 11; Baugh v. Ramsey, 4 T. B. Mon. 155; M'Minn v. Owen, 2 Dall. 173; Hair v. Le Bronse, 10 Ala. 548; Langenberger v. Kraeger, 48 Cal. 147; Clark v. Hart, 49 Ala. 86.

91. Bradley v. Anderson, 5 Vt. 152; Coe v. Wallace, 5 Blackf. 199.

92. Cockrill v. Kirkpatrick, 9 Mo. 688.

by verbal testimony—as that it should be void unless others interested agreed to the settlement in which it was given;[93] or was to be void if certain bills should be paid at maturity;[94] or was to be void or surrendered up in the event the case in which it was given for a fee were compromised,[95] or in any other contingency.[96] Nor can it be shown that it was only to be paid out of a particular fund or estate.[97]

81a. As to consideration generally.—In an action by the original payee of a negotiable instrument, or by one having notice, the question of consideration may be inquired into.[98] And so parol evi-

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93. Ely v. Kilborn, 5 Den. 514; Beecher v. Dunlap, 52 Ohio St. 64, 38 N. E. 795; Barnard State Bank v. Fesler, 89 Mo. App. 217; Chicago Cottage Organ Co. v. Swartzell, 61 Mo. App. 490. Without proof of fraud or mistake, a note executed as an absolute promise to pay cannot be attacked by showing a parol agreement to the effect that the promise was conditional and that the maker was not to pay the note unless on certain conditions. Begley v. Combs (Ky.), 87 S. W. 1081.

94. Penny v. Graves, 12 Ill. 187.

95. Dale v. Pope, 4 Litt. 166.

96. Holt v. Moore, 5 Ala. 521; Anderson v. Magruder, 10 Cal. 419; Rivers v. Brown (Fla.), 56 So. 553; Barber v. McHenry County Hedge Fence Co., 129 Ill. App. 45; Potter v. Earnest, 45 Ind. 418; Burge v. Dishman, 5 Ind. 272; Calhoun v. Davis, 2 Ind. 532; Miller v. White, 7 Blackf. 491; Thisler v. Mackey, 65 Kan. 464, 70 Pac. 334; Dale v. Pope, 4 Litt. 166; Sears v. Wright, 24 Me. 278; Goddard v. Cutts, 11 Me. 440; Adams v. Wilson, 12 Metc. (Mass.) 138; Spring v. Lovett, 11 Pick. 417; Underwood v. Simonds, 12 Metc. (Mass.) 275; Rose v. Learned, 14 Mass. 154; Tower v. Richardson, 6 Allen, 351; Central Sav. Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433; Haverin v. Donnell, 7 Smedes & M. 244; Jones v. Shaw, 67 Mo. 667; Third Nat. Bank v. Reichert, 101 Mo. App. 242, 73 S. W. 893; Aultman, Miller & Co. v. Hawk, 4 Nebr. (Unof.) 582, 95 N. W. 695; Brown v. Hull, 1 Den. 400; Cline v. Farmers' Oil Mill, 83 S. C. 204, 65 S. E. 272; Nixon v. First State Bank (Tex. Civ. App.), 127 S. W. 882, 129 S. W. 145; Wayland University v. Boorman, 56 Wis. 660; Brown v. Langley, 5 Scott N. R. 249; see *ante*, § 80.

97. Brown v. Spofford, 95 U. S. (5 Otto) 482 (1877); Gorrell v. Home Life Ins. Co., 11 C. C. A. 240, 63 Fed. 370; Mumford v. Tolman, 157 Ill. 258, 41 N. E. 617; Hensley v. Mitchell, 147 Ill. App. 161; Adams v. Wilson, 12 Metc. (Mass.) 138; Currier v. Hale, 8 Allen, 47; Ryan v. Sullivan, 128 N. Y. S. 632, 143 App. Div. 471; Fuller v. Law, 207 Pa. St. 101, 56 Atl. 333; Rawson v. Walker, 1 Stark. 361; Campbell v. Hodgson, Gow. 74.

98. 1 Greenleaf on Evidence, § 285; 2 Wharton on Evidence, § 1042; Folmar v. Siler, 132 Ala. 297, 31 So. 719; Ramsey v. Young, 69 Ala. 158; Cashman v. Harrison, 90 Cal. 297, 27 Pac. 283, citing text; Holmes v. Horn, 120 Ill. App. 359; First Nat. Bank v. Nugent, 99 Ind. 160; Deming Inv. Co. v. Wallace, 73 Kan. 291, 85 Pac. 139; Spies v. Rosenstock, 87 Md. 14, 39 Am. Rep. 268; Maltz v. Fletcher, 52 Mich. 484; Kessler v. Clayes, 147 Mo. App. 88, 125 S. W. 799; Car-

dence may be received, as against such original party or one having notice, to show a want [99] of consideration, or failure of considera-

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rington v. Waff, 112 N. C. 115, 16 S. E. 1008; Gifford v. Fox, 2 Nebr. (Unof.) 30, 95 N. W. 1066; Lone Star Leather Co. v. National Bank, 12 Tex. Civ. App. 128, 34 S. W. 297. See also *post*, § 174. Evidence may be given of the actual consideration for which a check was delivered though there may be a written memorandum containing the terms under which the check was given. Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308. It is competent to prove by parol evidence that a note was given for the purchase money of land. Davis v. Evans, 142 N. C. 464, 55 S. E. 344; McPeters v. English, 141 N. C. 491, 54 S. E. 417. When note specifies "legal services" as the consideration, it is competent for defendant to prove by parol that the agreement was that the payee was to attend to all her legal business in connection with her administration of an estate, and that a large amount of work remained to be done, which he refused to do. Jones v. Rhea, 122 N. C. 721, 30 S. E. 346. When the statement of the consideration is not a statement of the terms of the contract but is the narration of a mere fact, parol evidence may be introduced to vary, contradict, or explain such statement. Kampmann v. McCormick (Tex. Civ. App.), 99 S. W. 1147. The recitation of consideration is always open to explanation or contradiction. McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809. Whenever the statement of the consideration leaves the field of mere recital and enters into that of contract, as shown by the intention of the parties to be gathered from the instrument, it is no longer open to contradiction by parol evidence—as to a note stated to be in consideration of credit granted by one of the parties to a third person on the purchase price of machinery bought by said third person. McNinch v. Northwest Thresher Co., 23 Okl. 386, 100 Pac. 524. Where, at the time a note was executed, the payee signed a certificate showing the state of the account between himself and the maker at the time, and not purporting to contain the terms of the agreement between the parties as to the conditions under which the note was given, the payee may testify as to the understanding and agreement under which the note was executed. Haines v. Cadwell, 40 Or. 229, 66 Pac. 910.

99. Abbott v. Hendricks, 1 M. & G. 795 (39 Eng. C. L.); Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. Rep. 816; Independent Brewing Assn. v. Klett, 114 Ill. App. 1; Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 S. E. 138; Small v. Clewley, 62 Me. 155; Aldrich v. Whitaker, 70 N. H. 627, 47 Atl. 591; Smith v. Dotterweich, 93 N. E. 985, 200 N. Y. 299, 33 L. R. A. (N. S.) 892; reversing judgment 116 N. Y. S. 896, 132 App. Div. 489; South Dakota Cent. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120. At least in equity, it may be shown that the maker of a note was in fact the surety for an anomalous indorser—was an accommodation maker. Jennings v. Moore, 189 Mass. 197, 75 N. E. 214. Under the principle that want of consideration may be shown by parol, it was held in Brook v. Latimer, 44 Kan. 431, 24 Pac. 946, 21 Am. St. Rep. 292, that parol evidence was admissible to show that a promissory note for the payment of $10,000, executed by a daughter to her father and made payable on demand, was in fact executed by the daughter and received by the parent as a mere receipt or memorandum of advancement made by the parent to the child and that a partial understanding was had at the time of its execution and delivery that payment thereof would never be demanded or enforced. The maker of a note may properly

tion,[1] or that the consideration was illegal;[2] and the rule forbidding the admission of an oral agreement varying the terms of a written contract is not violated by permitting the defendant, in an action upon

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show that he and the payee jointly purchased certain property and that the note was given merely for the purpose of showing the payee's interest in the property, as showing that the maker received no consideration for the execution of the note. Davis v. Sterns, 85 Nebr. 121, 122 N. W. 672. Parol evidence is admissible to show that a certificate of deposit given by a bank was in fact a loan. State v. Corning State Savings Bank, 136 Iowa, 79, 113 N. W. 500.

1. Dial v. McKay, 150 Ala. 118, 43 So. 218; Miner v. Hamilton, 152 Cal. 634, 93 Pac. 857; Pope v. Peterson, 7 Ga. App. 395, 66 S. E. 984; Pidcock v. J. Crouch & Son, 7 Ga. App. 299, 66 S. E. 971; Purcell v. Armour Packing Co., 4 Ga. App. 253, 61 S. E. 138; Aultman Threshing & Engine Co. v. Knoll, 71 Kan. 109, 79 Pac. 1074; Brown v. Smedley, 136 Misc. 65, 98 N. W. 856; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; Great Northern Moulding Co. v. Bonewur, 113 N. Y. S. 60, 128 App. Div. 831; Fane v. Fitler, 223 Pa. St. 568, 72 Atl. 891, 132 Am. St. Rep. 742; Gandy v. Weckerly, 220 Pa. St. 285, 69 Atl. 858, 18 L. R. A. (N. S.) 434, 123 Am. St. Rep. 691; Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706. Evidence to show failure of consideration in a promissory note must clearly show that the thing on which the failure rests entered into the consideration of the note. Guthrie v. Huntington Chair Co., 69 W. Va. 152, 71 S. E. 14. Where notes were given for bonds issued by a company, which had no value apart from the ability of the promisor to perform them and represented an impossible undertaking by an insolvent concern, such facts may be shown on an issue of no consideration for the notes. German-American Security Co. v. McCulloch (Ky.), 89 S. W. 5. Upon the trial of an action on a negotiable note, given for the premium on an insurance policy, evidence of a parol contemporaneous agreement between the maker of the note and an agent of the payee that the policy was to be delivered within a given time was, in the absence of fraud, accident, or mistake, inadmissible, in connection with proof that the policy had not been so delivered, to show failure of consideration of the note. Union Central Life Ins. Co. v. Wynne, 123 Ga. 470, 51 S. E. 389. In an action on a note given for the price of animals sold, which note contained a warranty of title but did not exclude a warranty as to soundness, evidence was held admissible as to a parol warranty of the seller of soundness of the animals; the note not expressing the whole contract, and the warranty as to soundness not varying its terms. Whigham v. W. Hall & Co., 70 S. E. 23, 8 Ga. App. 509. But in Flemming v. Satterfield, 4 Ga. App. 351, 61 S. E. 518, it was held that where a promissory note is given for the purchase of a mule which is unambiguous and conditional and contains no warranty of the soundness of the mule, no express warranty can be added to the note by evidence of an express warranty alleged to have been made by parol contemporaneously with the execution of the note.

2. Corbett v. Clute, 137 N. C. 546, 50 S. E. 216. Where it is alleged that the consideration for a note given for rent under a lease was illegal, the fact that a written lease was entered into would not prevent the introduction of oral evidence to show the conversation and the circumstances for the purpose of determining the real consideration. O'Connor v. Kleiman, 143 Iowa, 435, 121 N. W. 1088.

a promissory note, to prove as a set-off an amount due from the plaintiff upon an oral contract made at the time the note was given, and which formed a part of its consideration.[3]

And parol evidence is admissible to show that the maker of a promissory note executed it for the accommodation and at the request of the payee and was not to be held personally responsible on the note by the payee; this shows want of consideration between the parties.[4]

§ 81b. Delivery to payee to take effect only upon condition precedent, or to be void upon condition subsequent.—A conditional delivery to the payee may be shown by parol; a promissory note, like any other written instrument has no legal inception or valid existence until it has been delivered in accordance with the purpose and intention of the parties.[5] And so, it has been held in a number

3. Owensboro Wagon Co. v. D. A. Wilson & Co., 79 Kan. 633, 101 Pac. 4; Brown v. Smedley, 136 Mich. 65, 98 N. W. 856.

4. Peterson v. Tillinghast, 192 Fed. 287; Tobriner v. White, 19 App. D. C. 163; National Citizens Bank v. Bowen, 109 Minn. 473, 124 N. W. 241; Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214, 119 N. W. 482. Evidence is admissible tending to show knowledge on the part of the payee of a draft of the character of the paper he received and the extent to which the drawer would be bound by it, namely that the draft was drawn for the accommodation of the payee. Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706. While parol evidence will be received to explain that a promissory note was executed by the maker for the accommodation of another, or to be held as collateral security, it cannot be received to defeat recovery thereon, where the payee, on the strength of the execution and delivery of such note, and at the request of the maker, extended credit to a third party. Willoughby v. Ball, 18 Okl. 535, 90 Pac. 1017.

5. Beach v. Nevins, 162 Fed. 129; Hunter v. First Nat. Bank, 172 Ind. 62, 87 N. E. 734; Oakland Cemetery Assn. v. Lakins, 126 Iowa, 121, 101 N. W. 778; Hill v. Hall, 191 Mass. 253, 77 N. E. 831; Great Northern Moulding Co. v. Bonewur, 113 N. Y. S. 60, 128 App. Div. 831; Pratt & Whitney Co. v. American Pneumatic Tool Co., 63 N. Y. S. 1062, 50 App. Div. 369, affirmed 166 N. Y. 588, 59 N. E. 1129; Hughes v. Crooker, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606. Where a note was executed at the time of an application for a life insurance policy, evidence may be received of an understanding that it was delivered to show the applicant's good faith, and that it would not be binding upon him except that if the policy, when it arrived, was satisfactory, and they accepted it, the note would be binding, otherwise it would be void. Graham v. Remmel, 76 Ark. 140, 88 S. W. 899. If a surety executes a note on the payee's agreement to procure the signature of another name thereto, and which the payee failed to do, this fact cannot be relied on as a defense when sued by a purchaser for value, who had no notice of such agreement; but if the payee or obligee had notice of such condition or agreement, the fact of the agreement, and knowledge thereof on the part of the

of cases that a note may be delivered to the payee to take effect only upon a condition precedent; and that default in the fulfillment of such conditions may be shown by parol evidence, and will defeat recovery as between immediate parties;[6] and also that it may be

obligee or payee, would constitute a valid defense, and it is entirely competent to show the existence of such knowledge by parol testimony. Caudle v. Ford (Ky.), 72 S. W. 270. In Pidcock v. J. Crouch & Son, 7 Ga. App. 229, 66 S. E. 971, it was held that while it is permissible to show that a promissory note, signed by one or more persons and apparently complete, is not in fact complete, by reason of the fact that it has never been delivered from one party to the other as a finally completed contract, but that it was simply left in the possession of the payee, until some additional person should sign it before it should become a completed contract, yet it is not permissible to show by parol that a note was delivered to the payee as a completed contract, but upon a promise upon his part that he would subsequently secure the signature of another person thereto, where the writing is silent as to any such promise on the payee's part. See Etz v. Place, 81 Hun, 203, 30 N. Y. S. 765. See Jamestown Business College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. 952, 92 Am. St. Rep. 740, holding (one justice dissenting) that a promissory note in the usual form and actually delivered to the payee, although accompanied by a contract in writing showing that the note was given for a scholarship in a business college, cannot be contradicted by parol evidence that the note was not to be paid if the maker should decide not to take instructions at the school and could not sell her scholarship, as the delivery of the note was not conditional, not to become effective until the happening of some condition precedent, but was an absolute delivery which cannot be defeated by the happening of any subsequent contingency.

6. Graham v. Remmel, 76 Ark. 140, 88 S. W. 899; Heitman v. Commercial Bank, 6 Ga. App. 584, 65 S. E. 590; Benton v. Martin, 52 N. Y. 574; Williams v. First Nat. Bank of Syracuse, 45 App. Div. 239, 60 N. Y. Supp. 1105, 6 Am. St. Rep. 70; Persons v. Hawkins, 41 App. Div. 171, 58 N. Y. Supp. 831; Tradesmen's Nat. Bank v. Curtis, 38 App. Div. 240, 57 N. Y. Supp. 121; Benjamin v. Ver Nooy, 36 App. Div. 581, 55 N. Y. Supp. 796, 93 Am. Dec. 540; Simmons v. Thompson, 29 App. Div. 559, 51 N. Y. Supp. 1018, 86 Am. Dec. 332, citing Higgins v. Ridgeway, 153 N. Y. 130, 47 N. E. 32; Andrews & Co. v. Hess, 20 App. Div. 194, 46 N. Y. Supp. 796; Juilliard v. Chaffee, 92 N. Y. 529; Quinlan v. Fairchild, 76 Hun, 312, 27 N. Y. Supp. 689; Elwell v. Turney, 39 Wash. 615, 81 Pac. 1047. See *ante*, § 68. There is a plain difference between allowing proof by parol or other extrinsic evidence of the nonperformance of a condition precedent as to which the writing is silent, and allowing such proof of the nonperformance of a condition stated in writing to have been performed, or to have been agreed upon as unnecessary to the final utterance of the writing as a presently operative contract. Heitman v. Commercial Bank, 6 Ga. App. 584, 65 S. E. 590. In an action to recover on a promissory note, parol evidence was admissible to show that the parties had made an oral agreement for the purchase of a commodity in pursuance of which the note was given, that under such agreement the payee of the note was to make its maker a certain loan, and that the loan had not been in fact made. Kessler & Co. v. Parelius, 107 Minn. 224, 119 N. W. 1069.

shown by parol that at the time a note was made it was agreed that it should be held for nothing on the happening of a certain event or on the nonfulfillment of a certain condition.[7] But unless such event operated a failure of consideration, we cannot perceive upon what principle such a view could be taken.[8]

§ 81c. Parol evidence is admissible to show that parties to bills and notes, apparently otherwise, are really in privity with each other;[9] and as between parties to show their real relations to each other;[10] and if there be a latent ambiguity to explain it.[11] And if the instrument be so obscurely written, or so mutilated or erased as to render its meaning uncertain, it is admissible to ascertain its terms.[12] There are also some cases in which patent ambiguities may be resolved by parol testimony, which are elsewhere considered.[13]

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7. Dial v. McKay, 150 Ala. 118, 43 So. 218; The Denver Brewing Co. v. Barets, 9 Colo. App. 341, 48 Pac. 834; Niblock v. Sprague, 200 N. Y. 390, 93 N. E. 1105, reversing 118 N. Y. S. 1127, 134 App. Div. 910; Ostrander v. Snyder, 73 Hun, 378, 26 N. Y. Supp. 263; Bissinger v. Guiteman, 6 Heisk. 277; Clark v. Duchesneau, 26 Utah, 97, 72 Pac. 331; Howell v. Ware, 175 Fed. 742. It may be shown by parol that the note was not executed until after the agreements between the parties were made, and it never was intended to be more than security for another agreement, and that such agreement has been performed. Oakland Cemetery Assn. v. Lakins, 126 Iowa, 121, 101 N. W. 778.

8. See ante, § 68.

9. §§ 175, 176.

10. Houck v. Graham, 106 Ind. 195; *post*, § 710. But in the hands of one who takes the paper for value before maturity without actual notice of any defect therein the law presumes, and the holder has a right to assume, that the relations to the paper of every party whose name appears on it are precisely what they appear to be. Chester v. P. S. & L. E. R. Co., 150 N. Y. 59, 41 N. E. 701, 55 Am. St. Rep. 646; Davis v. Bly, 32 App. Div. 124, 52 N. Y. Supp. 299; Schram v. Werner, 85 Hun, 293, 32 N. Y. Supp. 995; Marsh v. Chown, 104 Iowa, 556, 73 N. W. 1046; Hardester v. Tate, 85 Mo. App. 624. Evidence may be received of contemporary oral agreements that the maker of a note executed it as an accommodation, or to be held as collateral security, but not to defeat recovery thereon. Willoughby v. Ball, 18 Okl. 535, 90 Pac. 1017.

11. Wharton on Evidence, § 956.

12. Paine v. Ringold, 43 Mich. 341; County of Des Moines v. Hinckley, 62 Iowa, 642. And upon the same principle it is settled that the meaning of abbreviations may be explained by parol. See Lane v. Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613; Merrill v. Sypert, 65 Ark. 51, 44 S. W. 462.

13. §§ 418, 419. Thompson v. Thorne, 83 Mo. App. 241; Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co., 5 Okl. 32, 47 Pac. 484; Carr v. Jones, 29 Wash. 78, 69 Pac. 646. Where the susceptibility of language in a note to a double construction makes it ambiguous or obscure, a resort to parol testimony is neces-

Where a note was executed by several persons jointly and severally promising to pay a certain amount, parol evidence is inadmissible on a claim that they were severally and not jointly liable;[14] but between privy parties a mistake in the execution of a written instrument — as for instance where the makers of a note intended it should be several as well as joint, but it was drawn only as a joint note — may be rectified in a court of equity, and the true intention shown.[15] And as between them, if the party executed the instrument supposing himself liable for the amount, when in fact he was not, it is admissible to show it, the evidence going to prove want of consideration.[16] And if by mistake the instrument were given for too large an amount the better opinion is that it may be shown, for as to the mistaken excess there is partial want of consideration.[17] And, in general, parol evidence is admissible between the original parties to show fraud, accident, or mistake in the creation of the

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sary, to show in what sense the language used was intended by the parties to the instrument. Bertig-Smythe Co. v. Bonsack Lumber Co., 112 Mo. App. 259, 86 S. W. 870. See also Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911 (as to ambiguity in date of maturity); Southern R. Co. v. Cofer, 149 Ala. 565, 43 So. 102 (as to place of delivery in bills of lading).

14. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942; Parker v. Mayer, 85 S. C. 419, 67 S. E. 559, 137 Am. St. Rep. 912.

15. Rawstone v. Parr, 3 Russ. 424, 529; Chitty on Bills, 191 [*166], 213, [*184]; Benjamin's Chalmers' Digest, 252; Hopkins v. Insurance Co., 57 Iowa, 204. In Massachusetts, held: that contemporaneous written agreement of a collateral and personal character not admissible in evidence for the purpose of defeating recovery on note. Woods Sons Co. v. Schaefer, 173 Mass. 443, 53 N. E. 881, 73 Am. St. Rep. 305. But by the same court it has been held that a paper writing directed to payee and holder of a note and signed by person who has indorsed in blank before delivery and stating that he is an indorser and waives demand, protest and notice is admissible in evidence for purpose of showing that he understood that he was an indorser. State Trust Co. v. Owen Paper Co., 162 Mass. 156; First Nat. Bank v. Watkins, 154 Mass. 385, 28 N. E. 275. Same principle applicable to ownership of instrument. Taylor v. Smith, 116 N. C. 531, 21 S. E. 202. Evidence of an oral agreement not generally admissible. Carrington v. Waff, 112 N. C. 114, 16 S. E. 1008; Hemrich v. Wist, 19 Wash. 516, 53 Pac. 710; Bryan v. Duff, 12 Wash. 233, 40 Pac. 936, 50 Am. St. Rep. 899; Remington v. Dental Mfg. Co., 101 Wis. 307, 77 N. W. 178. In such case the mistake must be mutual. See Deering & Co. v. Russell, 5 N. Dak. 319, 65 N. W. 691; Johnson v. Willard, 83 Wis. 420, 53 N. W. 776; Lee v. Percival, 85 Iowa, 639, 52 N. W. 543.

16. Southall v. Rigg, 11 C. B. 481; Reardon v. Moriarty, 30 La. Ann. 120; 1 Parsons on Notes and Bills, 201.

17. Claxon v. Demaree, 14 Bush, 173. See §§ 179, 201. But see Downs v. Webster, Brayt. 79; 2 Parsons on Notes and Bills, 505.

instrument.[18] Also to set up a verbal agreement, by performance of which the written contract has been discharged.[19]

§ 81d. As to collateral matters.—A further exception to the general rule is recognized in many cases, by which, as between the parties or as to one taking with notice, parol evidence may be received of collateral matters affecting or being part of the contract and which do not interfere with the terms of the written contract.[20] So, it may be shown how the note should be paid,[21] as that it should

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18. Roe v. Kiser, 62 Ark. 92, 34 S. W. 534; Epps v. Waring, 93 Ga. 765, 20 S. E. 645; Mizell Live Stock Co. v. Banks (Ga. App.), 73 S. E. 410; White v. Smith, 79 Kan. 96, 98 Pac. 766; Denning Inv. Co. v. Wallace, 73 Kan. 291, 85 Pac. 139; Phœnix Ins. Co. v. Owens, 81 Mo. App. 201; Phillips v. Meily, 106 Pa. St. 536; Karner v. Ross, 43 Tex. Civ. App. 542, 95 S. W. 46.

19. In First Nat. Bank v. Watkins, 154 Mass. 385, 23 N. E. 275, it was held that an oral agreement operated at once, and in effect discharged the defendant from liability on the note, while in Hayes v. Allen, 160 Mass. 286, 35 N. E. 852, it was decided that "It is no defense to an action on a promissory note for a valid consideration, that subsequent to the making and delivery of the note, an independent oral agreement was made between the parties that the defendant would sell, and the plaintiff would buy, on January 1st next ensuing, certain shares of the capital stock of a corporation at a certain price per share and that the note should be taken as payment *pro tanto* for the shares." See Rogers v. Bedell, 97 Tenn. 240, 36 S. W. 1096. In this connection, court held: Evidence that a check which had been dishonored was subsequently delivered by the payee to another person, under an agreement that the former should not be bound upon it, because of his indorsement made before it was dishonored, is admissible to set aside the effect of the previous indorsement. Epps v. Waring, 93 Ga. 765, 20 S. E. 645; Truman v. Bishop, 83 Iowa, 697, 50 N. W. 278; Howard v. Stratton, 64 Cal. 487. Parol testimony is admissible, in an action upon a promissory note, to show that it was given to secure the performance of an agreement whereby, in consideration of the transfer of certain lands by the payee to the maker, the latter should support the payee during the remainder of his life, and that the maker had performed the conditions of the agreement. Gifford v. Fose, 2 Nebr. (Unof.) 30, 95 N. W. 1066.

20. Crooker v. Hamilton, 3 Ga. App. 190, 59 S. E. 722; Woodson v. Beck, 151 N. C. 144, 65 S. E. 751; *see post*, §§ 156, 1338. Parol evidence of a collateral agreement not purporting to be in writing is not excluded by the fact that in a written instrument such collateral agreement is recognized. Anderson v. Thero, 139 Iowa, 632, 118 N. W. 47. Where a warehouse receipt was pledged to secure a note, the pledgee may be allowed to testify that there was an agreement that if the note was not paid at maturity, the surplus arising from the sale of the property pledged should be credited on another indebtedness. Lewis v. First Nat. Bank, 46 Or. 182, 78 Pac. 990. When the promissory note is complete in itself, parol evidence cannot be received to add further terms to its consideration. Hightower v. Henry, 85 Miss. 476, 37 So. 745.

21. Louisville Tobacco Warehouse Co. v. Stewart (Ky.), 70 S. W. 285; Evans

be paid out of the proceeds of the sale of certain property,[22] from money earned on a contract for work upon which purchased machinery would be used,[23] or out of the first money earned by the maker as agent for the payee, and that money so earned had been applied on unsecured advances of the maker.[24] It may be shown that at the time the note was given, the maker directed that any deposit he might thereafter make should be credited on the note, although before its maturity,[25] and that, where the parties to the note were partners, it was agreed, that if the losses of the business amounted to a certain sum, the liability of the maker of the note should be released, and that such loss had occurred.[26]

SECTION II

THE FORMAL ELEMENTS AND PHRASES OF BILLS AND NOTES

§ 82. We have now to consider: 1st, the date; 2d, the amount; 3d, the time of payment; 4th, the place of payment; 5th, name of the drawer or maker; 6th, name of the drawee (if it be a bill); 7th, name of the payee; 8th, the terms of negotiability; 9th, the words of consideration; 10th, the words of advice; 11th, the statement of account; and 12th, the attestation.

§ 83. The date.[27]— In the first place, as to the date, this is usually written in the right-hand corner of the instrument; but no date is essential to the validity of a bill or note;[28] and it is of no consequence on what portion of the paper it is written.[29] If there be no date,

v. Freeman, 142 N. C. 61, 54 S. E. 847. Where notes are by their terms payable in money, evidence cannot be received tending to show an agreement between the original parties to the notes that payment should be made in labor. Vrandenburg v. Johnson, 3 Nebr. (Unof.) 327, 91 N. W. 496.

22. Saffer v. Lambert, 111 Ill. App. 410, the court saying that such an agreement is equivalent to a direction by the debtor as to application.

23. Ramsay & Bro. v. Capshaw, 71 Ark. 408, 75 S. W. 479.

24. New York Life Ins. Co. v. Smucker, 106 Mo. App. 304, 80 S. W. 278.

25. Roe v. Bank of Versailles, 167 Mo. 406, 67 S. W. 303.

26. Fane v. Fitler, 223 Pa. St. 568, 72 Atl. 891, 132 Am. St. Rep. 742.

27. As to presumption of date of indorsement, see *post*, § 728.

28. Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Mechanics, etc., Bank v. Schuyler, 7 Cow. 337; Byles [*74], 166; Edwards, 150; Bayley, 21; Story on Bills, § 37; Drake v. Rogers, 32 Me. 524; Vandeveer v. Ogden, 1 Pen. (N. J.) 67.

29. Shepherd v. Graves, 14 How. 505.

it will be considered as dated at the time it was made,[30] and parol evidence is admissible to show from what time an undated instrument was intended to operate,[31] or to show that there was a mistake in the date.[32] If dated, it will be presumed to have been executed on the day it bears date.[33] If undated, but containing a reference to date, it will date from delivery.[34] When a note without date is made for another's accommodation, the maker authorizes him to fill up the date as he sees fit.[35] An indorsee has been allowed to prove against the maker a mistake in the date of a note, though by such proof the maker was cut off from a defense valid as to the payee.[36] But a maker would not be admitted to prove a different date as against an indorsee for value, who relied on its apparent date.[37] A mistaken date may be rectified in equity.[38] *Prima facie*, an undated indorsement upon a note will be held to have been made as of the date of the note.[39]

§ 84. When the paper is payable at a specified time after date, it is almost indispensable that the date should appear on its face; for otherwise, if it be a bill, the drawee cannot tell when it falls due, nor can an indorsee tell whether it be a bill or note. Nor can the holder know when to present it for payment, nor when it will be considered overdue. When the bill or note is payable at sight, or on demand, or on a certain day, the date is not so material; but to avoid difficulty, it should never be omitted.[40] And it has been questioned

30. Giles v. Bourne, 6 Maule & S. 73; De la Courtier v. Bellamy, 2 Show. 422; Seldenridge v. Connable, 32 Ind. 375; Cowing v. Altman, 71 N. Y. 441; First Nat. Bank v. Hunt, 25 Mo. App. 174, citing the text; Button v. Belding, 22 App. Div. 618, 48 N. Y. Supp. 981.

31. Davis v. Jones, 25 L. J. C. P. 91, 17 C. B. 625 (84 Eng. C. L.); Richardson v. Ellet, 10 Tex. 190; Lean v. Lozardi, 27 Mich. 424; Cowing v. Altman, 71 N. Y. 441; Thompson on Bills, 37.

32. Drake v. Rogers, 32 Me. 524; Biggs v. Piper, 86 Tenn. 589; Paige v. Carter, 64 Cal. 489.

33. Kinsley v. Sampson, 100 Ill. 574; *ante*, § 65; Gage v. Anesilly, 57 Mo. App. 111.

34. Armitt v. Breame, 2 Ld. Raym. 1076; Styles v. Wardle, 4 B. & C. 908.

35. Androscoggin Bank v. Kimball, 10 Cush. 373; Shultz v. Payne, 7 La. Ann. 222.

36. Drake v. Rogers, 32 Me. 524; Germania Bank v. Distler, 4 Hun, 633.

37. Huston v. Young, 33 Me. 85.

38. Paysant v. Ware, 1 Ala. 160.

39. Dodd v. Doty, 98 Ill. 393.

40. Story on Notes, § 48.

whether or not the drawee might not reasonably refuse to accept or pay an undated bill, on account of embarrassments, in respect to remedy and evidence, to which he might be subjected.[41]

§ 85. **Ante-dating and post-dating.**—Bills, checks, and notes are sometimes post-dated or ante-dated for purposes of convenience;[42] and the fact that they are negotiated prior to the day of date is not a suspicious curcumstance against which parties must guard.[43] The indorsee of a bill which was post-dated, and indorsed by the payee, who died the day before the day of date, was held in an English case to have derived title through the indorser, and entitled to recover against the drawer,[44] and this case has been followed in the United States.[45] So if a note bear date as of a time before the maker became of age, or as of a time when the maker was disqualified by being a *feme covert*, it may be shown, in answer to the plea of infancy or coverture, that the period of its actual date or delivery was when no such incapacity or disqualification existed.[46] And if the bill or note be ante-dated or post-dated as of a time when it would be valid, it may be shown that it was dated or delivered at a time when the party had no capacity to enter into the contract, or that it came within the interdiction of a statute.[47] And whenever there is a false date to evade the law, the instrument is void as to all parties having notice.[48] If the date does not correspond with the declaration, the discrepancy must be explained.[49] But where it

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41. Story on Bills, § 37.

42. Gray v. Wood, 2 Harr. & J. 328; Richter v. Selin, 8 Serg. & R. 425; McSparran v. Neely, 91 Pa. St. 315; Union Bethel v. Sheriff, 33 La. Ann. 1461; Frazier v. Troy Print Co., 24 Hun, 281. But one of a firm of attorneys cannot post-date a check. Foster v. Mackreth, L. R., 2 Exch. 103. See Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756, as to a statute which seemed to contemplate instruments which are ante-dated or post-dated by the parties in accordance with a mutual agreement to that effect, as is frequently done, and declares that they are not invalid because of such fact, provided no illegal or fraudulent purpose is intended.

43. Brewster v. McCardel, 8 Wend. 478; Edwards on Bills, 151; Walker v. Geisse, 4 Whart. 252; McFall v. Murray, 4 Kan. App. 554, 45 Pac. 1100.

44. Pasmore v. North, 13 East, 517.

45. Brewster v. McCardel, 8 Wend. 478.

46. Pasmore v. North, 13 East. 517; Story on Notes, § 48.

47. Bayley v. Taber, 5 Mass. 286.

48. Serle v. Norton, 9 M. & W. 309; Byles on Bills [*75], 168; Edwards, 151. See Vail v. Van Doren, 45 Nebr. 450, 63 N. W. 787.

49. Fitch v. Jones, 5 El. & Bl. 238; Fanshawe v. Peet, 2 H. & N. 1.

is alleged that a note was made on a certain day (and not that it bore date on that day) it is not a fatal variance that it bears date on another.[50] When a person agrees to become a party to a note, and the payee takes it on that assurance, the signature, though actually signed long after the emission of the note, will relate back to its date, and bind accordingly.[51] And in general, time is computed in respect to an ante-dated or post-dated note with reference to the actual date it bears.[52]

§ 86. Secondly, as to the amount or sum payable.—This is usually specified in figures in the upper, or lower, left-hand corner of the instrument, as well as in writing in the body of it. But these marginal figures are really not a part of the instrument, but merely a memorandum of the amount.[53] They do not seem, in general, to have been considered among merchants as of the same effect and value as the mention of the sum contained in the body of the bill. The first model of a bill of exchange preserved to us, and which dates from the year A. D. 1381, does not possess them, though it does possess the *votum* or invocation with which merchants' bills used generally to commence, and which usually preceded the figures. The marginal figures were probably added at a very early date in order that the amount of the bill might strike the eye immediately, and was in fact a note, index, or summary of the contents of the bill which followed.[54] Where a difference appears between the words and figures, evidence cannot be received to explain it; but the words in the body of the paper must control;[55] and if there is a difference between printed and

50. Coxon v. Lyon, 2 Campb. 307; Smith v. Lord, 2 Dowl. & L. 759.

51. Harrington v. Brown, 77 N. Y. 72. See also Moies v. Bird, 11 Mass. 436; McNaught v. McClaughry, 42 N. Y. 22; Pauly v. Murray, 110 Cal. 13, 42 Pac. 313.

52. Luce v. Shaff, 70 Ind. 152.

53. Garrard v. Lewis, 10 Q. B. Div. 30, 37 Eng. 375; Prim v. Hammel, 134 Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52, quoting text; Sexton v. Barrie, 102 Ill. App. 586; Hollen v. Davis, 59 Iowa, 444, 43 Am. Rep. 690; Commonwealth v. Emigrants' Ins. Co., 98 Mass. 12; Smith v. Smith, 1 R. I. 398; Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879. See *post*, § 1499*a*, and notes.

54. Garrard v. Lewis, *supra*; Marius, P. 34; Beawes, § 193; Story on Bills, § 42.

55. Prim v. Hammel, 134 Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52; Payne v. Clark, 19 Mo. 152; Riley v. Dickens, 19 Ill. 30; Mears v. Graham, 8 Blackf. 144; Saunderson v. Piper, 5 Bing. N. C. 425; Fisk v. McNeal, 23 Nebr. 728, citing the text. In Smith v. Smith, 1 R. I. 398, it appeared a bill bore the marginal figures "$175.94," and on its face called for the payment of "three hundred and seventy-five 96–100," expressed as indicated. The clerk of the

written words, the written must control.[56] If the words are so obscurely written or printed as to be indistinct, the figures in the margin may be referred to to explain them.[57] If by inadvertence the amount is expressed in figures only, it will suffice.[58]

§ 86a. Marginal figures of amount, with blank amount in body of instrument.—The fact that an amount is stated in the margin of a note, both in words and figures, does not dispense with the necessity of expressing clearly in the instrument the amount for which it is made,[59] and though the figures are in the margin of the paper, so long as the amount is left blank in the body of the instrument, there can be no recovery thereon.[60]

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bank where it was left for discount, observing the difference between the marginal figures and the words in the body, changed the marginal figure 1 to a 3, thereby conforming them. The court said: "We do not think the marginal notation constitutes any part of the bill. It is simply a memorandum or abridgment of the contents of the bill for the convenience of reference. The contract is perfect without it. If this is so, any alteration in the figures cannot avoid the contract, because it is no alteration, either material or immaterial, in the contract." Chitty on Bills [*150], 173.

56. 1 Parsons on Notes and Bills, 28.

57. Riley v. Dickens, 19 Ill. 29; Corgan v. Frew, 39 Ill. 31; Chitty on Bills [*149], 172.

58. Sweetzer v. French, 13 Metc. (Mass.) 262; Petty v. Fleispel, 31 Tex. 169; Corgan v. Frew, 39 Ill. 31, where there was in the margin "$500" and in the body "five hundred," and it was held to mean "dollars." In Louisiana it is provided by the Revised Statutes of 1870, as follows: "Sec. 319. No bill of exchange, promissory note, or other obligation for the payment of money, made within the State, shall be received as evidence of a debt, when the whole sum shall be expressed in figures, unless the same shall be accompanied by proof that it was given for the sum therein expressed. The cents or fractional parts of a dollar may be in figures." In a case in which the amount in figures preceded the date of maturity and promise to pay, it was held to be sufficient. Strickland v. Holbrook, 75 Cal. 268.

59. Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348; 2 L. R. A. (N. S.) 879, citing text. Compare Witty v. Mut. Life Ins. Co., 123 Ind. 411, 24 N. E. 141, in which it was held that if the maker of a note promises to pay "dollars," but the number of dollars in the body is left blank, and figures in the margin state the number of dollars, the marginal figures should be taken as the obligation.

60. Norwich v. Hyde, 13 Conn. 279; Hollen v. Davis, 59 Iowa, 444. Where it was obviously the purpose of the parties that the body of the note should contain the complete promise of payment, the marginal figures will be regarded as merely a memorandum for convenience of reference, and no part of the note itself; and while the amount to be paid remains unstated, the writing does not constitute a note, and cannot be recovered upon as such. Vinson v. Palmer, 45 Fla. 630, 34 So. 276, citing text.

If it had really been the intention of the parties to the paper that the sum for which it was executed should have been stated therein, there is implied authority to the holder to fill the blank accordingly to an amount not exceeding the limitation of the figures on the margin.[61] Where the word "dollars" is left out, or the dollar-mark is omitted, they will nevertheless be supplied in this country,[62] where, under the like circumstances, "pounds" would be supplied in England.[63] Where "thee hundred dollars" was expressed in a note, it was left to a jury to say whether or not "three, etc.," was intended,[64] and a note for "the sum of fifty-two, 25-100," was held to denote, beyond question, that the fraction meant was "dollars."[65] So where the note was for "one hundred and ninety-one, fifty cents," the word dollars was supplied.[66]

§ 87. The term "dollars."—When the term "dollars" is used in any security for money given in any of the United States, it is understood to mean dollars "of the lawful money of the United States;" and extraneous evidence will not be permitted as a general rule to give it a different signification.[67] But under peculiar circumstances, such as arose during the existence of the Confederate States, when the term "dollars" was applied to Confederate currency in all circles, parol or other evidence will be permitted to explain the true meaning and intent with which it was employed.[68] Thus, in a case before the

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61. Bank of Commonwealth v. Curry, 2 Dana, 142; Bank of Limestone v. Penick, 5 Mon. 25; Norwich Bank v. Hyde, 13 Conn. 279. *See post*, § 143.

62. Corgan v. Frew, 39 Ill. 31; Eldridge v. Kay, 124 Ill. App. 136; Williamson v. Smith, 1 Coldw. 1; McCoy v. Gilmore, 7 Ohio St. 268; Murrill v. Handy, 17 Mo. 406; Coolbroth v. Purinton, 29 Me. 469; Sweetser v. French, 13 Metc. (Mass.) 262; Northrop v. Sanborn, 22 Vt. 433; Booth v. Wallace, 2 Root, 247; Harman v. Howe, 27 Gratt. 677; State v. Schwartz, 64 Wis. 432.

63. Rex v. Elliott, 1 Leach C. L. 175, 2 East P. C. 951; Phipps v. Tanner, 3 C. & P. 488. *See ante*, § 76.

64. Burnham v. Allen, 1 Gray, 496.

65. Murrill v. Handy, 17 Mo. 406.

66. Beardsley v. Hill, 61 Ill. 354.

67. Bank v. Supervisors, 7 Wall. 26; Thorington v. Smith, 8 Wall. 12; Omohundro v. Crump, 18 Gratt. 705; Lohman v. Crouch, 19 Gratt. 321; Smith v. Walker, 1 Call, 24; Commonwealth v. Beaumarchais, 3 Call, 107; Wilcoxen v. Reynolds, 46 Ala. 529; Hightower v. Maull, 50 Ala. 495; Stewart v. Salamon, 94 U. S. (4 Otto), 434.

68. Lohman v. Crouch, 19 Gratt. 331; Thorington v. Smith, 8 Wall. 12; Donley v. Tindall, 32 Tex. 43; Stewart v. Salamon, 94 U. S. (4 Otto) 434; Confederate Note Case, 19 Wall. 548; Wilmington, etc., R. Co. v. King, 91 U. S. (1 Otto) 3.

United States Supreme Court, involving the legal effect of a note for $10,000, dated Montgomery, Ala. (which was in the Confederate States during the war), November 28, 1864, Chief Justice Chase, delivering the opinion of the court, said: "It is quite clear that a contract to pay dollars, made between citizens of any State of the Union, while maintaining its constitutional relations with the national government, is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But is it equally clear, if in any other country coins or notes denominated dollars should be authorized, of different value from the coins or notes which are current here under that name, that, in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars were intended, and if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States. Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence may be removed by parol evidence."[69] But the same tribunal has held that in the absence of parol testimony it would be presumed that a note payable in one of the Confederate States during the war, in "dollars," was presumptively payable in lawful money of the United States.[70] In such cases the Supreme Court of the United States holds that the sum payable in actual money must be ascertained by the value in coin, or legal currency of the United States, at the time when, and place where, the note was made, of the Confederate note equal in nominal amount to the number of dollars specified.[71]

§ 88. Thirdly, as to the time of payment.—Bills and notes are usually drawn payable at a specified time after date, or after sight, or at sight.[72] Sometimes they are made payable on demand, or no

69. Thorington v. Smith, 8 Wall. 12. See Cook v. Lillo, 103 U. S. (13 Otto) 793. In New York held, that it was competent for an expert in handwriting to explain a provision, that might be construed to mean January or July. See Dresler v. Hard, 127 N. Y. 235, 27 N. E. 823. Following the principle that latent ambiguity can be explained by parol testimony, it has been held that the word "duplicate," as used in a note, can be explained as performing a similar office to that with which it is generally coupled in foreign bills of exchange. See McCann v. Preston, 79 Md. 223, 28 Atl. 1102.

70. The Confederate Note Case, 19 Wall. 548.

71. Stewart v. Salamon, 94 U. S. (4 Otto) 434 (1876).

72. Story on Bills, § 50. In Martin v. Lewis, 30 Gratt. 672, the bill was dated August 20, 1866, and was drawn payable "on the 1st January, 1867." A note

time is specified, in which case on demand is understood.[73] If the time of payment be left blank, as for instance if the instrument be payable "—— months after date," the like rule would apply.[74] A note promising to pay when the maker can make it convenient has been held payable within a reasonable time;[75] and it seems that notes payable within a reasonable time are generally regarded as negotiable in the United States, the law fixing a definite limit to the period to be allowed.[76]

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dated on March 25, 1904, and payable on "the 1st day of November," without specifying a year, is, in the absence of anything in the instrument requiring a contrary construction, to be construed as maturing on the 1st day of November of the year named. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 S. E. 911 (1907).

73. First Nat. Bank v. Hunt, 25 Mo. App. 174, citing the text; Collins v. Trotter, 81 Mo. 278, citing the text; Libby v. Mikelborg, 28 Minn. 38; Converse v. Johnson, 146 Mass. 22; Hall v. Toby, 110 Pa. St. 318; Roswell Mfg. Co. v. Hudson, 72 Ga. 25; Thompson v. Ketchum, 8 Johns. 189; Herrick v. Bennett, 8 Johns. 374; Gaylord v. Van Loan, 15 Wend. 308; Cornell v. Moulton, 3 Den. 12; Keyes v. Fenstermaker, 24 Cal. 329; Freeman v. Ross, 15 Ga. 252; Kendall v. Galvin, 15 Me. 151; Porter v. Porter, 51 Me. 376; Jones v. Brown, 11 Ohio St. 601; Bacon v. Page, 1 Conn. 404; Dodd v. Denny, 6 Oreg. 157; Green v. Drebillis, 1 Iowa, 552; Stover v. Hamilton, 21 Gratt. 273; Bowman v. McChesney, 22 Gratt. 609; Whitlock v. Underwood, 2 B. & C. 157; Aldous v. Cornwell, L. R., 3 Q. B. 573; Abbott v. Douglas, 1 C. B. 491; Story on Bills, § 50; Chitty [*151], 174; and interest runs from date: Collier v. Gray, 1 Tenn. 110. See *ante*, §§ 40, 44. In Georgia held (construing section 3700 of the Civil Code) that a promissory note payable generally "after date" and not otherwise expressing any time for payment, is payable on demand. Hotel Lanier Co. v. Johnson, 103 Ga. 604, 30 S. E. 558; Young v. Ellis, 91 Va. 301, 21 S. E. 480; Cowan v. Radford Iron Co., 83 Va. 550, 3 S. E. 120; McVeigh v. Howard, 87 Va. 603, 13 S. E. 31; Omohundro v. Omohundro, 21 Gratt. 631. Where a jury found that an agreement was made for an extension of time of payment of the note, that no definite time was agreed upon, but that a reasonable time for such delay was until the plaintiff was dissatisfied with the security, until payment was demanded or offered, the findings do not make the instrument a demand note in the ordinary legal meaning of the term "payable on demand." The jury in effect found that a right of action did not accrue upon the note until the payee was dissatisfied with the security and made an actual demand of payment. Lyndon Sav. Bank v. International Co., 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900. Where the laws of the State make the apparent maturity of a demand note bearing interest one year after its date, such an instrument is negotiable. Merchants' Nat. Bank of Santa Monica v. Bentel, 15 Cal. App. 170, 113 Pac. 708.

74. McLean v. Nichlen, 3 Vict. 107. But evidence will be received to identify such a note with one described in a mortgage as payable at a time therein specified. Stowe v. Merrill, 77 Me. 550.

75. Lewis v. Tipton, 10 Ohio (N. S.), 88. See *ante*, § 44.

76. Bowman v. McChesney, 22 Gratt. 609. See *ante*, § 44.

When the word "month" is used in specifying the time of payment, a calendar month is understood; and the word "year" signifies a calendar year.[77]

In England, foreign bills are frequently drawn payable at usance or usances; and by usance is meant the common period fixed by customary dealing between the country of the drawer and the country of the place of payment for the payment of bills.[78]

§ 89. A note payable "when demanded,"[79] or "on call,"[80] or when "called for,"[81] or "on demand after date,"[82] is not distinguishable from one payable on demand; and payable "on demand at sight," is equivalent to payable "at sight."[83] If payable with interest "twelve months after notice," the amount is due whenever demanded after notice has been given and twelve months have expired;[84] and the words "one hundred and eighty days pay to the order of" in a bill of exchange import that the bill was due 180 days after date, and not that the money should be paid within 180 days;[85] and where the expression used is "on demand with interest after four months," it is due when four months have expired.[86] But, in such a case, it has been held that demand might be made immediately, but that interest

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77. See chapter XX, on Presentment for Payment; and *post*, § 624.

78. Story on Bills, § 50.

79. Bowman v. McChesney, 22 Gratt. 609; Kingsbury v. Butler, 4 Vt. 458.

80. Luther v. Crawford, 116 Ill. App. 351, affirmed 213 Ill. 596, 73 N. E. 430; Bacon v. Bacon, 94 Va. 687, 27 S. E. 576.

81. Mobile Sav. Bank v. McDonnell, 83 Ala. 598; Crossmore v. Page, 73 Cal. 213; Dixon v. Nuttall, 1 Cromp., M. & R. 307; Boyman v. McChesney, 22 Gratt. 609. See §§ 599, 1215.

82. Hull v. Myers, 90 Ga. 674, 16 S. E. 653; citing text; Fenno v. Gay, 146 Mass. 118; Hitchings v. Edmands, 132 Mass. 338; O'Neill v. Magnor, 81 Cal. 631; Crim v. Starkweather, 88 N. Y. 339. See § 1215. In Crim v. Starkweather, 88 N. Y. 340, the words "on demand" were thought to render the note immediately due, while "on demand after date" require that some time should elapse before demand could be made. In New Jersey the Supreme Court commenting on this case said: "The New York case comports more exactly with the terms used, but plainly a demand forthwith after the day of the date would be in accordance with the contract," *i. e.*, to charge an indorser. Foley v. Emerald Brewing Co., 61 N. J. L. 430, 39 Atl. 650.

83. Bowman v. McChesney, 22 Gratt. 609.

84. Clayton v. Gosling, 5 B. & C. 360.

85. Moreland's Adm'r v. Citizens' Sav. Bank, 114 Ky. 577, 71 S. W. 520, 61 L. R. A. 900, 102 Am. St. Rep. 293.

86. Hobarts v. Dodge, 1 Fairf. 156.

would not begin until after the time specified.[87] And where, upon compromising a suit, a certain sum was paid in cash, and a note was given for the balance of the amount compromised on payable "at once," the words "at once" were construed to mean within reasonable time.[88]

Under Negotiable Instrument statute.—Under the statutory definition of an instrument payable on demand, and the provisions declaring that any terms are sufficient which clearly indicate an intention to conform to the requirements of the statute,[89] it has been held that an instrument not expressing any time of payment is payable on demand though it contain the words "and in the event of my death I hereby authorize and direct the payment of the same out of the funds of my estate," as such words are surplusage.[90]

§ 90. **Fourthly.—The place of payment** need not be specified in the bill or note, but very often is. If the drawer designate in the bill a place of payment, he will be discharged, unless it be there presented at maturity, as will also an indorser;[91] but as to the maker of a note or acceptor of a bill payable at a particular place, unless the restrictive words "only and not elsewhere" be added, no presentment there at maturity or afterward is necessary to charge him.[92] Where no place of payment is expressed in a note, the place of payment is understood to be where the maker resides;[93] and if none be expressed in a bill, where the drawee resides is understood.[94]

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87. Loring v. Gurney, 5 Pick. 15; Massie v. Boyd (Ala.), 6 So. 145.

88. Rivers v. Campbell, 51 Tex. Civ. App. 103, 111 S. W. 190.

89. Appendix, secs. 7, 10.

90. Gilbert v. Adams, 131 N. Y. S. 787.

91. See chapter XX, on Presentment for Payment.

92. See chapter XX, on Presentment for Payment. A statement of the place of payment in a promissory note does not affect the liability of the maker; therefore, in a suit on a note in which no place of payment was stipulated, evidence that the payee resided in Chicago, and that the contract was to pay the note in that city, was property excluded as immaterial. Ray v. Anderson, 119 Ga. 926, 47 S. E. 205.

93. Story on Notes, § 49; Oxnard v. Varnum, 111 Pa. St. 193; Overland Mining Co. v. McMaster, 19 Utah, 177, 56 Pac. 977; Christopherson v. Common Council, 117 Mich. 125, 75 N. W. 445, citing text; Bardsley v. Washington Mill Co., 54 Wash. 553, 103 Pac. 822, 132 Am. St. Rep. 1133, or at the usual place of business. Though at the time a note was given the payee resided and has continued to reside in another state, the place of payment is in the state where the maker resided, when the debt was contracted and the note was executed and delivered there. Gage v. McSweeney, 74 Vt. 370, 52 Atl. 969.

94. Chitty on Bills (13th Am. ed.), [*151], 174; Story on Bills, § 48; Scott v. Perlee, 39 Ohio St. 67, citing the text.

Circumstances however may control this inference. Thus, if a bill were drawn upon a merchant abroad, addressed to him "at Paris or at London," the place of payment would be deemed the place where he accepted it, whether Paris or London.[95] If the drawer direct on the face of the bill that it be paid at his own house, it creates a presumption that it is an accommodation bill; and that he was to pay it; and unless he rebut it by showing that he really had effects in the drawee's hands, notice of dishonor will be dispensed with.[96] Where a bank is named, it will be presumed, in the absence of evidence appearing on the face of the note to the contrary, that it was at the maker's home town.[97] And the execution of a note, on its face payable at a bank, the place for the name of which is left blank, at a town named, authorizes the payee, before the maturity of the note, to insert the name of a particular bank, at such town, in the blank space, so that, whatever limitation of authority may have been imposed by the maker on the payee, and although, by the law of the State, no note is negotiable unless payable at a specified bank, the note will be negotiable, and governed by the law merchant in the hands of a *bona fide* indorsee.[98]

§ 90a. Place of payment as criterion of negotiability.—In some of the States of the United States the place of payment is made criterion of negotiability.[99] Where it is necessary to negotiability

95. Freese v. Brownell, 35 N. J. L. 285; Cox v. National Bank, 100 U. S. (10 Otto) 713; Story on Bills, § 46. In Indiana, under 1 Rev. Stat. 1876, p. 636, § 6, notes to be governed by the law merchant must show on their face that they are payable at or in a bank. Crossan v. May, 68 Ind. 242. If payable "at Indiana Banking Company," it has been held that such expression is not equivalent to being payable at or in a bank. Rominger v. Keyes, 73 Ind. 376. So held also where the note was made "payable at the bank in Attica," though there was but one bank there. Hardy v. O'Brien, 91 Ind. 94; Butterfield v. Davenport, 84 Ind. 591.

96. Sharp v. Bailey, 9 B. & C. 44.

97. Bailey v. Birkhofer, 123 Iowa, 59, 98 N. W. 594. Where the maker promised to pay the sum named at "the First National Bank," and no other designation of the place of payment appeared upon the instrument, except a printed memorandum on the margin reading, "Corner Main Street and First Ave." these words were no part of the note. Bailey v. Birkhofer, 123 Ia. 59, 98 N. W. 594.

98. Gillaspie v. Kelly, 41 Ind. 158; Spitler v. James, 32 Ind. 203. See *post*, § 144.

99. For cases applying such statutes, see Oates v. National Bank, 100 U. S. 239 (Alabama statute); Gwathmay v. Clisby, 31 Fed. 220; Walston v. Davis, 146 Ala. 510, 40 So. 1017; Ray v. Baker, 165 Ind. 74, 74 N. E. 619; Adams & Westlake Co. v. Robinson (Ky.), 76 S. W. 510; Barger v. Farnham, 130 Misc. 487, 90 N. W. 281. It has been held in Georgia that a note payable at "H. & J.,"

that the note be payable at a bank in the State, and a note is made in the State, payable at a bank, it will be presumed that the bank is in the State.[1]

Under Negotiable Instrument statute.—It has been held that the Negotiable Instrument statute repealed a statute providing that a promissory note payable at a bank is put upon the footing of a bill of exchange when discounted by the bank.[2]

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does not upon its face show that it was made for the purpose of negotiation at a chartered bank; and that the fact that suit thereon is brought against the indorsers by H. & J., and who are described in the pleadings as lately bankers doing business under the name, style, and firm of H. & J., is not sufficient to prove that H. & J. is a chartered bank. Salmons v. Hoyt, 53 Ga. 493. In Freeman's Bank v. Ruckman, 16 Gratt. 126, the note sued on was executed in Boston, Mass., and was payable "at either of the banking houses in Wheeling, Va." Judge Moncure said: "The note was not payable at a particular bank, or at a particular office thereof, etc. (following the statute), but 'at either of the banking houses in Wheeling Va.,' and therefore is not a negotiable note." It is not necessary in Virginia that the note, in order to be negotiable, be expressly payable in that State: "It is certainly true that such note, etc., must on its face be payable in this State, because the section so requires. But it does not require that the State shall be expressly named in the note." McVeigh v. Bank of the Old Dominion, 26 Gratt. 830, Moncure, P. See Broun v. Hull, 33 Gratt. 31, in which case the bank ceased to exist after the note was made; and the court, considering the effect of this fact on an indorsement after maturity, held that the indorsement amounted to a mere assignment, and was not negotiable. If the note had been transferred before maturity, the principle of the decision would have led to a like ruling, the court being of opinion that as the indorsement could not be payable at the bank, it could not be such in the sense of the law merchant. The case is a very peculiar one, and the decision questionable. The negotiable character of the paper having been fixed in its inception, query, if that character could be changed by subsequent events? To place a note upon the footing of a bill of exchange under the Kentucky statute, it must be not only payable and negotiable at an incorporated bank, but indorsed to, and discounted by, the bank at which it is payable or by some other incorporated bank. Magoffin v. Boyle Nat. Bank (Ky.), 69 S. W. 702; Nickell v. Citizens' Bank (Ky.), 60 S. W. 925; Jones v. Wood, 10 Ky. (3 A. K. Marsh) 162. Under a statute providing that a note payable in a bank shall be negotiable, a note payable "at" a certain bank is within the statute. Halstead v. Woods (Ind. App.), 95 N. E. 429. Where false and fraudulent representations with respect to the consideration of a note are set up in an action on the note, where the note was not made payable at a bank in the State and had been assigned to a nonresident, the same remedy may be had against the assignee that might be had against the payee. Reed v. The Tioga Mfg. Co., 66 Ind. 21.

1. McGuirk v. Cummings, 54 Ind. 246. See McVeigh v. Bank of Old Dominion, 26 Gratt. 830, and *supra*.

2. Williams v. Paintsville Nat. Bank, 137 S. W. 535, 143 Ky. 781, as to Kentucky Statutes, § 483.

§ 90b. Power of government to change place of payment.—When the place of payment is specified in a bill or note, or negotiable bond it is a part of the contract, and after its execution a State is without power to change the place of payment, under the provision of the United States Constitution prohibiting the States from passing any law "impairing the obligation of contracts." [3]

§ 91. Fifthly, as to the name of the drawer or maker.—It is of the first importance, indeed indispensable, that the bill or note should point out with certainty the party who enters into the contract imported by its terms,[4] and if the promise be in the alternative, it is not a good negotiable instrument. Thus, where the note ran, "I, A. B., promise to pay," and was signed "A. B. or else C. D.," the court said: "This is not a promissory note against this defendant, within the statute of Anne. It operates differently as to the two parties. It is the absolute undertaking on the part of Corner (A.) to pay, and it is conditional only on the part of the defendant (B.), who undertakes to pay only in the event of Corner's not paying." [5] But it has been said that such an instrument would be a good note as against A.[6]

§ 92. The name of the drawer is absolutely needful upon the face of the bill; for without it the drawee cannot tell whether he should accept it or not, or any holder know to whom notice should be given. Indeed, it is paradoxical to speak of a bill without a drawer; for the very term imports a negotiable order drawn by some one.[7] And even when such an instrument bears the name of one upon it who signs as acceptor, it is still nothing more than an inchoate paper, which

3. Dillingham v. Hook, 32 Kan. 185, 4 Pac. 166.

4. Heman v. Francisco, 12 Mo. App. 560. In this case the note began, "One day after date, we, jointly and severally . . . as principal, and John Francisco, J. B. Walsh (and others) as security . . . promise to pay, etc." It was signed by the parties described as sureties, but the name of the maker was omitted. It was held that the name of the maker could not be supplied by parol evidence, and that there being no primary obligation, the parties signing as sureties were not bound. In Aultman & Taylor Co. v. Gunderson, 6 S. Dak. 226, 60 N. W. 859, 55 Am. St. Rep. 837, it is held that where a note is signed by one party in the lower right-hand corner and by another in the lower left-hand corner, evidence is admissible to show that the former was the maker, and the latter a witness.

5. Ferris v. Bond, 4 B. & Ald. 679; Story on Notes, § 34; 1 Parsons on Notes and Bills, 36–37; Chitty [*140], 162.

6. Byles (Sharswood's ed.) [*92], 190. See Edwards on Bills, 134. This seems to be there implied by the author's language.

7. Story on Bills, § 53; Benjamin's Chalmers' Digest, 4.

cannot be sued upon unless a drawer's name is authoritatively inserted in it.[8] And it has been well said that it is "an abuse of terms to say that one was the acceptor of a bill which had never been drawn; or, in other words, that he had accepted an 'order,' or 'request,' that had never been made upon him."[9] But authority to insert the name of a drawer to such an inchoate paper would be *prima facie* presumed;[10]

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8. Tevis v. Young, 1 Metc. (Ky.) 199; May v. Miller, 27 Ala. 515; Byles on Bills (Sharswood's ed.) [*83], 178. In McCall v. Taylor, 10 C. B. (N. S.) 30, 34 L. J. 365, C. P. Erle, C. J., said: "The instrument has no date and no drawer's name, but the defendant wrote his acceptance across it, and the question is, has the holder of such an instrument the right to declare on it, either as a bill of exchange or promissory note? It certainly is not a bill of exchange, nor is it a promissory note. It is, in fact, only an inchoate instrument, though capable of being completed." According, see Stoessiger v. S. E. R. Co., 3 El. & Bl. 549, 23 L. J. Q. B. 293; Regina v. Harper, 7 Q. B. D. 78; Cent. L. J., 1881, p. 174.

9. Tevis v. Young, 1 Metc. (Ky.) 199. In this case the instrument sued on was in the form of a bill, but no name was signed as drawer. It was dated Shelbyville, and addressed "To W. G. Rogers, Shelbyville," accepted by Rogers, and indorsed "John Tevis." Suit was brought by Young against Tevis as indorser, and Rogers as acceptor; but it was held that the instrument was incomplete, and the action could not be maintained. It was said by the court, per Duval, J. (Simpson, J., dissenting): "The fallacy of all the reasoning of counsel upon this point, consists in their failure to recognize the distinction between a bill of exchange and the mere form of such an instrument. The words written upon the face of the paper in question are utterly inoperative, and without force or legal effect for any purpose as a commercial instrument, without the name of a drawer, either subscribed to the paper, or inserted in the body of it. Whether the name of the drawer, or of any subsequent party to the bill, be forged or fictitious makes no difference as it respects the liability of the indorser. The indorsement implies an undertaking that the antecedent parties are competent to draw and accept the bill, and that their signatures are genuine. But the indorsement does not imply an undertaking that the paper indorsed contains the names of all the antecedent parties necessary to constitute a valid bill of exchange, when the face of the paper itself shows that it is blank as to all or any of such names. The indorsement of the paper would, doubtless, confer upon the party intrusted with it, authority to fill up the blanks with the names of any parties, at the discretion of the latter; and so, the indorsement of a piece of blank paper would give the holder authority to make a bill of exchange, upon which the indorser would be liable, in the hands of an innocent holder for value, for whatever amount or in the names of whatever parties the bill might be subsequently drawn and accepted. But certainly it cannot be supposed that in either of the cases stated, the indorser could be held liable, as such, until the paper should have been drawn and executed and completed as a bill of exchange. It is not the mere authority to make a bill, which of itself creates the liability, but it is the execution of that authority."

10. Harvey v. Cane, 34 L. T. R. 64 (1876). See *post*, §§ 142, 147, 843, 844; Seard v. Jackson, 34 L. T. R. 65, note *a*. Moies v. Knapp, 30 Ga. 942; Ben-

and if inserted without authority, the acceptor would be bound to a *bona fide* holder without notice.[11]

§ 93. Maker estopped to deny capacity of payee.—By executing a promissory note, the maker engages to pay the amount therein named to the bearer, if it be payable to bearer; to the payee or order, if it be payable to a particular person or order. By the very act of engaging to pay to a particular payee he acknowledges his capacity to receive the money; and also his capacity to order it to be paid to another.[12] And therefore if the maker is sued by an indorsee of the payee, he cannot defend himself on the ground that the payee had no capacity to take or to indorse it by reason of being an infant,[13] a married woman,[14] a bankrupt,[15] a fictitious person,[16] a corporation without legal existence or capacity to indorse;[17] or that such payee was insane at the time the note was executed;[18] though, if the payee became insane after the execution of the note, his indorsement would then be a mere nullity, and if the acceptor knew of such insanity he would not be justified in making payment to any one whose title was affected by it.[19] There are authorities which hold that the insanity

jamin's Chalmers' Digest, 35, 46; *In re* Duffy, 5 L. R., Ireland, 927; Hopps v. Savage, 69 Md. 516.

11. See these questions discussed, *post*, §§ 131, 132, 142, 147, 843, 844. The Scotch law accords. Smith v. Taylor, Ct. of Sess., Feb. 27, 1824; Ames on Bills and Notes, vol. I, p. 881. And so also the Irish law. *In re* Duffy, 5 L. R., Ireland, 92.

12. Wolke v. Kuhne, 109 Ind. 313; Lewisohn v. Kent & Stanley Co., 87 Hun, 257, 33 N. Y. Supp. 826, citing and approving the text; Mayer v. Old, 57 Mo. App. 639, text cited.

13. Frazier v. Massey, 14 Ind. 382; Taylor v. Croker, 4 Esp. 187; Jones v. Darch, 4 Price, 300; Grey v. Cooper, 3 Doug. 65. See, *post*, § 227.

14. Smith v. Marsack, 6 C. B. 486, Wilde, C. J.; Binney v. Globe Nat. Bank, 150 Mass. 574, 6 L. R. A. 381; Castor v. Peterson, 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854, citing text. See *post*, § 242.

15. Drayton v. Dale, 2 B. & C. 293.

16. Lane v. Krekle, 22 Iowa, 404. See §§ 136, 139.

17. Winer v. Bank of Blytheville, 89 Ark. 435, 117 S. W. 232, 131 Am. St. Rep. 102; Brickley v. Edwards, 131 Ind. 3, 30 N. E. 708; Ray v. Indianapolis Ins. Co., 39 Ind. 290; Vater v. Lewis, 36 Ind. 291; Snyder v. Studebaker, 19 Ind. 462; John v. Farmers' Bank, 2 Blackf. 367; Greiner v. Ulery, 20 Iowa, 266; Massey v. Building Assn., 22 Kan. 634; Stoutimore v. Clark, 70 Mo. 477; National Ins. Co. v. Bowman, 60 Mo. 252; Farmers' & M. Bank v. Needles, 52 Mo. 17; Blevins v. Fairley, 71 Mo. App. 259; Ehrmen v. Union Cent. Life Ins. Co., 35 Ohio. St. 324.

18. See Smith v. Marsack, *supra*.

19. See Bigelow on Estoppel, 450, 541; Alcock v. Alcock, 3 M. & G. 268 (42 Eng. C. L.). The fact of lunacy came to defendant's knowledge pending the trial.

of the payee at the time the paper was executed may be shown;[20] but they have been sharply criticised,[21] and do not accord with the general principle of estoppel applied to negotiable paper. He is also estopped from showing that the payee was not the real party in interest at the time the note was executed.[22]

§ 94. Joint and several notes.—A note by two or more makers may be either joint, or joint and several. A note signed by more than one person, and beginning "we promise," is joint only.[23] A joint and several note usually expresses that the makers jointly and severally promise.[24] But a note signed by more than one person, and

20. Peaslee v. Robbins, 3 Metc. (Mass.) 164.

21. Bigelow on Estoppel, 450, 451.

22. Johnson v. Conklin, 119 Ind. 109; Blacker v. Dunbar, 108 Ind. 217.

23. Thompson on Bills, 156; Union Nat. Bank v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426; Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130; Barrett v. Funay, 38 Ind. 86; Sharpe v. Baker (Ind. App.), 99 N. E. 44; Taylor v. Reger, 18 Ind. App. 466, 48 N. E. 262, 63 Am. St. Rep. 352; Dusenbury v. Albright, 31 Nebr. 345, 47 N. W. 1047. But in Michigan a note commencing "we promise to pay" with the further provision "to be paid by us in proportion to road tax in above-mentioned districts on lands" was held to create a separate and not a joint liability. Western Wheel Scraper Co. v. Locklin, 100 Mich. 339, 58 N. W. 1117. If, in an action on a joint note, it appears that one of the persons whose names appears thereon did not sign it, there can be a recovery against the other. Gray v. Gray (Del. Super.), 80 Atl. 233. Though a note is in form a joint and several liability, it may be shown that the parties intended to be bound only for their several liability, and this is shown by a contract forming part of the same transaction that each should be liable each for only his proper share. City Deposit Bank Co. of Columbus, Ohio, v. Green, 130 Ia. 384, 103 N. W. 96. But see Rumsey v. Fox, 158 Mich. 348, 122 N. W. 526, holding that where several persons signed a subscription paper agreeing to give their joint and several obligations for the property purchased, and subsequently delivered joint and several notes in payment for the property, their obligation is joint and several notwithstanding the subscription recited that each subscriber took the amount of stock set opposite his name, and a certificate was signed by the vendor and delivered to each reciting his share in the property. Where a joint note has been given by two persons for the purchase of property which turns out to be useless, a promise by one of the makers after knowing its condition to pay the note is not binding upon the other. Hayman v. Lambden, 97 Md. 33, 54 Atl. 962. Under a statute providing that a promissory note signed by two, through joint in form, is joint and several, when such a note has been declared on jointly and also on common counts, recovery may be had against one only when service has been quashed as to the other. Harrison v. Thackaberry, 94 N. E. 172, 248 Ill. 512.

24. It is the same as though the parties to it had executed a joint obligation and each of the parties had executed a separate obligation. Sharpe v. Baker (Ind. App.), 99 N. E. 44. Under a statute providing that "where all the parties that

beginning "I promise," is several as well as joint;[25] and so also is one signed by two makers, and running "we or either of us promise to pay."[26] And where two have signed a joint note, "payable to the order of myself," it means payable to the order of either, and the indorsement of either carries a good title.[27] If a note running "we promise" is signed by but one person, he is bound just as if the language were "I promise."[28] Where two sign the note as makers, they will be regarded *prima facie* as joint makers, and not as partners.[29]

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unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several," where it appears that the parties received some benefit from the consideration, and nothing further is shown from which their intention can be ascertained, the law steps in and makes the promise joint and several, but where it clearly appears that such was not the intention of the parties, and it clearly appears, on the contrary, that the intention was that the promise should be joint, the presumption is overcome, and the promise must be enforced according to its express terms. Farmers' Exch. Bank v. Morse, 129 Cal. 239, 61 Pac. 1088.

25. Salomon v. Hopkins, 61 Conn. 49, 23 Atl. 716; Monson v. Drakely, 40 Conn. 552; Booth v. Huff, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98; Miller v. Lewiston Nat. Bank, 18 Idaho, 124, 108 Pac. 901; Maiden v. Webster, 30 Ind. 317; Corneille v. Pfeiffer, 26 Ind. App. 62, 59 N. E. 188; Hemmenway v. Stone, 7 Mass. 58; Dow Law Bank v. Godfrey, 126 Mich. 521, 85 N. W. 1075, 86 Am. St. Rep. 559; Ely v. Clute, 19 Hun, 35; Partridge v. Colby, 19 Barb. 248; Lane v. Salter, 4 Rob. (N. Y.) 239; Barrett v. Skinner, 2 Bailey, 88; Arbuckle v. Templeton, 65 Vt. 207, 25 Atl. 1095; Dill v. White, 52 Wis. 169; Holman v. Gilliam, 6 Rand. 39; Marsh v. Ward, Peake, 130; Ladd v. Baker, 6 Fost. 76; Galway v. Mathew, 1 Campb. 462.

26. Pogue v. Clark, 25 Ill. 335; Harvey v. Irvine, 11 Iowa, 82; First Nat. Bank v. Fowler, 36 Ohio St. 524. And when the note was given for the purchase of property by the signers, a recital of the proportions paid and to be paid of the purchase price of the property by the purchasers thereof should be construed as intended as between themselves to evidence their respective interests in it. Dolinski v. First Nat. Bank of Pittsburg, (Tex. Civ. App.), 122 S. W. 276 (1909).

27. First Nat. Bank v. Fowler, 36 Ohio St. 524. In Jenkins v. Bass (Ky.), 11 S. W. 293, parol evidence was admitted to show which of the two was intended as payee.

28. Whitmore v. Nickerson, 125 Mass. 496; Rice v. Gove, 22 Pick. 158; Holmes v. Sinclair, 19 Ill. 71.

29. Ellinger's Appeal, 114 Pa. St. 505, § 361, *post*. A joint and several note not negotiable binds makers proportionately. Groves v. Sentell, 153 U. S. 465, 14 Sup. Ct. Rep. 898. Where one, for a valuable consideration, signs his name to a joint and several promissory note after it has been signed and delivered, he becomes, as between himself and the payee, a maker, and may be sued as such. He entered into a new contract with the holder of the note on a new and additional consideration. First Nat. Bank v. Cecil, 23 Oreg. 58, 31 Pac. 61, 32 Pac. 393; Palmer v. Field, 76 Hun, 229, 27 N. Y. Supp. 736.

If a note be signed by a person in the name of a firm, whether that name represents in form more than one person, as "A. & Co.," or only one person, as "A.," it is in both cases the note of the firm, and all the partners will be bound, whether the language be "I" or "We" promise.[30] If the note runs "We promise," and is signed "A. B., principal; C. D., surety," it is still the joint note of both; and if it were written "I promise," and signed in the same manner, it would be the joint and several note of both.[31] A joint and several note, though on one piece of paper, comprises in reality and in legal effect, several notes.[32] Thus, if A. B. & C. make a joint and several note, there is a several note of each, and the joint note of all—in all, four notes.[33] The joint note may be valid, though the several notes are void.[34]

Under Negotiable Instrument statute.—The statute declares that "where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed to be jointly and severally liable thereon." [35]

§ 95. **Two or more drawers.**—The drawer of a bill is generally a single person, or a copartnership firm, or a corporation. But two or more persons may unite in drawing a bill,[36] and unless they are partners, each is entitled to require demand and notice.[37] And they may make the bill payable to their joint order, or to the order of either of them, or to a third person or order. Sometimes another person unites with the drawer as a surety, and such person is called a "surety drawer." Where several persons unite in drawing a bill of exchange upon a person in whose hands they have no funds, and the

30. Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716; Rees v. Abbott, Cowp. 832.

31. Hunt v. Adams, 5 Mass. 358; Palmer v. Grant, 4 Conn. 389; Latham v. Flour Mills, 68 Tex. 130, citing the text; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716.

32. Fletcher v. Dyte, 2 T. R. 6; Byles, 78. The fact that the word surety is written after the name of one of two signers of a promissory note does not render them any the less joint and several obligors, so far as their liability to the plaintiff is concerned. Galloway v. Bartholomew, 44 Or. 75, 74 Pac. 467; See also Booth v. Huff, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98.

33. King v. Hoare, 13 M. & W. 565.

34. McClae v. Sutherland, 3 El. & Bl. 1 (77 Eng. C. L.); Byles (Sharswood's ed.) [*8], 79.

35. Appendix, sec. 17 (7). See also Ullery v. Brohm, 20 Colo. App. 389, 79 Pac. 180, holding that one could not be charged as guarantor for the other.

36. Suydam v. Westfall, 4 Hill, 211, 2 Den. 205; McMean v. Little, 3 Baxt. 332.

37. McMean v. Little, 3 Baxt. 332.

bill is accepted and paid, all of them are bound to the acceptor, and neither one of them can show that he signed as surety for the others, and that the drawee knew the fact when he accepted the bill.[38] The doctrine has been carried farther, and it has been held that if A. & B. draw on C. without having funds in his hands, and B. signs himself surety, both must be considered as drawers to all the parties to the bill, as well to the acceptor as the payee, for the acceptor may have been induced to accept the bill quite as much as the payee or other holder to take it, because B., as surety of A., was liable to him for payment in the character of joint drawers.[39]

In New York a different view is taken, on the ground that the liability of a joint drawer extends to the payee or subsequent holder alone, and even if he draws the bill, with the understanding that he is to be liable to the acceptor, such a contract would be a parol promise to pay the debt of another, and void under the statute of frauds.[40] But this view does not seem to us tenable.[41]

§ 95a. In an English case, M. and P. drew a bill payable to their own order on R. B., who accepted it, and J. B. indorsed it with the view of becoming surety for R. B. to the drawer. Action was brought against J. B. as an indorser, and also as a drawer. He was held bound in the latter character. Shee, J., said: "It is alleged that the defendant 'indorsed,' which as a stranger he could not do. But the defendant here may be treated as drawer: that is, as guaranteeing the payment of the bill by the acceptor." [42]

§ 96. Sixthly: as to the drawee.—A bill of exchange being an open letter of request from the drawer to a third person, supposed to be under obligation to accept the bill, should be regularly addressed to such person by his christian name and surname, and also by a designation of his place of residence; and if it is addressed to a firm, the name of the firm should be expressed in the address.[43]

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38. Suydam v. Westfall, 4 Hill, 211, 2 Den. 205; Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004.

39. Swilley v. Lyon, 18 Ala. 558; Story on Bills, § 420; Church v. Swope, 38 Ohio St. 495, citing the text.

40. Griffith v. Reed, 21 Wend. 502; Wing v. Terry, 5 Hill, 160.

41. Story on Bills, § 420; Edwards on Bills, § 376.

42. Mathews v. Bloxsome, Q. B., 33 L. J. R. 209. See Penny v. Innes, 1 Cromp. M. & R. 439.

43. Byles (Sharswood's ed.) [*84], 179; Chitty on Bills (13th Am. ed.) [*164], 188; Story on Bills, § 58.

Such at least is requisite to perfect the bill in a proper and business-like manner; and without such accuracy in the address, it does not appear who should be called upon to accept or pay it, or who would be justified in so doing. In an early English case it was held that it was not necessary that the bill should have a drawee; [44] but that case has been distinctly repudiated, and both in England and in the United States it is settled doctrine that a drawee must be pointed out.[45] Where a bill without a drawee was sued upon, it was well said: "For want of a drawee it is incomplete as a bill of exchange; and for want of a promise it appears to us incomplete as a note." [46] But the *bona fide* holder of a check without a drawee, which has been issued as a memorandum of indebtedness, may recover on account for money had and received.[47]

§ 97. Where a bill was drawn payable to the drawer's order, and there was added "Payable at No. 1 Wilmot Street, opposite the Lamb, Bethnal Green, London," and was accepted by one Milner, it was held sufficient, upon the ground that it must be considered as directed

44. Regina v. Hawkes, 2 Moo. C. C. 60.

45. In Peto v. Reynolds, 9 Exch. 410, Alderson, B., said: "With respect to the question whether this instrument is or is not a bill of exchange, the case of Regina v. Hawkes is undoubtedly in point. I must own, however, that I now think I was wrong on that occasion. The case seems to have been decided on the ground that Milner v. Gray, 8 Taunt. 739, governed it; and the fact was not adverted to, that Gray v. Milner may be thus explained: that a bill of exchange made payable at a particular place or house, is meant to be addressed to the person who resides at that place or house. Therefore, in that case, the bill was, on the face of it, directed to some one; and the court held, that, inasmuch as the defendant promised to pay it, that was conclusive evidence that he was the party to whom it was addressed. But in the case of Regina v. Hawkes, the instrument was addressed to no one." See also Reynolds v. Peto, 11 Exch. 418; Watrous v. Hallbrook, 39 Tex. 572. In Ball v. Allen, 15 Mass. 435, Parker, C. J., says: "The mere possession of a paper drawn in the form of an order, there being no drawee in existence, we think, cannot entitle the possessor to an action in any form, for the paper may have been carelessly dealt with as being imperfect, and may have come to the possessor by finding. It is enough for the purpose of justice that the holder of such a paper may entitle himself to recover, merely by showing that he paid for it, or that he came otherwise fairly by it; for it can rarely happen that he will be unable to produce the person for whom he received it. If the circumstances are such as induce him to decline producing evidence of the manner in which the paper came to him, no probable harm will be the result of his loss of the money." Story on Bills, § 58; 1 Parsons on Notes and Bills, 61; 2 Robinson's Practice (new ed.), 144.

46. Forward v. Thompson, 12 Up. Can. Q. B. 103, Draper, J. See § 97.

47. Ellis v. Wheeler, 3 Pick. 19. See Ball v. Allen, *supra*.

to the person residing at that house, and acceptance by the defendant was acknowledgment that he was intended as the drawee.[48] Such a bill—or any accepted bill without a drawee—is considered by many authorities as defective in its inception, but perfected by acceptance, the acceptor being estopped to deny that he was the drawee.[49] And this seems the correct doctrine. But it was regarded in the case above cited as informal, but valid.[50] That decision however has been questioned.[51] If invalid as an acceptance the paper might be treated as a note.[52]

§ 98. Alternative address of bill.—If the bill be addressed to A., or in his absence to B., it is sufficient and valid, and will bind whichever accepts as acceptor.[53] And it has been thought that a direction to A. or B., in the alternative, would be sufficient if both were at the same place at the same time.[54] If the bill is drawn upon A., B., and C., it may be accepted by A. and B. only, and they will be bound as acceptors, and it will be no variance to allege in the declaration that it was drawn upon A. and B., without referring to C.[55] But if a bill is intended to be accepted by two persons, it should be addressed to both; otherwise, though accepted by both, it will bind only the drawee as acceptor, as there cannot be a series of acceptors.[56] The drawer and drawee may be the same person, but such an instrument would be actionable without acceptance.[57] In case of uncertainty as to the real drawee attempted to be expressed or designated, or any

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48. In Gray v. Milner, 8 Taunt. 739, 3 Moore, 90, Dallas, C. J., said the instrument was clearly a bill of exchange; and that, "it being directed to a particular place, could only mean to the person who resided there; and that the defendant, by accepting it, acknowledged that he was the person to whom it was directed." Cork v. Bacon, 45 Wis. 192.

49. Wheeler v. Webster, 1 E. D. Smith, 3; *post*, § 486; Thompson on Bills, 46; Grierson v. Sutherland, Scotch case therein cited; Chitty on Bills [*164], 188; 1 Parsons on Notes and Bills, 288-289; Benjamin's Chalmers' Digest, 50.

50. Gray v. Milner, *supra*; Edwards on Bills, 174.

51. Davis v. Clarke, 6 Q. B. 16. See also Peto v. Reynolds, *supra*; Story on Bills (Bennett's ed.), 58; 1 Parsons on Notes and Bills, 62.

52. See §§ 131, 132, 133, 485.

53. Anonymous, 12 Mod. 447; Chitty, Jr., 216; Ames on Notes and Bills, 111.

54. Marius on Bills, 16; Story on Bills (Bennett's ed.), § 58.

55. Mountstephen v. Brooke, 1 B. & Ald. 224; Story on Bills, § 58.

56. Davis v. Clarke, 6 Ad. & El. (N. S.) 16; Jackson v. Hudson, 2 Campb. 447. See chapter XVIII, on Acceptance.

57. See chapter V, on Irregular, etc., Instruments; and, *post*, § 482.

ambiguity in the address of the bill, then, as in all cases of written contracts, extrinsic evidence is admissible to ascertain.[58]

By the French and English usage, the address is uniformly at the left-hand lower corner, upon the face of the bill; but the Italians and Dutch, as it seems, write it on the back of the bill.[59] But it is not supposed that the place of the address is essential, if it distinctly appear what was intended.

§ 99. Seventhly: as to the payee.—The bill or note must point out with certainty the party who is to receive the money—that is, it must designate a payee.[60] But the payee need not be named in person, it being sufficient if some one be indicated.[61] Thus, if the instrument be payable to A. or bearer, or to bearer, or to the holder, or to order, it is intended to mean whoever comes in lawful possession, and the holder may sue upon it.[62] In order to make a promissory note or other obligation for the absolute payment of a sum certain, on a certain day negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity.[63] Hence, if the instrument be payable to a certain person or "assigns,"[64] or to a certain corporation, or the holder, "if transferred by the signature of its president," it would be negotiable.[65] If the note be written "due the bearer $100, which I promise to pay A. or

58. Cork v. Bacon, 45 Wis. 192; McCullough v. Wainwright, 14 Pa. St. 171; Jackson v. Sell, 11 Johns. 201.

59. Story on Bills (Bennett's ed.), § 58, note 1.

60. Rich v. Starbuck, 51 Ind. 87. A promissory note payable to a person named therein "*et al.* or order" is not negotiable either at the common law or under the Code of Iowa. See Gordon v. Anderson, 83 Iowa, 224, 49 N. W. 86, 32 Am. St. Rep. 302. Where a note is made payable to a certain person or persons named as payee therein, and there is nothing in the wording of the note to indicate, and no showing in the evidence, that any other person has any interest therein, the presumption will be that the note is for the personal benefit of the payee named therein. McGuffin v. Coyle & Guss, 16 Okl. 648, 85 Pac. 954.

61. Evidence may be received to show that a certain person was the person intended to be described by the name which appears as that of the payee. Tapley v. Herman, 95 Mo. App. 537.

62. Mechanics' Bank v. Straiton, 3 Abb. N. Y. App. 269; Hathwick v. Owen, 44 Miss. 803; Melton v. Gibson, 97 Ind. 158, citing the text; Tescher v. Merea, 118 Ohio St. 586.

63. County of Wilson v. National Bank, 103 U. S. 776.

64. Porter v. City of Janesville, 3 Fed. 619. But see § 1496 and Cronin v. Patrick County, 4 Hughes, 529.

65. County of Wilson v. National Bank, 103 U. S. 776.

order," it is payable not to bearer, but to A. or order.[66] And whenever a bill or note is payable to a certain person or order, it is the same as if expressed to be payable to the order of that person,[67] payable to whomsoever the payee named may by indorsement order it to be paid.[68]

So the instrument, though not naming a payee on its face, yet if it furnishes a sufficient description by which he may be ascertained, it is sufficient; the maxim applying *id certum est quod certum reddi potest*.[69] Thus it suffices if it be payable to "the administrators of the estate of A.;" [70] or to the "trustees acting under the will of A.;" [71] or to the "heirs of A.," though A. were then alive; [72] or to "A. or his heirs;" [73] or to the order of the person who should thereafter indorse it; [74] for in all such cases the payee is ascertainable.[75]

Under Negotiable Instrument statute.—Under the statute it has been held that an order addressed to no one in particular, but generally to any one for whom plaintiff might be employed or who owed him money, is too indefinite and uncertain to be binding on any one,[76] and that an indorser of a note which does not name any person to whom payments shall be made, nor make the payment due to bearer, incurs no obligation.[77]

§ 100. Illustrations.—Where the writing ran, "I owe the estate of A. B. $190," it was held that no payee was sufficiently designated,

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66. Cock v. Fellows, 1 Johns. 143. See *post*, § 102.

67. Fisher v. Pomfret, 12 Mod. 125; Huling v. Hugg, 1 W. & S. 418.

68. See chapter XXI, on Transfer by Indorsement.

69. Blackman v. Lehman, 63 Ala. 553; Clarke v. Marlow, Admr., 20 Mont. 249, 50 Pac. 713. As to the identity of the payee, a note is sufficient if it discloses from whom the consideration was received. Kessler v. Clages, 147 Mo. App. 88, 125 S. W. 799 (1910).

70. Adams v. King, 16 Ill. 169; Moody v. Threlkeld, 13 Ga. 55.

71. Megginson v. Harper, 2 Cromp. & M. 322.

72. Bacon v. Fitch, 1 Root, 181.

73. Knight v. Jones, 21 Mich. 161.

74. United States v. White, 2 Hill, 59.

75. See Chadwick v. Allen, 2 Stra. 706 (1726). Note ran: "I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes for which £400 were paid him on account by Col. Synge, and that Sir Andrew delivered me Major Graham's receipt and bill on me for £10, which £10, and £15 5s., balance due Sir Andrew, I am still indebted and do promise to pay." Held a good note. See *post*, § 102.

76. Appendix, § 126. Dugane v. Hvezda Porokn No. 4, (Ia.) 119 N. W. 141.

77. Appendix, secs. 1, 8; Hilborn v. Pennsylvania Cement Co., 129 N. Y. S. 957, 145 App. Div. 442.

and it was inferred under the circumstances to be a mere memorandum of a balance due.[78] But it has been held that a note regular in form, payable "to the estate of T. A. Thornton," might be sued on by Thornton's personal representative.[79] The contrary view however has been taken.[80] If a note is payable to A., and there are two persons of the same name, father and son, it seems that it would be *prima facie* payable to the father;[81] but the son being in possession, and bringing the action, would be entitled to recover.[82] Wherever there is any misdescription or misspelling of the payee's name, it may be shown who was really intended.[83] And extrinsic evidence is in general admissible as to the subject-matter and the parties, to make both certain and show what and who was intended.[84]

§ 101. Illustrations continued.—If the note were made payable "to the secretary for the time being of a certain society," it would not be sufficient, as it would be a floating promise, the performance of which would be made to the person being secretary at its maturity;[85] but if it be payable "to the now secretary" of a certain society, it would be different, as such person could be immediately and definitely ascertained.[86] And if payable to the "trustees of W. Chapel,

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78. Bowles v. Lambert, 54 Ill. 239.

79. Hendricks' Exrs. v. Thornton, 45 Ala. 300; Shaw v. Smith, 150 Mass. 166, 6 L. R. A. 348. In New York held, that note payable "to the order of the estate of D. G. Littlefield," is a promissory note with a fictitious payee, and where it has been negotiated by the maker, is deemed as against him to be payable to the bearer. See Lewisohn v. Kent & Stanley Co., 87 Hun, 257, 33 N. Y. Supp. 826.

80. Tittle v. Thomas, 30 Miss. 132; Lyon v. Marshall, 11 Barb. 248, Edwards, J.: "The instrument sued upon (by Lyon's representatives) was made payable to the 'estate of Moses Lyon, deceased,' and not to any person or persons by name. Such an instrument is clearly not a promissory note under the statute. But whatever it may be considered, it certainly is not a promise to pay the testator, for he is described as deceased. It could only be recovered upon as a promise to pay some other person or persons. If it be regarded as a promise to pay the plaintiffs, as it was treated in this case, there was no necessity for their suing in a representative capacity; and having done so unnecessarily, they are liable to pay costs, without a special motion or order for that purpose."

81. Sweeting v. Fowler, 1 Stark. 106; Wilson v. Stubbs, Hobart, 330.

82. Stebbing v. Spicer, 19 L. J. C. P. 24, 8 C. B. 827 (65 Eng. C. L.).

83. Jacobs v. Benson, 29 Me. 132; Willis v. Barrett, 2 Stark. 29; Hall v. Tafts, 18 Pick. 455.

84. Cork v. Bacon, 45 Wis. 192; Jackson v. Sell, 11 Johns. 201.

85. Storm v. Sterling, 3 El. & Bl. 382.

86. *Ibid.*; Robertson v. Steward, 1 M. & G. 511; Davis v. Garr, 6 N. Y. 124; Rex v. Box, 6 Taunt. 325.

or their treasurer for the time being," it would suffice, as the trustees are the real payees, the treasurer being merely designated as their agent to receive payment.[87] So it would suffice if payable to "the treasurer or his successors in office" of a corporation named; for the corporation would then be the real payee, and the treasurer its agent to receive payment.[88] And such would also be the effect of a note payable "to the treasurer of a corporation," the corporation, but not the treasurer, being named.[89] A note payable to "The People of Illinois" means to the State of Illinois, and the designation is sufficient.[90] A note payable to "W. Lane, cashier First Nat. Bank of Lebanon," is payable to the bank.[91]

§ 102. Without definite payee the instrument is defective.—If no one be named or definitely referred to as payee and no blank be left, the instrument is fatally incomplete; and therefore "$500 on demand, value received," [92] is mere waste paper, and so also papers running "Good for one hundred and twenty-six dollars on demand," [93] "pay on within $750," [94] and "pay to the order of on sight." [95] But "received of A. one hundred dollars, which I promise to pay on demand," [96] is regarded as sufficient, it being inferred that A. is the payee. It has been held that where the promise is to pay "*you*," as, for instance, where the paper runs, "I. O. U. the sum of $160, which I shall pay on demand to you," parol evidence would be admissible to explain who was meant.[97] But as there is no certainty about the

87. Holmes v. Jacques, 1 Q. B. 376.

88. Fisher v. Ellis, 3 Pick. 322; Rogers v. Gibson, 15 Ind. 218; Patton v. Melville, 21 Up. Can. Q. B. 263; Sayers v. First Nat. Bank, 89 Ind. 230.

89. McBrown v. Corporation of Lebanon, 31 Ind. 268; Vater v. Lewis, 36 Ind. 293.

90. Esley v. People of Illinois, 23 Kan. 510.

91. Nave v. First Nat. Bank, 87 Ind. 204; Dutch v. Boyd, 81 Ind. 146; Erwin Lane Paper Co. v. Farmers' Nat. Bank, 130 Ind. 367, 30 N. E. 411; Darby v. Berney Nat. Bank, 97 Ala. 643, 11 So. 881.

92. Gibson v. Minet, 1 H. Bl. 569. That the fact that the name of the payee was left blank is not fatal, see *post*, § 145.

93. Brown v. Gilman, 13 Mass. 158. See also Mayo v. Chenoweth, Breese, 155; Mathews v. Redwine, 23 Miss. 233; Enthoven v. Hoyle, 13 C. B. 373; Rush v. Haggard, 68 Tex. 675.

94. Douglass v. Wilkeson, 6 Wend. 637.

95. McIntosh v. Lytle, 26 Minn. 336.

96. Green v. Davies, 4 B. & C. 235; Ashby v. Ashby, 3 Moore & P. 186; Chadwick v. Allen, 2 Stra. 706. See *ante*, § 99.

97. Kinney v. Flinn, 2 R. I. 319; Shackleford v. Hooker, 54 Miss. 716.

payee on the face of the paper, and nothing from which he may be ascertained, such a paper could not consistently with accepted principles be held negotiable.

Pothier puts a case quite similar: "If," says he, "the drawer should omit the name of the payee, but should draw the bill in this form: 'Pay a thousand livres at sight, value received of A. B.,' it appears to me reasonable to presume that the drawer intended that the bill should be payable to the person from whom the value had been received, as no other person is named to whom it ought to be paid." [98] He adds however that he has learned from an experienced merchant, that bankers would make a difficulty as to paying such a bill.[99]

§ 103. Alternative and joint payees.—A note payable to A. or to B. is not negotiable, for, as said by Abbott, C. J., in an English case: "For if a note is made payable to one or other of two persons, it is payable to either of them only on the contingency of its not having been paid to the other, and is not a good promissory note within the statute." [1] The same views have obtained in some of the United States, but the cases are not uniform on the subject. In Illinois, where the note was payable to "Oliver Fletcher or R. H. Oakes, administrators of Winslow Fletcher, deceased," Caton, C. J., said: "The instrument sued on was payable in the alternative to one of two persons, and for that reason is not a promissory note, and could not be sued on as such. * * * Here the promise was to pay Fletcher or Oakes: but which, is uncertain; which of them had the right to receive the pay is not specified, and the legal right to the money is not vested in either." [2] In New York it has also been held

98. Pothier de Change, n. 31; Story on Bills, § 55.

99. Story on Bills, § 55.

1. Blanckenhagen v. Blundell, 2 B. & Ald. 418 (1819); Osgood v. Pearson, 4 Gray, 455; Carpenter v. Farnsworth, 106 Mass. 561; Story on Bills, § 54; Thompson on Bills, 12, 34; 1 Parsons on Notes and Bills, 34. Under a statute providing that the survivor of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common unless otherwise expressed in the instrument, it was held that, where notes for the purchase price of land owned by the husband were made payable to "the order of W. G. C. or M. C.," who were husband and wife, and, at that time the husband had ample property to pay all his indebtedness but at the time of his death his estate was insolvent, the wife surviving the husband one day, the estate of each was entitled to one half of the notes. Collyer v. Cook, 28 Ind. App. 272, 62 N. E. 655.

2. Musselman v. Oakes, 19 Ill. 81 (1857).

that a note payable in the alternative is not negotiable; but, value received being expressed, it might be sued on as a nonnegotiable note.[3] And likewise in New Hampshire, but it was thought that action might be brought in the name of all the payees.[4] If the instrument were payable to "A., B., and C., or to their order or the major part of them," it would suffice, and be negotiable, for it would mean, as said by Wilde, B., "to pay to all three or their order, but I allow any two to sign for them all." [5]

Opposing decisions have been rendered in South Carolina,[6] and by one of the Circuit Courts of the United States,[7] where it has been held that a note payable in the alternative is payable to, and may be sued upon by, either one of the payees; but in neither case was the English precedent above quoted before the court. And it may be considered as settled that a bill or note payable in the alternative is not negotiable. Where the paper is payable to joint payees, as, for instance, "to A. & B.," and they are not in fact partners, the indorsement by both of them is necessary to pass title.[8] Such a note imports a joint and coequal interest in the payees, but their real interest may be shown.[9]

Under Negotiable Instrument statute.—The conflict of authority on the above question is settled on the adoption of the statute, declaring that a negotiable instrument may be drawn payable to the order of "one or some of several payees." [10] An indorsement by either one of two or more payees therein would pass title, as such a note does not fall within the terms of the provision requiring indorsement by all joint payees unless the one indorsing has authority to indorse for the others.[11]

§ 104. In the eighth place: as to the terms of negotiability.—It was formerly held that a bill payable to A. or bearer was not ne-

3. Walrad v. Petrie, 4 Wend. 576 (1830).

4. Willoughby v. Willoughby, 5 N. H. 245 (1830), approved in Quinby v. Merritt, 11 Humphr. 440 (1850).

5. Watson v. Evans, 1 Hurl. & Colt, 663 (1863), distinguishing Blanckenhagen v. Blundell, 2 B. & Ald. 417 (1819). See *post*, § 684; 1 Ames on Bills and Notes, 124; Benjamin's Chalmers' Digest, 7, 134.

6. Ellis v. McLemore, 1 Bailey (S. C.), L. R. 13 (1830).

7. Spaulding v. Evans, 2 McLean, 139 (1840).

8. Ryhiner v. Feickert, 92 Ill. 305; *post*, § 684.

9. Tisdale v. Maxwell, 58 Ala. 40.

10. Appendix, sec. 8 (5).

11. Appendix, sec. 41; Union Bank of Bridgewater v. Spies, 151 Iowa, 178, 130 N. W. 928.

gotiable so as to enable the holder to sue the drawer in his own name; [12] but the contrary doctrine is now well established.[13] It was also at one time a matter of doubt whether it was not essential to the character of a bill of exchange that it should be negotiable—that is to say, that it should be payable "to A. or order," or "to A. or bearer," or "to bearer;" for otherwise it was thought to be a mere common-law contract.[14] But it is now well settled it is not necessary to constitute a bill of exchange that it should be negotiable, and that it is entitled to grace, and is in all respects a bill, though containing no negotiable words.[15] Nor are such words necessary to the character of a promissory note, nor to entitle it to grace, though wherever the statute of Anne has been adopted, or its principles obtain, they or some similar words are requisite to its negotiability; [16] and they are also requisite to the negotiability of a bill, as without some such words making the instrument payable to A. or order, or to bearer, or to A. or assigns, the power to transfer it so as to give a right of action to the indorsee against prior parties is not imparted.[17] But the indorse-

12. Hodges v. Steward, 1 Salk. 125 (1691).

13. Grant v. Vaughan, 3 Burr. 1516 (1764). In some States peculiar phrases are essential to negotiability of promissory notes. In Alabama, Indiana, and Virginia, they must be expressed to be payable in bank. (See *ante*, chapter on Formal Requisites, § 90*a* Place of payment.) In Arkansas the words "without defalcation" must be used (see Act of April 10, 1869); and in Missouri "for value received" must be used in a note, but not in a bill; Lowenstein v. Knopf, 2 Mo. App. 159 (see Code of Missouri, chap. 86, § 15). In very many States similar statutes to that of Anne have been enacted. In Illinois a note payable to "A. or bearer," is not, under the statute, deemed negotiable. Garvin v. Wiswell, 83 Ill. 218. See *post*, §§ 663, 1496. In Indiana words of negotiability are necessary; otherwise the instrument is classed with bank checks. Sinclair v. Johnson, 85 Ind. 527.

14. Story on Bills, § 60.

15. Averett's Admr. v. Booker, 5 Gratt. 167; Michigan Bank v. Eldred, 9 Wall. 544; Wells v. Brigham, 6 Cush. 6; Story on Bills, § 60; Chitty on Bills [*159], 182.

16. Ibid; Smith v. Kendall, 6 T. R. 123, 1 Esp. 231; Rex v. Box, 6 Taunt. 328; Burchell v. Slocock, 2 Ld. Raym. 1545; Bank of Sherman v. Apperson, 4 Fed. 25; Graves v. Mining Co., 81 Cal. 304; Curtis v. Hazen, 56 Conn. 146; Davis v. Helm, 34 Mo. App. 332; Hisford v. Stone, 7 Nebr. 380; and words "without defalcation or discount" will not suffice; Maule v. Crawford, 14 Hun, 193; Stebbins v. Union Pac. R. Co., 2 Wyo. Ter. 78. See Ames on Bills and Notes, 77, 78; Parsons on Notes and Bills, 227. In some states words of negotiability are dispensed with by statute. See Cowan v. Hallack, 9 Colo. 572; Beckstrom v. Krone, 125 Ill. App. 376; Russell v. Bosworth, 106 Ill. App. 314.

17. Ellis v. Hahn, 29 Tex. Civ. App. 395, 68 S. W. 336; Douglass v. Wilkeson, 6 Wend. 637; United States v. White, 2 Hill (N. Y.), 59; Story on Bills, § 60; National Bank v. Silke, 1 Q. B. 435 (1890).

ment would give a right of action against the payee himself, as it is, in legal effect, the drawing of a bill on the party who is, or is to be, primarily liable for payment, that is, the drawee, acceptor, or maker.[18]

§ 105. Note payable to certain person only, not negotiable.—If the bill or note be payable to a certain person only, it is not negotiable so as to bind the maker or drawer in the hands of any other person than the payee,[19] though the payee, if he indorse it, will be bound thereon to his immediate indorsee.[20] If it be payable "to the bearer A.," it is the same as if simply payable to A., and is not negotiable.[21] But if payable to A. or bearer, it is the same as if payable to bearer,[22] and so if payable to A. or holder.[23] And if payable to order only, it has been held the same as payable to bearer.[24] But if payable "to the order of A." it is the same as if payable to A. or order.[25]

§ 106. Words of negotiability; form.—No precise form of words is necessary to impart negotiability. As has been said in Pennsylvania, "'order' or 'bearer' are convenient and expressive, but clearly not the only words which will communicate the quality of negotiability. Some equivalent words should be used. Words in a bill, from which it can be inferred that the person making it, or any other party to it, intended it to be negotiable, will give it a transferable quality against that person. The concession therefore may be made that if the makers of this note, having omitted the usual words to express negotiability, had said, 'this note is and shall be negotiable,' it would have been negotiable." [26]

18. Hill v. Lewis, 1 Salk. 132; Ballingalls v. Gloster, 3 East. 482; Smallwood v. Vernon, 1 Stra. 478; Thompson on Bills, 53; Story on Bills, § 60.

19. Hackney v. Jones, 3 Humphr. 612; Warren v. Scott, 32 Iowa, 22; Hill v. Lewis, 1 Salk. 132; Ames on Bills and Notes, 132. See *post*, § 633; De Hass v. Dibert, 17 C. C. A. 79, 70 Fed. 227.

20. See Story on Bills, §§ 119, 199, 202; De Hass v. Dibert, 17 C. C. A. 79, 70 Fed. 227.

21. Warren v. Scott, 32 Iowa, 22.

22. Eddy v. Bond, 19 Me. 461.

23. Putnam v. Crymes, 1 McMull. 9. See *ante*, § 99.

24. Davega v. Moore, 3 McCord, 482.

25. Frederick v. Cotton, 2 Shower, 8; Smith v. McClure, 5 East. 476; Story on Bills, § 56; Howard v. Palmer, 64 Me. 86; Dugin v. Bartol, 64 Me. 473.

26. Raymond v. Middleton, 29 Pa. St. 530, Porter, J. See United States v. White, 2 Hill (N. Y.) 59; Stadler v. First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

Under Negotiable Instrument statute.—Under the statute, a note payable to order or to bearer and negotiable and payable at a certain place is negotiable within the meaning of the statute,[27] and a note order or draft which is not payable to order or bearer is not negotiable.[28] The term "indorsement" in the statute applies only to negotiable instruments, and an indorsement by the payee of a note payable to a person named does not render the note negotiable.[29]

§ 107. Effect of making note negotiable at particular bank.—A note may be made negotiable at one bank, and payable at another, the word "negotiable" not importing, as we have already seen, that the note is also payable where it is negotiable. But making the note negotiable at a particular bank has in itself a meaning. And in a case where the note was negotiable at the Union Bank of Georgetown, in Maryland, but payable at the Bank of Potomac, in Alexandria, Virginia, Chief Justice Marshall said:[30] "By making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner the sum expressed on its face. It would be a fraud in the bank to set up offsets against this note in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up." At the time of the decision, by the laws in force in Alexandria, Virginia, an off-set might have been pleaded against the assignee, as the note was not under the Virginia laws negotiable, while, if governed by the laws of Maryland in force in Georgetown, it was a negotiable note; but the chief justice thought it entirely immaterial whether the question was governed by the laws of the one State or the other, on the grounds above stated.[31] In general, a note made negotiable and payable at a particular bank may be negotiated anywhere.[32]

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27. Appendix, secs. 1, 184. Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353; Hickok v. Bunting, 73 N. Y. S. 967, 67 App. Div. 560; Gilley v. Harrell, 118 Tenn. 115, 101 S. W. 424.

28. Appendix, secs. 1, 126. Fulton v. Varney, 102 N. Y. S. 608, 117 App. Div. 572; Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23; Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572. The absence of the words "order" or "bearer" do not affect the validity or render it nontransferable or nonassignable; their only effect is to make the instrument negotiable, and therefore cut off defenses. Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741.

29. Appendix, sec. 9 (5). Johnson v. Lassiter, 155 N. C. 47, 71 S. E. 23.

30. Mandeville v. Union Bank, 9 Cranch. 9.

31. *See post*, §§ 325–326.

32. Wardell v. Hughes, 3 Wend. 416; Schoharie Nat. Bank v. Bevard, 51 Iowa,

§ 108. In the ninth place: as to the words of consideration.—The words "value received" are almost invariably expressed in bills of exchange and promissory notes, and they were at one time thought essential, by the custom of merchants, to impart negotiability to the instrument.[33] But it is now well settled that they only express what the law itself implies from the execution of the paper;[34] and it has been said that they "are only inserted *ex majori cautela*, in order that the payee may be able to recover upon it in an action for money lent, or money had and received, in case the instrument should be defective in other respects, as a bill of exchange.[35]

When the words "value received" are inserted in a note, it is obvious that they import value received by the maker from the payee;[36] but where a bill is drawn payable to the order of a third person, they are ambiguous.

They may mean either value received by the acceptor from the drawer, or by the drawer of the payee. But the latter is the more natural and probable construction; for, as said by Lord Ellenborough, it is more natural "that the party who draws the bill should inform the drawee of a fact which he does not know, than one of which he must be well aware."[37] When however the bill is drawn payable to the drawer's own order, the words "value received" must mean re-

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258; Stadler v. First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582.

33. Byles on Bills (Sharswood's ed.) [*82], 176; Edwards on Bills, 56. See 2 Bl. Com. 468. In Missouri they are essential to the negotiability of promissory notes under the statute, but not to bills. Code, chap. 86, § 15; Bailey v. Smock, 61 Mo. 213; Lowenstein v. Knopf, 2 Mo. App. 159; International Bank v. German Bank, 3 Mo. App. 362; Taylor v. Newman, 77 Mo. 263; Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 39. Also to certificates of deposit. Savings Bank of Kansas v. National Bank of Commerce, 38 Fed. 805.

34. Poplewell v. Wilson, 1 Stra. 274 (1719); Macleod v. Snee, 2 Ld. Raym. 1481 (1727); Grant v. Da Costa, 3 Maule & S. 351 (1815); Hatch v. Frayes, 11 Ad. & El. 702; Underhill v. Philips, 10 Hun, 591; Kendall v. Galvin, 15 Me. 131; Townsend v. Derby, 3 Metc. (Mass.) 363; Hubble v. Fogartie, 3 Rich. 413; Leonard v. Walker, Brayton, 203; Arnold v. Sprague, 34 Vt. 402; Hughes v. Wheeler, 8 Cow. 77; People v. McDermott, 8 Cal. 288; 1 Parsons on Notes and Bills, 163; Bayley on Bills, 33; Thompson on Bills, 53; Byles on Bills (Sharswood's ed.) [*82], 177; Chitty on Bills [*161], 185; Story on Bills, § 63; Story on Bills and Notes, § 51; Edwards on Bills, 56, 169; Culbertson v. Nelson, 93 Iowa, 187, 61 N. W. 854, 57 Am. St. Rep. 266, citing the text; Martin v. Stone, 67 N. H. 367, 29 Atl. 845.

35. White v. Ledwick, 4 Doug. 247 (1785), Ashurst, J.

36. Clayton v. Gosling, 5 B. & C. 361 (11 Eng. C. L.), 8 Dowl. & R. 110.

37. Grant v. Da Costa, 3 Maule & S. 351.

ceived by the acceptor of the drawer; and in such a bill, if the declaration state that it was for value received by the drawer, it will be a variance.[38] A declaration in an action on a bill of exchange need not state that any value has been received, although it is stated on the face of the bill,[39] and the like rule applies to actions on notes.[40] The statement of a particular consideration, as, for instance, "in consideration of foregoing and forbearing a certain action-at-law," [41] or "for work done on logs," [42] in nowise affects the character of the instrument.[43]

§ 109. In the tenth place: as to the words of advice.—Sometimes the words "without further advice," or "as per advice," are inserted in bills of exchange; and when the latter appear, they warn the drawee not to accept or pay the bill until he receives advice respecting it. And if he disregards the intimation, he acts at his peril.[44] Such words are altogether unnecessary; but by admonishing the drawee to await advice, they sometimes serve as safeguards against alterations; and Mr. Chitty says that every prudent drawer ought to send a distinct letter of advice, and that no prudent drawee should accept without having previously received one, stating the sum for which the bill is drawn.[45]

§ 110. In the eleventh place: as to the statement of account.—Words are frequently inserted in bills of exchange indicating the account to which they are to be charged (as, for instance, "and place the same to account cotton shipment as advised"),[46] in which

38. Highmore v. Primrose, 5 Maule & S. 65.

39. Grant v. Da Costa, 3 Maule & S. 351.

40. Underhill v. Phillips, 10 Hun, 591.

41. Shenton v. James, 5 Q. B. 199.

42. Sylvester v. Staples, 44 Me. 496; Corbett v. Clark, 45 Wis. 403.

43. See *ante*, §§ 51, 60*a*, and *post*, §§ 150, 797; Jury v. Barker, El., Bl. & El. 459; Biegler v. The Merchants' Loan & Trust Co., 164 Ill. 197, 45 N. E. 512; Dollar Sav. & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089. Where notes were given reciting that they were "to defray the cost of securing the right of way for the Covina extension of the Pacific Electric Railway," the question of what was the meaning of the words "Covina extension of the Pacific Electric Railway" was a question of fact to be determined from all the circumstances surrounding their execution. First Nat. Bank v. Ruddock Co., 158 Cal. 334, 111 Pac. 86.

44. Byles on Bills [*86], 182; Edwards on Bills, 172; Story on Bills, § 65.

45. Chitty on Bills [*162], 187.

46. *In re* Entwistle, 3 Ch. Div. 477.

event they do not at all affect the qualities of the paper.[47] And they are by no means essential.[48] If the drawee be debtor to the drawer, "put it to your account" is usually inserted; but if the drawer is himself to be the debtor, he inserts, "and put it to my account." And where the amount is to be credited to a third person, "put to the account of A. B."[49]

In Indiana, where A. sued B. upon the following instrument:

"Mr. B.:

"Sir, Please pay to 'A.' or order the sum of one hundred and nineteen dollars on said bill of 1¾ in. lumber, and oblige the firm of

[SIGNED] "C. & Co."

"I accept." [SIGNED] "B."

it was held that the instrument possessed all the characteristics of a bill of exchange.[50]

§ **111. Provision in case of need.**—Sometimes provision is made, in the bill, that the holder in case of need shall apply to another drawee; by which is meant, that if the first drawee refuse to honor the bill, the second shall be resorted to. The holder is bound to apply to the party so indicated, and he may accept or pay the bill without protest. The usual form is: "*In case of need, apply to Messrs. C. & D., at E.*,"[51] or in French, "*au besoin chez Messrs. C. & D., à E.*" In the event that the party so pointed out pays the bill, the drawer will be liable to him for the full amount.[52]

§ **112. In the twelfth place: as to the attestation.**—It is not necessary that there should be an attesting witness to a bill or note, though in many cases one is resorted to as matter of convenience.[53] Where the instrument is signed by a marksman, or by initials only, it may be important to have the act attested by a witness, in order

47. See *ante*, § 51.

48. Laing v. Barclay, 1 B. & C. 392, 2 Dowl. & R. 530; Chitty on Bills [*162], 186; Jarvis v. Wilson, 46 Conn. 90.

49. Martin v. Lewis, 30 Gratt. 672.

50. Spurgin v. McPheeters, 42 Ind. 527. See Corbett v. Clark, 45 Wis. 403.

51. Chitty on Bills [*165], 189; Story on Bills, § 65.

52. Ibid.

53. Chitty on Bills (13th Am. ed.) [*166], 190; Story on Notes, § 54; Edwards on Bills, 175; 1 Randolph on Commercial Paper, § 68. The agent or attorney of the payee is not incompetent to act as the attesting witness to the execution of a note. Sowell v. Bank of Brewton, 119 Ala. 92, 24 So. 585.

to establish the genuineness of the mark or initials, and the occasion of its execution.[54] When there is an attesting witness, the signature or mark to the instrument must be proved by him and not otherwise, unless by reason of his death, absence from the country, or other cause, he cannot be produced at the trial;[55] but when such is the case, the next best evidence, that is, proof of the party's signature or mark, is not required, but proof of the attesting witness' signature is required instead.[56] Such is also the rule where the attesting witness is blind[57] or insane.[58] Such are the rules of evidence of the common law on this subject. In regard to promissory notes the rule has been so far relaxed, in some cases, that the admission of the party that he executed the instrument may be shown without calling the subscribing witness.[59] And the doctrine has been repudiated that those who attest such an instrument are agreed upon as the only witnesses to prove it; but only applied where the note is fully identified, and there is no chance of mistake in respect to what the party intended to admit.[60] In England, by statute of 1854, such instruments may be proved by other than subscribing witnesses.[61]

If the attesting witness is not able to prove the signature, by reason of not having seen the party write, secondary evidence is admissible.[62] So, if he does not recollect his own signature, it may be proved by other testimony;[63] and so if his own testimony is not clear.[64]

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54. Story on Notes, § 54.

55. Greenleaf on Evidence, §§ 569, 572; Chitty on Bills [*166], 190; Edwards on Bills, 175; 2 Parsons on Notes and Bills, 474; Stone v. Metcalf, 1 Stark. 53; Lemon v. Deane, 2 Campb. 636; M'Craw v. Gentry, 3 Campb. 232; Burt v. Walker, 4 B. & Ald. 697; Richards v. Frankum, 9 Car. & P. 211; January v. Goodman, 1 Dall. 208.

56. Greenleaf on Evidence, § 575; Story on Notes, § 54; Chitty on Bills (13th Am. ed.) [*166], 190; 2 Parsons on Notes and Bills, 480; Page v. Newman, Moody & M. 79; Kay v. Brookman, Moody & M. 286; Shiver v. Johnson, 2 Brev. 397; Dunbar v. Marden, 13 N. H. 311; Lyons v. Holmes, 11 S. C. 429; Bussey v. Whitaker, 2 Nott & McC. 374.

57. Wood v. Drury, 1 Ld. Raym. 734. But see Cronk v. Frith, 9 Car. & P. 197.

58. Nelson v. Whittall, 1 B. & Ald. 22, note; Carrie v. Child, 3 Campb. 293.

59. Shaver v. Ehle, 16 Johns. 201; Hall v. Phelps, 2 Johns. 451; Henry v. Bishop, 2 Wend. 575; Williams v. Floyd, 11 Pa. St. 499; Hodges v. Eastman, 12 Vt. 358; Edwards on Bills, 176.

60. Shaver v. Ehle, 15 Johns. 201; Edwards on Bills, 176.

61. Edwards on Bills, 176.

62. Lemon v. Deane, 2 Campb. 636.

63. Shiver v. Johnson, 2 Brev. 397; Quimby v. Buzzell, 16 Me. 470.

64. Walker v. Warfield, 6 Metc. (Mass.) 466.

SECTION III

THE SEVERAL PARTS OF A FOREIGN BILL CALLED A SET

§ 113. In order to avoid delay and inconvenience which may result from the loss or miscarriage of a foreign bill, and to facilitate and expedite its transmission for acceptance or payment, the custom has prevailed from an early period for the drawer to draw and deliver to the payee several parts of the same bill of exchange, which may be forwarded by different conveyances, and any one of them being paid, the others are to be void. These several parts are called a set, and constitute in law one and the same bill.[65] Sometimes there are four, but usually three parts.[66] And if any person undertake to draw or deliver a foreign bill to another person, it seems that he is bound to deliver the usual number of parts,[67] and it has been thought that the promisee may in such a case demand as many parts as he pleases.[68] But this is questionable.[69]

In Europe it is not unusual for the original bill to be forwarded for acceptance, and, in the meantime, a copy of it negotiated.[70] But this practice is not followed in England or in the United States.[71]

§ 114. Condition in each part of set.—It is usual for the drawer, and to his protection it is essential, to incorporate in each part of the set, a condition that it shall only be payable provided the other remain unpaid; in other respects the parts are identical in terms. Thus the first part should be expressed: "Pay this my first of exchange—second and third remaining unpaid;" where there are three parts, or where there are four parts, there should be added, "Second, third, and fourth remaining unpaid." [72] This condition operates as notice to the world that all the parts constitute one bill, and that if the drawee pay any

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65. Story on Bills, § 66; Edwards on Bills, 161; Byles on Bills [*376], 555; Chitty on Bills [*155], 178; 1 Parsons on Notes and Bills, 58, 60; Thompson on Bills, 45; Bayley on Bills, 24; 1 Randolph on Commercial Paper, § 237.

66. Ibid.

67. Kearney v. West Granada Mining Co., 1 H. & N. 412; Byles on Bills [*376], 555; Thompson on Bills, 46, 92.

68. Chitty on Bills [*154], 178; Edwards on Bills, 151; Byles on Bills [*376], 556.

69. Story on Bills, § 66.

70. Byles on Bills (Sharswood's ed.) [*377], 557.

71. 1 Parsons on Notes and Bills, 60.

72. Thompson on Bills, 45; Bayley on Bills, 24; Chitty on Bills [*155], 178.

part the whole is extinguished.[73] The condition should mention every part of the set, for if a person intending to make a set of three parts should omit the condition in the first, and make the second with a condition, mentioning the first only, and in the third take notice only of the other two, he might be obliged to pay each, for it would be no defense to an action by a *bona fide* holder on the second that he had paid the third, nor to an action on the first that he had paid either of the others.[74] But an omission is not material perhaps which upon the face of the condition must necessarily have arisen from a mistake, as if mention of an intermediate part were omitted: for instance, "pay this my first of exchange, second and fourth unpaid." [75]

§ 115. The indorser or transferrer is bound to pass to his transferee all the parts of the bill in his possession, and he may be even liable to hand them over to a subsequent transferee if he have them still in his possession.[76] If the indorser improperly circulate two parts to distinct holders he may be liable on each.[77]

§ 116. Only one part of set should be accepted.—The drawee should accept but one part of the set. And having accepted one part, he should not pay another part, for he would still be liable on the accepted part.[78] When however he pays the part he accepts, the whole bill is extinguished.[79] The party entitled to the bill should claim and hold all the parts, for payment of any one part to another person might defeat him.[80] But he to whom any one part of the set is first transferred acquires a property in all the other parts, and may maintain trover even against a *bona fide* holder, who subsequently,

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73. Holdsworth v. Hunter, 10 B. & C. 449; Wells v. Whitehead, 15 Wend. 527; Kenworthy v. Hopkins, 1 Johns. Cas. 107; Durkin v. Cranston, 7 Johns. 442; Ingraham v. Gibbs, 2 Dall. 134; Byles on Bills [*376], 555; Edwards on Bills, 161.

74. Davison v. Robertson, 3 Dow. 218; Thompson on Bills, 45; Byles on Bills (Sharswood's ed.) [*376], 556; Chitty [*155], 178.

75. Chitty on Bills [*155], 178.

76. Pinard v. Klockman, 43 L. J. Q. B. 82; 3 Best & Smith, 388 (113 Eng. C. L.).

77. Holdsworth v. Hunter, 10 B. & C. 449.

78. Holdsworth v. Hunter, 10 B. & C. 449; Chitty on Bills [*155], 178; Byles on Bills [*377], 556.

79. Ibid.

80. Holdsworth v. Hunter, 10 B. & C. 449.

by transfer or otherwise, gets possession of another part of the set.[81] For it is the duty of the person taking one part to inquire after the others; and he is advertised by their absence, that they, or one of them, may be outstanding in the hands of a prior *bona fide* holder.[82]

§ 117. Production of set in evidence.—In a suit against the drawer or indorser, the very part of the set which has been protested must be produced,[83] and there is authority for the view that in a suit against the indorser all of the set must be produced or their nonproduction satisfactorily accounted for.[84] But the United States Supreme Court has held that, when the part which has been protested is produced, it is sufficient. The indorser may defend by showing that another person than the plaintiff has a superior adverse claim by reason of prior acquisition of another part, but unless he can prove that fact, the law protects him in making payment to the holder of the part protested, and requires no explanation from him as to the whereabouts of the other parts.[85]

Under Negotiable Instrument Statute.—A bill of exchange drawn in two parts of even date and tenor constitutes one bill, and a valid payment by the drawee of one part of such a bill discharges the whole bill.[86]

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81. Perreira v. Jopp (1793), cited 10 B. & C. 450, note *a*; Chitty Jr. 1477; Holdsworth v. Hunter, 10 B. & C. 449; Byles on Bills [*376], 556.

82. Lang v. Smyth, 7 Bing. 284, 294 (20 Eng. C. L.), 5 M. & P. 78.

83. Wells v. Whitehead, 15 Wend. 527; Johnson v. Offut, 4 Metc. (Ky.) 19; 3 Kent's Com. 109.

84. Byles on Bills (Sharswood's ed.) [*377], 557; 2 Starkie on Evidence, 142. Two sets of drafts are in law to be regarded as but one, and when the payee produced the duplicates duly protested with notice of demand given, he made out a *prima facie* case, as no duty lay upon him to account for the originals, and if the originals had been paid, that fact was a defense to be affirmatively proved by the drawers. Kessler v. Armstrong Cork Co., 158 Fed. 744.

85. Downes v. Church, 13 Pet. 205, Story, J. But see Wells v. Whitehead, 15 Wend. 527, and Edwards on Bills, 163; Miller v. Palmer, 58 Md. 452.

86. Appendix, secs. 178–183. Caras v. Thelmann, 123 N. Y. S. 97, 138 App. Div. 297.

CHAPTER IV

STAMPS UPON NEGOTIABLE INSTRUMENTS

§ 118. It seems that stamp duties were first levied on the continent of Europe, in Holland, in the year 1624, being employed to raise revenues for the prosecution of war against Spain.[1] In England, they were first imposed in 1694, war then being waged against France.[2] In the United States, individual States have at different periods imposed stamp duties; but such duties were never imposed by the Federal government until July 1, 1862, during the progress of the war against the Confederate States. At that time a sweeping act requiring deeds, bills, notes, checks, and other agreements and evidences of debt to be stamped, was passed, being framed for the most part upon the model of the British statutes. The statute has long since been repealed, but the discussion of the effect of this act and of the act of 1898, is retained here, on account of its historic interest and importance, and because the information may be of value in the event that Congress should again impose such duties on any emergency arising.

§ 119. The original provisions of the Stamp Act can therefore be now of but limited interest to the legal profession and the public generally. But we append the portion of the schedule in force in 1870.[3]

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1. Edwards on Stamp Act, 2.

2. Edwards on Stamp Act, 3.

3. We transcribe also a few of the notes of Mr. Orlando F. Bump to his annotated edition of the Stamp Act:

I. Bank check, draft, or order for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, or for any sum exceeding ten dollars drawn upon any other person or persons, companies, or corporations, at sight or on demand, two cents. Checks drawn on a bank, by one of its proprietors for his daily expenses, or by its employees for their wages, must be stamped. Bout. 344. The check of a correspondent on money to his credit, to transfer an amount of money collected for him, must be stamped. Checks drawn by a State for moneys belonging to the State are exempt. Bout. 345. When a note is made payable at a certain bank, and a check is drawn upon the same bank for the amount thereof, the check must be stamped. When the note is simply

§ 120. Schedule B of the act of Congress of July 1, 1862, entitled "An act to provide internal revenue to support the government,

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charged at the bank to the account of the promisor without the use of a check, no stamp is required. Bout. 347. If a check upon a bookkeeper is used merely as a memorandum to show the liability of the drawer to the firm of which he is a member, it is exempt; but if used for any other purpose, and especially if paid out or transferred, or negotiable to a third party, it should be stamped. Bout. 349.

II. Bill of exchange (inland), draft, or order for the payment of any sum of money not exceeding one hundred dollars, otherwise than at sight or on demand, or any promissory note (except bank notes issued for circulation, and checks made and intended to be forthwith presented, and which shall be presented to a bank or banker for payment), or any memorandum, check, receipt, or other written or printed evidence of an amount of money to be paid on demand, or at a time designated, for a sum not exceeding one hundred dollars, five cents, and for every additional one hundred dollars, or fractional part thereof in excess of one hundred dollars, five cents. Promissory notes for a less sum than one hundred dollars are exempt. A check payable at sight, but post-dated, which has been put into circulation prior to the day of its date, should be stamped the same as a promissory note and not as a check payable on demand. Pope v. Burnset *et al.*, 4 I. R. R. 133. An agreement jointly and severally to pay the sums set opposite to the respective names of the makers is a promissory note. Ballard v. Burnside, 49 Barb. 102. A due-bill is a promissory note under the Illinois statutes, and in that State should be so stamped. Jacquin v. Warren, 40 Ill. 461.

III. Bill of exchange (foreign) or letter of credit, drawn in, but payable out of, the United States, if drawn singly, or otherwise than in a set of three or more, according to the custom of merchants and bankers, shall pay the same rates of duty as inland bills of exchange or promissory notes. If drawn in sets of three or more; for every bill of each set where the sums made payable shall not exceed one hundred dollars, or the equivalent thereof, in any foreign currency in which such bills may be expressed, according to the standard of value fixed by the United States, two cents. And for every additional one hundred dollars, or fractional part thereof in excess of one hundred dollars, two cents. A foreign bill of exchange or letter of credit, drawn in, but payable out of, the United States, if drawn according to the custom of merchants and bankers, is liable to the same stamp tax as an inland bill of exchange, *i. e.*, if drawn at sight or on demand, it is liable to a tax of two cents; if drawn otherwise than at sight or on demand it should be stamped at the rate of five cents for each one hundred dollars, or fractional part thereof. Duplicates require the same amount of stamps as the original. 9 I. R. R. 165. The phrase "letter of credit" is construed to refer to such letters as are equivalent to a bill of exchange, the payment of which is not contingent upon any other transaction. Bout. 353.

IV. Bill of lading or receipt (other than charter-party), for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents. An inland or domestic bill of lading is exempt. 9 I. R. R. 161. A bill of lading to any port in British North America is exempt. 9 I. R. R. 161.

V. Bond of any description, other than such as may be required in legal proceedings, or used in connection with mortgage deeds, and not otherwise charged

and to pay interest on the public debt," contained the provisions respecting the stamps required upon negotiable instruments, including bills of exchange, promissory notes, checks, bills of lading, negotiable bonds, and certificates of deposit; and this schedule, either in its original form, or as subsequently amended, continued in force until the 1st day of October, 1872, when it was repealed, "excepting only the tax of two cents on bank checks, drafts, or orders," by the subjoined section of the act of that date.[4]

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in this schedule, twenty-five cents. State and city securities are exempt from stamp duty. 1 I. R. R. 75; 3 I. R. R. 14. See Bump's ed. Stamp Act, 41.

VI. CERTIFICATE of stock in any incorporated company, twenty-five cents.

VII. CERTIFICATE of profits, or any certificate or memorandum showing an interest in the property or accumulations of any incorporated company, if for a sum not less than ten dollars and not exceeding fifty dollars, ten cents. Exceeding fifty dollars and not exceeding one thousand dollars, twenty-five cents. Exceeding $1,000, for every additional one thousand dollars, or fractional part thereof, twenty-five cents.

VIII. CERTIFICATE. Any certificate of damage, or otherwise, and all other certificates or documents issued by any port warden, marine surveyor, or other person acting as such, twenty-five cents.

IX. CERTIFICATE of deposit of any sum of money in any bank or trust company, or with any banker or person acting as such: if for a sum not exceeding one hundred dollars, two cents. For a sum exceeding one hundred dollars, five cents. When money is received as a *bona fide* deposit, against which the depositor may draw, the certificate need only be stamped with a two-cent or a five-cent stamp, according to whether the amount exceeds one hundred dollars or not, even though the deposit draws interest for part or for all the time it remains in bank. 11 I. R. R. 4, 5.

X. CERTIFICATE of any other description than those specified, five cents.

4. 17 U. S. Stat. at Large, chap. 315, § 36, p. 256: "Sec. 36. That on and after the first day of October, eighteen hundred and seventy-two, all the taxes imposed by stamps under and by virtue of Schedule B of section one hundred and seventy of the act approved June thirtieth, eighteen hundred and sixty-four, and the several acts amendatory thereof, be and the same are hereby repealed, excepting only the tax of two cents on bank checks, drafts, or orders: Provided, that where any mortgage has been executed and recorded, or may be executed and recorded, before the first day of October, Anno Domini eighteen hundred and seventy-two, to secure the payment of bonds, or obligations that may be made and issued from time to time, and such mortgage not being stamped, all such bonds or obligations so made and issued on or after the first day of October, Anno Domini eighteen hundred and seventy-two, shall not be subject to any stamp duty, but only such of their bonds or obligations as may have been made and issued before the day last aforesaid: And provided further, That, in the meantime, the holder of any instrument of writing of whatever kind and description, which has been made or issued without being duly stamped, or with a defunct [deficient] stamp, may make application to any collector of internal revenue, and that upon such application such collector shall thereupon affix the stamp provided by such holder upon such

§ **121.** It is not within the purview of this work to treat otherwise than incidentally and briefly on the subject of stamps. In "Edwards on the Stamp Act," "Bump's Annotated Edition of the Stamp Act," and in the appendix to the second volume of "Parsons on Notes and Bills," will be found very ample information respecting the act of Congress, with the decisions of the American courts, and also of the British courts *in pari materia*. Herein we shall only touch upon some of the most prominent and important points, the act no longer having application to the subject of this treatise.

§ **122. As to the construction of the stamp act.**—It will be observed that section 163 of the act relating to stamps did not in terms apply to instruments recorded, admitted, or offered as evidence in the State courts. It is therefore the conclusion of reason, and of the majority of the adjudicated cases, that Congress did not intend the act to apply to the State courts. It had full operation and effect, if construed to apply to those courts only which have been established under the Constitution of the United States, and by acts of Congress, and over which the Federal legislature can legitimately exercise control, and to which they can properly prescribe rules regulating

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instrument of writing as [is] required by law to be put upon the same, and subject to the provisions of section one hundred and fifty-eight of the internal revenue laws." It is also provided by chap. 462, p. 250, Stat. 1873-1874, as follows: "An act to provide for the stamping of unstamped instruments, documents, or papers: Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all instruments, documents, and papers, heretofore made, signed, or issued, and subject to a stamp duty or tax under any law heretofore existing, and remaining unstamped, may be stamped by any person having an interest therein, or, where the original is lost, a copy thereof, at any time prior to the first of January, eighteen hundred and seventy-six. And said instruments, documents, and papers, and any record thereof, shall be as valid, to all intents and purposes, as if stamped when made, signed, or issued, but no right acquired in good faith shall in any manner be affected by such stamping as aforesaid. Provided, That, to render such stamping valid, the person desiring to stamp the same, shall appear with the instrument, document, or paper, or copy thereof, before some judge or clerk of a court of record, and before him affix the proper stamp; and the said judge or clerk shall indorse on such writing or copy a certificate, under his hand, when made by said judge, and under his hand and seal, when made by said clerk, setting forth the date at which, and the place where, the stamp was so affixed, the name of the person presenting said writing or copy, the fact that it was thus affixed, and that the stamp was duly cancelled in his presence. Sec. 2. That all laws or parts of laws in conflict with the above, are hereby repealed. Approved June 23d, 1874."

the course of justice, and the mode of administering the law.[5] But a contrary view was taken.[6]

§ 123. Where the stamp laws of the United States are recognized as binding in the State courts, the defense that the note was not stamped until after it was issued, is not permitted to be made against a *bona fide* holder for value, who received it after it was stamped.[7] Bearing all the appearances of an instrument conforming to every legal requirement, it would only facilitate fraud to permit this latent defect to be pleaded against an innocent party; and therefore the instrument is enforced.

If a bill or note be void for want of a stamp, the creditor may nevertheless recover on the original consideration.[8]

§ 124. There must be express proof that the stamp was omitted with the intent to evade the act, in order to invalidate the instrument. The section of the Stamp Act declaring invalid the instrument, and subjecting to a penalty of $50 every person who makes, signs, accepts, or issues a bill, note, or draft for money without a stamp, "with intent to evade the provisions of this act," has been the subject of numerous adjudications; and it is distinctly settled by weight of authority, that the words, "with intent to evade the provisions of this act," are connected with and qualify both the clause declaring the instrument invalid, and that imposing the penalty of $50.[9] "It is a fraudulent and not an accidental omission at which the penalty

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5. Greene v. Holway, 101 Mass. 243; Moore v. Quirk, 105 Mass. 49; Carpenter v. Snelling, 97 Mass. 452; Beebe v. Hutton, 47 Barb. 187; Daily v. Coker, 33 Tex. 815; Davis v. Richardson, 45 Miss. 499; Moore v. Moore, 47 N. Y. 467; People v. Gates, 43 N. Y. 40; Griffin v. Ranney, 35 Conn. 239; Sammons v. Halloway, 21 Mich. 162; Fifield v. Cluse, 15 Mich. 505; Clement v. Conradt, 19 Mich. 170; Bowen v. Byrne, 55 Ill. 467; Bumpass v. Taggart, 26 Ark. 398; Burson v. Huntington, 21 Mich. 415; Atkins v. Plympton, 44 Vt. 21; Fifield v. Cluse, 22 Ind. 276; Rockwell v. Hunt, 40 Conn. 328; Duffy v. Hobson, 40 Cal. 240 (overruling Hallock v. Jaudin, 34 Cal. 171).

6. City of Muscatine v. Sterneman, 30 Iowa, 526.

7. Sperry v. Horr, 32 Iowa, 184; Robinson v. Law, 31 Iowa, 9; Blackwell v. Denie, 23 Iowa, 63; Pearson v. Cummings, 28 Iowa, 344.

8. Wilson v. Carey, 40 Vt. 179.

9. Hallock v. Jaudin, 34 Cal. 167; Sawyer v. Parker, 57 Me. 39; Rowe v. Bowman, 183 Mass. 488, 67 N. E. 636; Green v. Holway, 101 Mass. 243; Desmond v. Norris, 10 Allen, 250; Redlich v. Doll, 54 N. Y. 241; Harper v. Clark, 17 Ohio St. 190; Hitchcock v. Sawyer, 39 Vt. 412; Rhemstron v. Cone, 26 Wis. 163.

of the statute" is levied, says the United States Supreme Court, concurring in effect with the State authorities herein cited.[10]

§ **125.** A number of cases concede that there must be a fraudulent "intent to evade the provisions of the act," in order for the instrument to be invalid, or the party to be subject to the penalty imposed; but maintain that the mere omission to put the proper stamp on the paper is presumptive evidence that such intent to evade the act existed, on the ground that every person must be presumed to know the law, and is chargeable with the duty to comply with it.[11] But penal laws and laws concerning revenues must be strictly construed. Stamps are frequently omitted by inadvertence or mistake; and to throw the burden of proving the negative proposition that he had no intent to evade the act upon the party would be a harshness of construction unfamiliar to the liberal principles of the common law. And the cases which hold that the intent to evade the act must be affirmatively shown, in addition to the mere fact of omission, commend themselves to favor as embodying the better opinion of this question.[12] It will therefore never avail to demur to an unstamped instrument.[13]

§ **126. Power of Congress.**—The gravest question which the Federal Stamp Act can give rise to is, whether or not Congress has the power so to frame its laws for taxation as to prescribe the formalities of contracts, and records, of process to institute suits, and of evidence to sustain them. The power of Congress to raise revenue by taxation is admitted; but still it must be remembered that the Federal and State governments can neither trench upon the independent existence of the other, and must therefore exercise the powers existing

10. Campbell v. Wilcox, 10 Wall. 421.

11. Harper v. Clark, 17 Ohio St. 190; Miller v. Morrow, 3 Coldw. 587; Beebe v. Hutton, 47 Barb. 187; Howe v. Carpenter, 53 Barb. 382; Miller v. Larmon, 38 How. Pr. 417; Maynard v. Johnson, 2 Nev. 16; Wayman v. Torreyson, 4 Nev. 124.

12. Campbell v. Wilcox, 10 Wall. 421; Daily v. Coker, 33 Tex. 815; Moore v. Moore, 47 N. Y. 467; Green v. Holway, 101 Mass. 243; Moore v. Quirk, 105 Mass. 49; Powell v. Feely, 49 Ill. 143; U. S. Express Co. v. Haines, 48 Ill. 248; Craig v Dimock, 47 Ill. 308; Morris v. McMorris, 44 Miss. 441; Davis v. Richardson, 45 Miss. 499; Hallock v. Jaudin, 34 Cal. 167; Mitchell v. Mitchell, 32 Iowa, 421, overruling former cases in order to conform with decisions of Supreme Court of United States (see former case of Muscatine v. Sterneman, 30 Iowa, 526); Trull v. Menetone, 12 Allen, 396; Lynch v. Morse, 97 Mass. 458; Sawyer v. Parker, 57 Me. 39; Whiteman v. Sheckle, 43 Mo. 537; McGovern v. Hoseback, 53 Pa. St. 177.

13. Campbell v. Wilcox, *supra*

in each, in a manner consistent with the legitimate freedom of both within their proper spheres. The United States Supreme Court has, accordingly, held that a State cannot tax the branches of the national banks, or their stocks and securities, or the salaries of government officers.[14] And, reciprocally, the doctrine has been established by preponderance in numbers of cases, and by the weight of reason and authority, that the Federal government has no power, in the form of taxation or otherwise, to prescribe the formalities of contracts, records, process, or evidence; and that in so far as the Stamp Act of Congress, or any other act, undertakes so to do, it is unconstitutional and void.[15] They might therefore be admitted as evidence in State courts, although unstamped. But Congress has power to establish the rules of evidence in the Federal courts, and also to provide appropriate remedies by fine or imprisonment for the enforcement of its revenue laws.[16]

§ 127. It has been held that the United States internal revenue laws were not in operation in the Confederate States during the war between them and the United States, and that it was therefore unnecessary to stamp promissory notes made during the war, in order to give them validity.[17]

§ 127a. Federal Stamp Act of 1898—Negotiable Instruments taxed.—For the purpose of raising revenue to defray the expenses of the war with Spain, Congress, on the 13th day of June, 1898, enacted "An act to provide ways and means to meet war expenditures and for other purposes."

The act referred to was essentially a revenue enactment, and among other things, negotiable contracts were made subject to revenue obligations. By the twenty-fifth section of this statute, it was provided:

"Bank check, draft, or certificate of deposit not drawing interest, or order for the payment of any sum of money, drawn upon or issued by any bank, trust company, or any person or persons, companies, or corporations, at sight or on demand, two cents.

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14. McCullough v. State of Maryland, 4 Wheat. 316; Weston v. City of Charleston, 2 Pet. 442; Dobbins v. Comrs. of Erie, 16 Pet. 435.

15. Craig v. Dimock, 47 Ill. 308; Latham v. Smith, 45 Ill. 29; Bumpass v. Taggart, 26 Ark. 398; Davis v. Richardson, 45 Miss. 499; Hunter v. Cobb, 1 Bush (Ky.), 239. See Ebert v. Gitt, 95 Md. 186, 52 Atl. 900.

16. Craig v. Dimock, 47 Ill. 308; Clemens v. Conrad, 19 Mich. 170.

17. McElvain v. Mudd, 44 Ala. 48; Susong v. Williams, 1 Heisk. 625.

"Bill of exchange (inland), draft, certificate of deposit drawing interest, or order for the payment of any sum of money, otherwise than at sight, or on demand, or any promissory note, except bank notes issued for circulation, and for each renewal of the same, for a sum not exceeding one hundred dollars, two cents; and for each additional one hundred dollars or fractional part thereof, in excess of one hundred dollars, two cents. And from and after the first day of July, eighteen hundred and ninety-eight, the provisions of this paragraph shall apply as well to original domestic money orders issued by the government of the United States, and the price of such money orders shall be increased by a sum equal to the value of the stamps herein provided for.

"Bills of exchange (foreign) or letter of credit (including orders by telegraph or otherwise for the payment of money issued by express or other companies or any person or persons), drawn in but payable out of the United States, if drawn singly or otherwise than in a set of three or more, according to the custom of merchants and bankers, shall pay for a sum not exceeding one hundred dollars, four cents, and for each one hundred dollars or fractional part thereof in excess of one hundred dollars, four cents.

"If drawn in sets of two or more: For every bill of each set, where the sum made payable shall not exceed one hundred dollars, or the equivalent thereof, in any foreign currency in which such bill may be expressed, according to the standard of value fixed by the United States, two cents; and for each one hundred dollars or fractional part thereof in excess of one hundred dollars, two cents.

"Bills of lading or receipt (other than charter-party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

Section 14 provided:

"That any bond, debenture, certificate of stock, or certificate of indebtedness issued in any foreign country shall pay the same tax as is required by law on similar instruments when issued, sold, or transferred in the United States; and the party to whom the same is issued, or by whom it is sold or transferred, shall, before selling or transferring the same, affix thereon the stamp or stamps indicating the tax required."

§ **127b. Exemptions from stamp tax.**—Section 17 provides as follows:

"That all bonds, debentures, or certificates of indebtedness issued

by the officers of the United States government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this act such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity: *Provided further*, That stock and bonds issued by co-operative building and loan associations whose capital stock does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

§ **127c. Penalties.**—Sections 10, 11, and 13 provide the penalties for a willful evasion of the provisions of the act, and it should be noted that while the penalties for an intentional violation of the law were severe, the law was quite liberal in cases where the party, through accident or ignorance, failed to affix the stamp required. Section 10 provided:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, or shall accept or pay, or caused to be accepted or paid, with design to evade the payment of any stamp tax, any bill of exchange, draft, or order, or promissory note for the payment of money, liable to any of the taxes imposed by this act, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax hereby charged thereon, he, she, or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars, at the discretion of the court."

Section 11 provided:

"That the acceptor or acceptors of any bill of exchange or order for the payment of any sum of money drawn, or purporting to be drawn, in any foreign country, but payable in the United States, shall, before paying or accepting the same, place thereupon a stamp, indicating the tax upon the same, as the law requires for inland bills of exchange or promissory notes; and no bill of exchange shall be paid or negotiated without such stamp; and if any person shall pay or negotiate, or offer in payment, or receive or take in payment, any such draft or order, the person or persons so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be pun-

ished by a fine not exceeding one hundred dollars, in the discretion of the court."

The proviso in section 13 was designed to provide a liberal remedy for all cases of ignorant or accidental failure to stamp the instrument. So much of it as bore directly upon this subject read as follows:

"*Provided*, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon at the time of issuing, selling, or transferring the said bonds, debentures, or certificates of stock or of indebtedness, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or, if said instrument be lost, to a copy thereof, he or they shall appear before the collector of internal revenue of the proper district, who shall, upon the payment of the price of the proper stamp required by law, and of a penalty of ten dollars, and, where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty dollars, on payment also of interest, at the rate of six per centum, on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such bonds, debenture, certificate of stock or of indebtedness or copy, and note upon the margin thereof the date of his so doing and the fact that such penalty has been paid; and the same shall thereupon be deemed and held to be as valid, and to all intents and purposes, as if stamped when made or issued: *And provided further*, That where it shall appear to said collector upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped, at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any willful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the making or issuing thereof, be brought to the said collector of internal revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid and to cause such instrument to be duly stamped."

§ **127d. Repealed.**—Congress, by the act of April 12, 1902, ch. 500, sec. 7, 32 Stat. L. 97, repealed the act of 1898, so far as it related to stamps on negotiable instruments.

CHAPTER V

IRREGULAR, AMBIGUOUS, AND FICTITIOUS INSTRUMENTS, AND INSTRUMENTS IN BLANK

SECTION I

IRREGULAR AND AMBIGUOUS INSTRUMENTS

§ 128. Same persons as different parties.—Ordinarily, as we have already seen, a bill of exchange comprises three separate and distinct parties, a drawer, a drawee, and a payee. But sometimes the drawer and payee are the same person, as where the drawer expresses the bill to be payable to himself only; or to himself or order. And in such case when indorsed, it becomes payable to order, or bearer, as the case may be.[1] There is no doubt that there may be a bill to which only one individual is a party, as where the drawer draws a bill upon himself, payable to his own order; [2] and the same person may be drawer, payee, and acceptor.[3] The drawer may also draw a bill upon himself, payable to the order of a third party.[4] But in all cases where

1. Rice v. Hogan, 8 Dana, 134; Woods v. Ridley, 11 Humphr. 194; Hall v. Shorter, 46 Ala. 453; Columbus Ins. & Bkg. Co. v. First Nat. Bank, 73 Miss. 96, 15 So. 138.

2. Harvey v. Kay, 9 B. & C. 364; Planters' Bank v. Evans, 36 Tex. 592; Walton v. Williams, 44 Ala. 347; Randolph v. Parish, 9 Port. 76; Chitty on Bills (13th Am. ed.) [*25], 33; Byles on Bills (Sharswood's ed.) [*89], 185.

3. As in Lovejoy v. Spafford, 93 U. S. (3 Otto) 430.

4. Roach v. Ostler, 1 Man. & Ry. 120; Dehers v. Harriott, 1 Shower, 163 (1691); Robinson v. Bland, 2 Burr. 1077 (1760); Mayor v. Hammond, Chitty, Jr., 1423; Harvey v. Kay, 9 B. & C. 364; French v. Gordon, 10 Kan. 370; Planters' Bank v. Evans, 36 Tex. 592. In this case suit was brought by an indorsee against the maker of the following paper: "Ten months after date pay to the order of myself, thirty-nine hundred dollars, for value received, and charge to account of yours, H. E. To M. C. & Co., New Orleans, La.;" which instrument was accepted by M. C. & Co., and bore the indorsement in blank of the maker and payee. Held (1) that it was optional with the indorsee, either to treat this instrument as a bill of exchange, and sue the drawer and the acceptor together, or to treat it as a promissory note, and sue the maker alone. Held further (2), that such an instrument, when delivered to the drawee, imports that it is not drawn against funds of the drawer, in the hands of the drawee. And as the indorsee acquired the

the drawer and drawee are the same person, the instrument, although it be declared upon as a bill, may be regarded as in legal effect a promissory note; in which case the drawer will be bound without notice of dishonor; [5] or what is the same as a promissory note, it may be regarded as an accepted bill, the drawer's engagement that he himself, who is the drawee also, will pay it, being equivalent to acceptance.[6] A third party writing his name across the face of such a paper could not be the acceptor, because not the drawee, and would be regarded as an indorser.[7]

In practice, it is usual to declare upon such instruments as bills of exchange, not admitting the identity of the drawer and drawee.[8] And their identity, as it seems, must be proved by the party alleging it.[9] Where an agent draws a bill upon his principal by his authority, and for money obtained and used in his business, the drawer and drawee, it has been held, may be treated as in fact the same party, and held without demand or notice.[10]

§ **129.** Where a copartnership carries on business at two places, and at one place draws a bill upon the firm at another, the drawer and drawee being the same, the bill may be treated as a promissory note, or as a bill at the holder's option. Thus where the manager of a branch of a joint-stock bank drew a bill upon the bank at another place, Maule, J., said: "This is a bill drawn by the whole company, acting by their directors upon the whole company. It is a promise, acting on behalf of the company, under the order of the directors, that the company shall pay. It is a promise made by the company at Dorking to pay in London. It is therefore in effect a promissory

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instrument before maturity, it is further held (3), that no defense was presented by an answer which alleged that the defendant had settled it with M. C. & Co., the drawees, without notice of its transfer to the plaintiff. Evans, P. J., dissenting. Planters' Bank v. Evans, 30 Tex. 592.

5. Roach v. Ostler, 1 Man. & Ry. 120; Randolph v. Parish, 9 Port. 78; Wardens of St. James' Church v. Moore, 1 Ind. (Carter) 289; Chicago R. Co. v. West, 37 Ind. 211; Planters' Bank v. Evans, 36 Tex. 592. See Armfield v. Allport, 27 L. J. Exch. 42; Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166, citing text.

6. Cunningham v. Wardwell, 3 Fairfax, 466; Planters' Bank v. Evans, 36 Tex. 592.

7. Walton v. Williams, 44 Ala. 347.

8. Roach v. Ostler, 1 Man. & Ry. 120; Harvey v. Kay, 9 B. & C. 364; Starke v. Cheeseman, Carthew, 509.

9. Cooper v. Poston, 1 Duv. 92.

10. Raymond v. Mann. 45 Tex. 301 (1876); McCormick v. Hickey, 24 M. App. 363.

note." [11] In a House of Lords' case it was held that where a firm in one country drew upon the same firm in another country, and the bill was accepted, the paper was perhaps strictly a promissory note, but the holder might treat it either as a bill or a note; and where it appears to have been the intention that it should be negotiable in the market as a bill of exchange, it should be so treated.[12] The same principle applies where the duly authorized officer of an incorporated company draws on its behalf upon another officer, having custody of its funds; and the instrument may be treated as the note of the corporation.[13]

§ 130. Notes payable to the order of the maker.—A note must have two parties, a maker and a payee, and a note made by a person payable to himself, or to himself or order, is a nullity until it is indorsed by him and negotiated; [14] it then becomes in legal effect payable to the indorsee and it may be so treated and declared on.[15]

11. Miller v. Thompson, 3 M. & G. 576; Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166, citing text.

12. Williams v. Ayres, 3 App. Cas. 133.

13. See chapter XIV, on drafts or warrants of one corporate officer upon another. In 1 Parsons on Notes and Bills, 63, it is said: "Where a duly authorized agent or officer of an incorporated company, draws in behalf of the company upon the treasurer, cashier, or other officer of the company who has the custody of, and is charged with the duty of disbursing, the company's funds, this is in substance, it should seem, a draft by the company upon itself, and may be treated either as a bill of exchange or a promissory note."

14. German Bank v. De Shon, 41 Ark. 337; Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 145, citing the text; Myers v. Weger, 62 N. J. L. 432; Harnett v. Holdrege, 5 Nebr. (Unof.) 114, 97 N. W. 443, affirmed on rehearing 73 Nebr. 570, 103 N. W. 277, 119 Am. St. Rep. 905; Reid's Admr. v. Windsor, 69 S. E. 1101, 111 Va. 825; Roach v. Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102. In Muhling v. Sattler, 3 Metc. (Ky.) 286, such a note was held to be a nullity, the court saying that the statute of Anne, had not been passed in that State, and the utmost effect given such papers being to admit them as evidence of indebtedness from maker and indorser to indorsee, when executed for such indebtedness, and not then unless so averred.

15. Norfolk Nat. Bank v. Griffin (N. C.), 11 S. E. 1049, citing the text; Wood v. Mytton, 10 Q. B. 805 (1847); Hooper v. Williams, 2 Exch. 13 (1848). In this case Parke, B., said: "The principal question was, what the effect of this instrument was as it stood originally before it was indorsed, and whether it was, within the statute of 3 & 4 Anne, chap. 9, a good and valid note payable to the order of the maker. The opinions of this court and of the Queen's Bench as to this point are at variance with one another. In Flight v. Maclean, this court held, on special demurrer to the first count of a declaration—stating a note payable to the order of the maker, and indorsed to the plaintiffs—that the count was bad, such a note

Notes of this kind are of common use in England and in this country, and though characterized as "informal, if not absurd in form," they

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not being within the statute of Anne. The case of Wood v. Mytton afterward came on in the Queen's Bench. It was an action on a similar note indorsed to the plaintiff. After verdict for the plaintiff, a motion was made in arrest of judgment, and the court discharged the rule, holding, after a minute examination of all the provisions of the statute of Anne, that such a note was within that statute, and assignable by indorsement. Though these decisions are not at variance, as will be afterward explained, the construction of the statute by the two courts differs. After a careful perusal of the statute, we must say that we do not think that it ever contemplated the case of notes payable to the maker's order, which are incomplete instruments, and have no binding effect on any one till indorsed. The Court of Queen's Bench thought that, though the first part of the first section of the statute of Anne applied only to notes payable to another person, or his order, or to bearer, which notes it makes obligatory between the parties, yet that the second part applies to every note payable to any person and therefore includes a note payable to the maker or his order. It appears to us that this is not the meaning of this part of the section, which is, as we think, intended to make those instruments to which it had previously given an obligatory effect between the original parties transferable to third persons, so as to enable them to sue upon them as upon the transfer of bills of exchange. The previous part of the section had given to the payee when the note was made payable to another person, or to another person or order, and to the bearer, whoever at any time he might be, a right to sue, thus providing entirely for notes payable to bearer, whether in the hands of the original or a subsequent bearer; and then the section proceeds to make the class of notes payable to a person or order transferable. We think that the legislature, by the second part of the section, could only mean to make that instrument which gave a right to sue assignable and no right to sue could exist in any one in the case of a note payable to the maker's order until the order was made in the shape of an indorsement. Until that indorsement was made, it was an imperfect instrument, and, in truth, not a promissory note at all, and consequently not transferable under the statute. What then, is the effect of the indorsement to another person? We think it was to perfect the incomplete instrument, so that the original writing and indorsement taken together became a binding contract, though an informal one, between the maker and the indorsee; and then, and not till then, it became an assignable note. * * * It appears to us, then, that the instrument in this case was, when it first became a binding promissory note, a note payable to bearer, and consequently was properly described in the declaration. This view of the case reconciles the decision of this court in Flight v. Maclean with that of the Queen's Bench in Wood v. Mytton, but not the reasons given for those decisions. In the case in this court, the declaration was bad on special demurrer, as it did not set out the legal effect of the instrument. In that in the Queen's Bench, the motion being for arrest of judgment, the declaration was in substance good, for it set out an inartificial contract, which had the legal effect of a valid note payable, as stated on the record, to the plaintiff. The difference between the two courts in the construction of the statute is of no practical consequence, as, in our view of the case, securities in this informal, not to say absurd form, are still not invalid; and it might be of much inconvenience

are designed to enable the holder to pass them without indorsement, and are simply roundabout notes payable to bearer.

The fact that the name of the payee is the same as that of the maker does not show that they are the same person; on the contrary, when such a note is sued on, it will be presumed that they are different persons until their identity is proved.[16] It might be urged with force that the maker is estopped from showing his identity with the payee. Where the maker of a note payable to his own order, wrote and signed on the back thereof a certificate of the amount of his property, and delivered the same, it was held that the title did not pass, the words on the note not indicating his intention to make such an order as would create liability on his part.[17]

Under Negotiable Instrument statute.—By the terms of the statute, a negotiable instrument may be drawn payable to the order of the drawer or maker,[18] but it also declares the rule that where a note is drawn to the maker's own order, it is not complete until indorsed by him.[19]

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if they were, for there is no doubt that this form of note, probably introduced long after the statute of Anne—and for what good reason no one can tell—has become, of late years, exceedingly common; and it is obvious that, until they are indorsed, they must always remain in the hands of the maker himself, and so he can never be liable upon them." See Brown v. De Winton, 17 L. J. C. P. 280 (60 Eng. C. L.) Gay v. Lander, 17 L. C. J. P. 287 (60 Eng. C. L.); Main v. Hilton, 54 Cal. 110; Bishop v. Rowe, 71 Me. 263; Commonwealth v. Butterick, 100 Mass. 12; Commonwealth v. Dullinger, 118 Mass. 439; Dubois v. Mason, 127 Mass. 37; Baldwin v. Shuter, 82 Ind. 560; United States v. White, 2 Hill, 154; Plets v. Johnson, 3 Hill, 114; Hall v. Shorter, 46 Ala. 453; Muldrow v. Caldwell, 7 Mo. 563; Seull v. Edwards, 6 Eng. 24; Miller v. Weeks, 22 Pa. St. 89; Smalley v. White, 44 Me. 442; Woods v. Ridley, 11 Humphr. 194; Wilder v. De Wolf, 24 Ill. 190; 1 Parsons on Notes and Bills, 17, 18; Byles on Bills (Sharswood's ed.) [*6], 75, [*87], 183; Thompson on Bills, 52. But in Flight v. Maclean, 16 M. & W. 51, a demurrer to a declaration charging that the defendant made his note, and thereby promised to pay defendant £500, and that the defendant indorsed the same to plaintiff, was sustained. As to the law of New York under statute and decisions, see § 136, and note. Bank of Winona v. Wofford, *et al.* 71 Miss. 711, 14 So. 262; Columbus Ins. & Bkg. Co. v. First Nat. Bank, 73 Miss. 96, 15 So. 138. See Lowrie v. Zunkel, 49 Mo. App. 153; Barling v. Bank, 1 C. C. A. 510, 50 Fed. 620, text cited; Bank v. Barling, 46 Fed. 357, citing text.

16. Cooper v. Poston, 1 Duv. 92; First Nat. Bank v. Payne, 11 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520, citing text.

17. Pickering v. Cording, 92 Ind. 306.

18. Appendix, sec. 8. Melton v. Pensacola Bank & Trust Co., 190 Fed. Rep. 126, 111 C. C. A. 166.

19. Appendix, sec. 184. Sherman v. Goodwin, 11 Ariz. 141, 89 Pac. 517;

§ 131. Election of holder of ambiguous instruments.—If the instrument be so ambiguous that it is doubtful whether it be a bill or note, the holder may treat it as either, at his election.[20] Thus, where the form of the instrument was—

"£44 11s. 5*d*. LONDON, 5th August, 1883.

"Three months after date I promise to pay Mr. John Bury, or order, forty-four pounds eleven shillings and five pence. Value received.

"JOHN BURY.

"J. B. Grutherot,

"35 Montague Place, Bedford Place."

and Grutherot's name was written across the paper as an acceptance, and Bury's name on the back as an indorsement; it was held that Bury might be treated either as a drawer of a bill on Grutherot, or as the maker of a note, and therefore was bound without notice of dishonor. Holroyd, J., said: "Until Grutherot put his name to this instrument it was clearly in terms a promissory note, and having been once such, the fact of his having afterward put his name to it as acceptor cannot alter the nature of it." [21] Where the instrument ran, "On demand I promise to pay A. B., or bearer, the sum of £15 for value received," and was addressed in the margin to defendant, who wrote upon it "Accepted, J. Bell," it was considered to be in effect the note of Bell, as it contained a promise to pay, although in terms it was an acceptance.[22] In Scotland, where J. D. accepted a paper drawn on him payable to the order of A. D., but there was no subscription of a drawer's name, it was considered to contain all the essential elements of a promissory note.[23] But such an instrument has been more properly regarded as inchoate, and although capable of being completed, to be in its inchoate form neither a bill nor a note.[24]

Where the language is doubtful and will admit of more than one interpretation, as for instance, where under the signature of the maker there is a memorandum as to a lien on personalty to secure the note, record evidence is admissible to show the situation, motives, and

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Simon v. Mintz, 101 N. Y. S. 86, 51 Misc. 670; Edelman v. Rams, 109 N. Y. S. 816, 58 Misc. 561.

20. Heise v. Bumpass, 40 Ark. 547, citing the text.

21. Edis v. Bury, 6 B. & C. 433 (13 Eng. C. L.).

22. Block v. Bell, 1 M. & R. 149.

23. Drummond v. Drummond, Ct. Sess., Feb. 8, 1785; Morrison's Dictionary of Decisions; Ames on Bills and Notes, vol. I, p. 883.

24. See cases cited, § 92.

circumstances of the parties, and that a party who signed the memorandum intended to bind himself as a party to the note.[25]

§ 132. Further illustrations.—In another case, where the instrument ran, "Two months after date I promise to pay A. B. or order £99, (signed) H. Oliver," and was addressed to J. E. Oliver, and accepted by him, it was held that it might clearly be declared on against H. Oliver as a bill of exchange. Erle, J., said: "It is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or as a bill of exchange." And Crompton, J., said it was most important that the decision should not be impeached; "that equivocal instruments of this kind, possessing the character both of promissory notes and bills of exchange, may be treated as either." [26]

§ 133. Sometimes the instrument is in the common form of a bill of exchange, except that the word "at" is substituted for "to" before the name of the drawee—as in the following manner:

"Two months after date, pay to the order of John Jenkins £78 11s., value received.

"THOS. STEVENS.

"At Messrs. JOHN MERSON & Co."

Such an instrument may be undoubtedly declared on as a bill, and Lord Ellenborough thought that perhaps it might be treated as a note, at the option of the holder.[27] But in a later case, where an indictment for forgery described a similar instrument as a promissory note, it was held a variance, as it was in law a bill of exchange.[28] Mr. Chitty says that if such word "at" before the drawee's name "is written so small, or in a manner so indistinct, as to be capable of deceiving, it might be declared on either as a bill or as a promissory note after it is due." [29] But the authority cited only establishes that it undoubtedly is a bill,[30] and this seems to us the correct conclusion.[31]

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25. Bacon v. Dodge, 62 Vt. 461, 20 Atl. 197; Wing v. Cooper, 37 Vt. 169.

26. Lloyd v. Oliver, 18 Q. B. 471 (83 Eng. C. L.). To same effect, see Brazelton v. McMurray, 44 Ala. 323. See *ante*, § 98; *post*, § 485.

27. Shuttleworth v. Stevens, 1 Campb. 407 (1808). See also Allan v. Mawson, 4 Campb. 115 (1814).

28. Rex v. Hunter, Russ. & Ry. C. C. 511.

29. Chitty on Bills (13th Am. ed.) [*25], 33, citing Allan v. Mawson, 4 Campb. 115. See also Chitty, Jr., 11.

30. Allan v. Mawson, 4 Campb. 115, Gibbs, C. J.

31. Benjamin's Chalmers' Digest, 4.

§ **134. As to certified notes.**—There is no such thing as acceptance of a regular promissory note; but when notes are expressed to be payable at a particular bank, there may be a custom for the bank, with the consent of the holder, instead of paying it at maturity, when authorized to do so, to certify it as "good," in like manner as checks are often certified. By such certificate the bank becomes the debtor, and the parties to the note are discharged; and the bank cannot afterward say that there were no funds of the maker on deposit, or that it was not authorized so to appropriate them. In New York it has been said on this subject: "The presentation of the note at the counter of the bank, on its maturity for payment, was in the ordinary course of business; and so was the certificate then and there indorsed by the teller, certifying that the same was good. The legal effect and force of such certificate was, that the maker had deposited funds in the bank to meet said note; and that the bank then held the same in deposit for that purpose, and would pay the amount upon request. * * * The indorsement was, in effect, an absolute engagement on the part of the bank to pay the note, and dispense with protest, or steps to charge the indorser, as much so as if the defendant had actually received the cash on the presentation of the note, instead of taking the certificate of the teller that the note was good." [32]

§ **135.** In another New York case it appeared that on the day a note payable at the Irving Bank matured, it was there presented, certified as good, and charged in account against the maker. The maker had no funds to meet it, which was discovered before 3 o'clock on the same day; and the Irving Bank requested that its certificate be canceled. This was refused; whereupon the Irving Bank took up the note, presented it at its own counter, refused payment, and notified the indorsers. It was held that the Irving Bank, under these circumstances, had a right to retract its certificate; that it took the note as a purchaser, and not as a payor, and that although it was marked as paid by the Seventh Ward Bank, which held it for collection; and therefore that the maker and indorsers were bound to the Irving Bank.[33]

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32. Mead v. Merchants' Bank, 25 N. Y. 148.

33. Irving Bank v. Wetherald, 36 N. Y. 337; Brooklyn Trust Co. v. Toler, 65 Hun, 187, 19 N. Y. Supp. 975.

SECTION II

BILLS AND NOTES TO WHICH THERE ARE FICTITIOUS OR NONEXISTING PARTIES

§ 136. The law abhors fraud and discountenances the instruments by which it may be committed. For this reason bills and notes payable to fictitious payees are not tolerated, and will never be enforced, save when in the hands of a *bona fide* holder, who received them without knowledge of their true character. The appearance of a name upon the paper as a payee and indorser is naturally calculated, and has been often used as a means to give it fictitious credit, whereby innocent parties are beguiled into purchasing it. The use of fictitious names in this manner has been highly censured, and the person fraudulently indorsing such a name upon a bill or note, to give it currency, would be guilty of forgery.[34]

There is no doubt that if the holder knew, at the time that he took the bill, that the payee was a fictitious person, he cannot recover upon it against the acceptor, though the acceptor also had knowledge of the fiction, it being the policy of the law to interdict the circulation of such deceptive instruments.[35] Nor is there any doubt that such a bill or note is, in effect, payable to bearer, and may be declared on as such by a *bona fide* holder, who acquired it in ignorance of the fact against the drawer,[36] and also against the acceptor, *supra protest*, who

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34. Thompson on Bills, 52. See chapter on Forgery. Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App 322, 33 N. E. 247, 34 N. E. 608, 52 Am St Rep. 450, quoting text; The Governor v. Vagliano Bros., L. R., App. Cas. 107 (1891).

35. Hunter v. Jeffery, Peake's Adm. Cas.; Chitty, Jr., 587 (1797); Minet v. Gibson, 3 T. R. 481 (1789), affirmed in the House of Lords, 1 H. Bl. 569; 2 Brown's Parl. Cas. 48 (1791).

36. Collis v. Emett, 1 H. Bl. 313 (1790). See also Vere v. Lewis, 3 T. R. 298 (1789), Lord Kenyon, C. J., Ashurst and Buller, JJ.; Kohn v. Watkins, 26 Kan. 691; Phillips v. Inthun, 18 J Scott (N. S.), 694 (114 Eng. C. L.); 18 C. B. (N. S.) 694; Byles on Bills (Sharswood's ed.) [*79], 173; Lane v. Krekle, 22 Iowa, 404; Forbes v. Espy, 21 Ohio (N. S.) 483; Rogers v. Ware, 2 Nebr. 29. In New York it is provided by statute that "notes made payable to the order of the maker thereof, or to the order of a fictitious person, shall, if negotiated by the maker, have the same effect, and be of the same validity, as against the maker and all persons having knowledge of the facts, as if payable to bearer" (1 Rev. Stat. 768). The "knowledge of the facts" therein referred to has been held to be "simply that the note is payable to the order of the maker, or of a fictitious person. If so pay-

is subrogated for the drawer.[37] He may also recover against an acceptor in the ordinary course of business, if he knew of the fiction when he accepted, and thus participated in the fraud.[38]

§ 137. Acceptor's knowledge of fictitious payee.—In a case before Lord Ellenborough, where the acceptor of a bill having a fictitious payee was sued, it was held that such a bill was neither, in effect, payable to the order of the drawer, or to bearer, but was utterly void. On a motion for a new trial however Lord Ellenborough said that he conceived himself bound by Minet v. Gibson, and other cases which had been carried up to the House of Lords, and though by no means disposed to give them any extension, yet if it had appeared that the acceptor knew the payee to be a fictitious person when he accepted, he should have directed the jury to find for the plaintiff.[39] And this

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able, the name of the payee need not be indorsed thereon before negotiation. It must then be treated, without such indorsement, as a note payable to bearer." And it has been also considered that the indorser of such a note would not be permitted to deny knowledge of such facts to defeat the note, as he must be taken to have known the contents. Irving Nat. Bank v. Alley, 79 N. Y. 536.

37. Phillips v. Inthun, 18 J. Scott, 694 (114 Eng. C. L.).

38. Edwards on Bills, 125, 126, 128; Hunter v. Blodgett, 2 Yeates, 480; Tatlock v. Harris, 3 T. R. 174, Chitty, Jr., 453; Vere v. Lewis, 3 T. R. 182, Chitty, Jr., 455; Minet v. Gibson, 1 H. Bl. 569; Gibson v. Hunter, 2 H. Bl. 187, 288.

39. Bennett v. Farnell, 1 Campb. 130 (1807). See also Were v. Taylor, therein cited, and Gibson v. Hunter, 2 H. Bl. 187. The reporter appends the following note to the case of Bennett v. Farnell: "Almost all the modern cases upon this question arose out of the bankruptcy of Livesay & Co., and Gibson & Co., who negotiated bills, with fictitious names upon them, to the amount of nearly a million sterling a year. The first case was Tatlock v. Harris, 3 T. R. 174, in which the Court of King's Bench held that the *bona fide* holder for a valuable consideration of a bill drawn payable to a fictitious person, and indorsed in that name by the drawer, might recover the amount of it, in an action against the acceptor, for money paid or money had and received, upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill. In Vere v. Lewis, 3 T. R. 182, decided the same day, the court held there was no occasion to prove that the defendant had received any value for the bill, as the mere circumstance of his acceptance was sufficient evidence of this; and three of the judges thought the plaintiff might recover on a count which stated that the bill was drawn payable to bearer. Minet v. Gibson, 3 T. R. 481, put this point directly in issue, and the unanimous opinion of the court was, that where the circumstance of the payee being a fictitious person is known to the acceptor, the bill is in effect payable to bearer. Soon after, the Court of Common Pleas laid down the same doctrine, in Collis v. Emett, 1 H. Bl. 313. This decision was acquiesced in, but Minet v. Gibson was carried up to the House of Lords, 1 H. Bl. 569. The opinion of the judges being then

seems to be the rule of the English law, that the acceptor must have participated in the fraud in order to be bound.[40]

§ 138. We cannot perceive the wisdom or philosophy of applying the test of the acceptor's knowledge of the fiction. If the holder has acquired the bill *bona fide*, he may certainly sue the drawer, although he makes title against him through the name of a fictitious person—why may he not also sue the acceptor, who, by acceptance, admits that he has funds of the drawer in his hands? If indeed the name of an existing payee were forged, the holder could not sue the acceptor, because the amount in his hands would be due such real payee. But where the payee's name is fictitious, the acceptor is not concerned; for the reason that the drawer has directed him to pay the money to the order of that name, and if it be thereon indorsed by the drawer or by the holder, he would fulfill that direction and discharge the debt.[41] The language of Lord Loughborough, in a previous case, is broad enough to sustain our view;[42] and the better opinion is, as it seems to us, that a bill with a fictitious payee may be treated by the innocent holder precisely as if payable to bearer.[43]

§ 139. Rights of holder when payee is fictitious.—In a case of a note payable to a fictitious person, it appears to be well settled that any *bona fide* holder may recover on it against the maker as upon

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taken, Eyre, C. B. (p. 618) and Heath, J. (p. 619), were for reversing the judgment of the court below, and Lord Thurlow, C., coincided with them (p. 625); but the other judges thinking otherwise, judgment was affirmed (Parl. Cas., 8 vo, ii., 48). The last case upon the subject reported is Gibson v. Hunter, 2 H. Bl. 187, 288, which came before the House of Peers upon a demurrer to evidence, and in which it was held that, in an action on a bill of this sort against the acceptor, to show that he was aware of the payee being fictitious, evidence is admissible of the circumstances under which he had accepted other bills payable to fictitious persons."

40. Chitty on Bills [*157], 181 (13th Am. ed.); Edwards on Bills, 128; 1 Parsons on Notes and Bills, 32; Byles on Bills (Sharswood's ed.) [*79], 173; Thompson on Bills, 52; Story on Bills, §§ 200, 56.

41. See chapter XXIII, on Acceptance, Anderson v. Dundee State Bank, 66 Hun, 613, 21 N. Y. Supp. 925, quoting with approval the text; Meridian Nat. Bank of Indianapolis v. First Nat. Bank of Shelbyville, 7 Ind. App. 322, 33 N. E. 247, 34 N. E. 608, 52 Am. St. Rep. 450, citing text.

42. See Collis v. Emett, 1 H. Bl. 313.

43. See Rogers v. Ware, 2 Nebr. 29. See also the Negotiable Instruments Law of New York, § 28, par. 3, showing the adoption of the author's conclusion relative to this question.

a note payable to bearer.[44] It will be no defense against such *bona fide* holder for the maker to set up that he did not know the payee to be fictitious. By making it payable to such person he avers his existence, and he is estopped as against a holder ignorant of the contrary to assert the fiction.[45] It has been held that if a party takes a note payable to a fictitious person for a debt due himself, he may recover on the common counts,[46] though not, as it seems, upon the note itself, as he has participated in the wrong by taking a fictitious paper.[47]

Where a note has as its payee a fictitious firm, and the holder indorses it assuming the firm's name, a *bona fide* indorsee may recover against the maker.[48] But where an impostor procured a check to be drawn to a firm in a distant city, of which he represented himself to be a member, such firm being actually in existence, and then indorsed the check to a *bona fide* holder for value in the name of the firm, it was held that the maker was not bound, the firm not being a fictitious

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44. Farnsworth v. Drake, 11 Ind. 103; Emporia Nat. Bank v. Shotwell, 35 Kan. 360; Ort v. Fowler, 31 Kan. 478; Robertson v. Coleman, 141 Mass. 231; Shaw, Kendall & Co. v. Brown, 128 Mich. 573, 87 N. W. 757 (under statute); Rogers v. Ware, 2 Nebr. 29; Blodgett v. Jackson, 40 N. H. 26; Forbes v. Espy, 21 Ohio (N. S.), 483; *Re* Assignment of Pendleton Hardware Co., 24 Oreg. 330, 33 Pac. 544, quoting from and approving text; By statute in New York. Plets v. Johnson, 3 Hill (N. Y.), 115; Stevens v. Strong, 2 Sandf. 139; Odell v. Clyde, 38 App. Div. 333, 57 N. Y. Supp. 126; First Nat. Bank v. American Exch. Nat. Bank, 49 App. Div. 349, 63 N. Y. Supp. 58. The Court of Appeals, construing this statute, held that such paper cannot be treated as payable to bearer, unless it was put in circulation by the maker with knowledge that the name of the payee does not represent a real person. Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 371, 22 Am. St. Rep. 821. Where there is no statute on the subject, the transfer of a negotiable instrument to a fictitious person or bearer will be treated as payable to bearer, and the holder of such paper may bring suit thereon in his own name. Keeman v. Blue, 240 Ill. App. 177, 88 N. E. 553.

45. Kohn v. Watkins, 26 Kan. 691, approving text, and applying the principle to a drawer; Lane v. Krekle, 22 Iowa, 404. *Contra*, Armstrong v. National Bank, 46 Ohio St. 518; Chism, Churchill & Co. v. Bank, 82 Hun, 559, 31 N. Y. St. Rep. 541. But in New York, by statute, the maker is not bound to an indorsee even, unless he, the maker, knew of the fiction at the time of signing. Maniort v. Roberts, 4 E. D. Smith, 84; Fifth Nat. Bank v. Central Nat. Bank, 82 Hun, 559, 31 N. Y. St. Rep. 541. See also Clutton v. Attenborough & Son, L. R., App. Cas. 90 (1896); Clutton & Co. v. Attenborough, 2 Q. B. 306 (1895); Clutton & Co. v. Attenborough, 2 Q. B. 707 (1895), decided on the English Bills of Exchange Act, under sec. 7 (3), corresponding to section 9 (3) of the statute in the Appendix.

46. Foster v. Shattuck, 2 N. H. 447.

47. See *ante*, § 136.

48. Blodgett v. Jackson, 40 N. H. 26.

payee, and though having no interest in the paper, its genuine indorsement was necessary to pass the title thereto.[49]

Where a note is executed in the name of a fictitious person, it has been held that the payee who indorses it with knowledge of that fact will be held liable as maker, without demand or notice of nonpayment.[50]

§ **140.** If the bill or note be payable to some person who had no interest in it, and was not intended to become a party to it, whether such person is or is not known to exist, the payee may be deemed fictitious. But if it be payable to some person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary, in order to a recovery thereon by an indorsee, even though he had no interest in it, and the drawer knew that fact.[51]

§ **141. Adopted names.**—Parties sometimes adopt and use fictitious names as their own, and when there is a real party in existence who uses a fictitious name as descriptive of, and with intent to bind himself, it is the same in law as if it were his real name; and he may be sued by the holder, and declared against as having contracted by such adopted name.[52] But if it were not a name which he adopted

49. Rowe v. Putnam, 131 Mass. 281.

50. Bundy v. Jackson, 24 Fed. 629.

51. Rogers v. Ware, 2 Nebr. 29; Phillips v. Mercantile Nat. Bank, 67 Hun, 378, 22 N. Y. Supp. 254 (affd. in 140 N. Y. 556, 35 N. E. 982); *Re* Assignment of Pendleton Hardware Co., 24 Oreg. 330, 33 Pac. 544; Phillips v. Mercantile Nat. Bank, 67 Hun, 378, 22 N. Y. Supp. 254 (affd. in 140 N. Y. 556, 35 N. E. 982, quoting with approval the text).

52. Ladd v. Rogers, 11 Allen, 209; Fiore v. Ladd & Tilton, 22 Oreg. 202, 29 Pac. 435. In this case held: "Where, in the regular course of business and without any circumstances tending to rouse suspicion, a bank receives from a stranger, money which he deposits in a name assumed by him, the bank is authorized to repay him the money on the return of its certificate of deposit issued in the transaction, indorsed by the person making the deposit, although the indorsement be in the assumed name and the money in fact belonged to the person whose name the depositor wrongfully assumed, unless before such repayment something occurs to indicate the true ownership or put the bank on inquiry thereabout." The reasoning of the court was: "They contracted with him under the name of Savens Fiore, believing that to be his true name, issued and delivered to him the certificate of deposit in such name, thereby intending to make it payable to the person to whom it was delivered; and although they may have been mistaken in the name of the man, the person with whom they dealt was the person intended

and used as his own, the only civil remedy of the holder would be a suit in tort for the false representation.[53]

Under Negotiable Instrument statute.—The statute declares that an instrument is payable to bearer when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable.[54] A fictitious person is one who, though named as payee, has no right to the instrument because the drawer of it so intended, and it therefore matters not whether the name of the payee used by him be that of one living or dead, or of one who never existed.[55] Under the statute, in order for such an instrument to be payable to bearer, the fact that the payee is a fictitious or nonexisting person must be coupled with knowledge of the person making it,[56] but the fact that the maker is ignorant of the existence of the payee is not the equivalent of knowledge of nonexistence.[57]

SECTION III

NEGOTIABLE INSTRUMENTS EXECUTED IN BLANK

§ **142.** In subsequent portions of this work will be found the citation and discussion of cases illustrating the rights of holders of nego-

by them as the payee of the certificate." Anderson v. Dundee State Bank, 66 Hun, 613, 21 N. Y. Supp. 925, quoting with approval the text. Where a note was signed: "People's Sav. Bank, Geo. H. Simmons, Pres.," and Simmons was owner of the bank, which was not incorporated, as between Simmons and the payee the case stood as if the instruments had been signed simply "Geo. H. Simmons." Union Brewing Co. v. Interstate Bank & Trust Co., 240 Ill. 454, 88 N. E. 997, 144 Ill. App. 415.

53. Bartlett v. Tucker, 104 Mass. 345.

54. Appendix, sec. 9.

55. Snyder v. Corn Exch. Nat. Bank, 221 Pa. St. 599, 70 Atl. 876, 128 Am. St. Rep. 780, in which case the checks were drawn by an agent, in fraud of his principal, naming a certain person as payee, and the indorsement of the name of the payee was a forgery, and it was held that the check was made to a fictitious person, and that this under the statute made the check payable to bearer.

56. Boles v. Harding, 201 Mass. 103, 87 N. E. 481; Seaboard Nat. Bank v. Bank of America, 193 N. Y. 26, 85 N. E. 829, holding that a draft drawn by a bank upon an existing partnership at the fraudulent request of one known to the bank who deposited therefor a forged check, was not drawn upon a fictitious person, affirming Seaboard Nat. Bank v. Bank of America, 103 N. Y. S. 1141, 118 App. Div. 907.

57. Seaboard Nat. Bank v. Bank of America, 100 N. Y. Supp. 740, 51 Misc. 103, affirmed 103 N. Y. S. 1141, 118 App. Div. 907.

tiable instruments intrusted to another with blanks,[58] and of holders of such instruments altered after issue; [59] but we deem it proper here to state the general principles applicable to them. Parties often lend their mercantile credit to others by signing their names to blank papers to be afterward filled as bills of exchange or promissory notes written over their signatures as drawers or makers; or by signing their names in the appropriate manner to indicate that they design to bind themselves as acceptors or indorsers of the instrument which it is contemplated to complete upon such blank papers. And it is a settled principle of commercial law, that when such instruments are afterward completed by the holder of such blanks, to whom they are loaned, such parties become as absolutely bound as if they had signed them after their terms were written out; and further, that the presence of their names upon blanks purports an authority granted to the holder to fill them for any sum, and with any terms as to time, place, and conditions of payment. And that although the party may prescribe limits to the holder, a *bona fide* transferee from him, ignorant of such limitation of authority, when he takes an instrument which has exceeded it, may recover upon it.[60]

In an early case, where the party had indorsed his name on the back of five copper-plate checks, blank as to sums, dates, and times of payment, and Galley, the holder, filled them up as his own notes,

58. See chapter XXVI, § 3, vol. I, § 843 *et seq.*

59. See chapter XLIII, § 6, vol. II, § 1405, *et seq.*

60. This text is approvingly cited in Frank v. Lilienfeld, 33 Gratt. 384. In Snyder v. Van Doren, 46 Wis. 602, this doctrine was applied where a note was signed by the first maker for accommodation, leaving blanks for words, making it a joint or several obligation, and in that form he delivered it to the person accommodated. The latter procured other parties to sign it as joint makers with the first; and the first maker was held liable to the holder, although but for the blanks being left, the note would have been regarded as altered and avoided. See also Binney v. Globe Nat. Bank, 6 Law. Rep. Annot. 381; Farmers' Nat. Bank v. Thomas, 79 Hun, 595, 29 N. Y. Supp. 837; Whittle & Harrel v. National Bank, 7 Tex. Civ. App. 616; Prim v. Hammel, 134Ala. 652, 32 So. 1006, 92 Am. St. Rep. 52; Reddick v. Young (Ind.), 98 N. E. 813. See *post*, § 843. In Dow-Hayden Grocery Co. v. Muney (Ky.), 73 S. W. 1030, citing text, the rule was recognized though the blank was filled in by an agent of the payee for a greater amount than agreed, of which the payee had no notice. The mere ownership by a corporation of blank notes with the signature of an accommodation maker affixed thereto does not constitute ownership of the notes as legal obligations on its part to pay, when it appears that it had no concern in filling them or with the paper in its completed form, but that it was filled out by an officer of the corporation not having authority. Pelton v. Spider Lake Sawmill, etc., Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963.

with different dates, sums, and times of payment, the indorser was held bound to the plaintiff, who had discounted them, and Lord Mansfield said: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said: 'Trust Galley to any amount and I will be his security.' It does not lie in his mouth to say the indorsements were not regular." [61] And this admirable statement of the law is almost universally quoted with approval, and followed as a precedent, applying equally to maker, acceptor, and drawer, as to the indorser.[62] The United States Supreme Court has said on the same subject: "Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it." [63] And again: [64] "But the authority implied from the existence of the blanks would not authorize the person intrusted with the instrument to vary or alter the material terms of the instrument by erasing what *is written or printed* as part of the same, nor pervert the meaning and scope of the same by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument before

61. Russell v. Langstaffe, 2 Doug. 514 (1781).

62. *Post*, § 843; Usher v. Dauncey, 4 Campb. 97 (1814) (bill); Bulkley v. Butler, 2 B. & C. 425 (bill held good, though sum not filled up till after bankruptcy of acceptor); Powell v. Duff, 3 Campb. 182; Schultz v. Astley, 29 Eng. C. L. 414; Mahone v. Central Bank, 17 Ga. 111; Fullerton v. Sturgiss, 4 Ohio (N. S.), 529; Bank of Commonwealth v. Curry, 2 Dana, 142; Bank of Limestone v. Perrick, 5 T. B. Mon. 25; Jones v. Shelbyville Ins. Co., 1 Metc. (Ky.) 58; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Androscoggin Bank v. Kimball, 10 Cush. 373; Nichol v. Bate, 10 Yerg. 429; Ives v. Farmers' Bank, 2 Allen, 236; Rich v. Starbuck, 51 Ind. 87; Hardy v. Norton, 66 Barb. 527; Joseph v. National Bank, 17 Kan. 259; Waldron v. Young, 9 Heisk. 777; Snyder v. Van Doren, 46 Wis. 602; Coburn v. Webb, 56 Ind. 96; Johnston Harvester Co. v. McLean, 57 Wis. 258; Hopps v. Savage, 68 Md. 516; Thompson on Bills, 37.

63. Bank of Pittsburg v. Neal, 22 How. 107; Davidson v. Lanier, 4 Wall. 457; Angle v. Northwestern, etc., Ins. Co., 92 U. S. (2 Otto) 330; Bradford Nat. Bank v. Taylor, 75 Hun, 297, 27 N. Y. Supp. 96; De Pauw v. Bank of Salem, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151; Market & Fulton Nat. Bank v. Sargeant, 85 Me. 351, 27 Atl. 192, 35 Am. St. Rep. 376.

64. Angle v. Northwestern Mut. Life Ins. Co., 92 U. S. (2 Otto) 331. See also Goodman v. Simonds, 20 How. 361; Bank of Pittsburg v. Neal, 22 How. 108.

it was so delivered." * * * And it does not confer authority to make any additions to the terms of the note; and if any such of a material character are made by such a party, without the consent of the party from whom the paper was received, it will avoid the note even in the hands of an innocent holder."[65] It has been held that if the blank space be filled with terms foreign to the apparent object of such a blank, an innocent holder cannot recover.[66]

§ **143. Illustrations of authority implied.**—The authority implied by a signature to a blank, and the credit granted, are so extensive, that the party so signing will be bound to a *bona fide* transferee in due course, though the holder was only authorized to use it for one purpose, and has perverted it to another,[67] though authorized to be filled for a certain amount and a greater is inserted;[68] and though the authority was limited to a time which has expired,[69] or was only to be exercised upon a condition which has not happened.[70] If the date be left blank, any holder has a right to insert the true date; and should he insert an improper date, the parties will still be bound to a *bona fide* holder for value and without notice of the impropriety,[71] but a

65. Coburn v. Webb, 56 Ind. 100; Ivory v. Michael, 33 Mo. 400. See McGrath v. Clark, 56 N. Y. 36, and vol. II, § 1406; *post*, § 694; Weyerhauser v. Dun, 100 N. Y. 150; Meise v. Doscher, 83 Hun, 580, 31 N. Y. Supp. 1072.

66. McCoy v. Lockwood, 71 Ind. 319.

67. Putnam v. Sullivan, 4 Mass. 45; Frank v. Lilienfeld, 33 Gratt. 384. In this case a wife indorsed, for her husband's accommodation, a note blank as to date, time, and place of payment, amount, and name of payee. It was filled up in excess of authority, and the *bona fide* holder recovered against her, and subjected her separate estate. See chapter XXVI, on Rights of *Bona Fide* Holder, § 843 *et seq.*, and chapter XI, for Authority of Agents; First Nat. Bank of Decatur v. Johnston, 97 Ala. 655; Mechanics' Bank v. Chardavoyne, 69 N. J. L. 256, 55 Atl. 1080, 101 Am. St. Rep. 701, citing text. The payment of a note by the maker is a ratification of the filling out. Staunton v. Smith, 6 Penn. (Del.) 193, 65 Atl. 593.

68. London & S. W. Bank v. Wentworth, 42 L. T. R. 188; Diercks v. Roberts, 13 S. C. 338; Market & Fulton Nat. Bank v. Sargent, 85 Me. 351, 27 Atl. 192. In Chestnut v. Chestnut, 104 Va. 539, 52 S. E. 348, 2 L. R. A. (N. S.) 879, citing text, it was held that in the absence of evidence that the blank in a paper sued on was the result of a mistake, the presumption is that the payee has the right to fill up the blank with any amount agreed upon between him and the maker, and that right continues for a reasonable time.

69. Montague v. Perkins, 22 Eng. L. & Eq. 516.

70. See chapter XXVI, on Rights of *Bona Fide* Holder, § 7, § 854 *et seq.*

71. Page v. Morrel, 3 Abb. App. Dec. 433; Redlich v. Doll, 54 N. Y. 238; Frank v. Lilienfeld, 33 Gratt. 378; Overton v. Mathews, 35 Ark. 154; First State Sav. Bank v. Webster, 121 Mich. 149, 79 N. W. 1068.

party having notice could not recover, unless he acquired it from one who took it *bona fide* without notice.[72] The marginal figures being no part of the instrument, it has been held that where the holder of a note, in blank, filled it up and negotiated it for a larger amount than was indicated by the marginal figures, this did not vitiate the note, although he also altered the figures.[73] If the place of payment be left blank, the principles above stated apply,[74] and so if there be left a blank for the name of the promisor, so that words may be inserted making it joint or several, and additional makers sign and unite in the note, it will not be a material alteration unless it was known to the holder that authority was exceeded to fill the blanks.[75] If a blank be left for the rate of interest, it does not imply authority to fill in a rate greater than the legal rate, and the party doing this would commit a material alteration.[76]

§ 143a. Effect of acceptance of bill blank as to drawer.—A bill without a drawer is a contradiction of terms, and the acceptance of a bill, blank as to the drawer, amounts to nothing so long as it so remains, as already seen.[77] But if the acceptance of such a paper be given, and it be delivered in that form to a creditor, a right to insert his name as drawer would be inferred, and also to use the paper in negotiation, the transferee inserting his own name.[78] And it might be filled up by the personal representative of the holder for value after the latter's death.[79] Even where there had been given no authority to insert any one's name as drawer, yet when the insertion of a name is actually made, the instrument would be binding as an acceptance to a *bona fide* holder in the usual course of business.[80] There are some cases in which a party signing his name on the back

72. Emmons v. Meeker, 55 Ind. 321.

73. Schryver v. Hawkes, 22 Ohio St. 308. See, *ante*, § 86*a*.

74. Redlich v. Doll, 54 N. Y. 238; Marshall v. Drescher, 68 Ind. 242 (*semble*).

75. Snyder v. Van Doren, 46 Wis. 602. But there is no implied authority given to the person to whom the same was delivered to fill in such note the words "with interest," when there is no blank left therefor, or to write in the blank preceding the words "after date," the words "on demand." See Farmers' Nat. Bank v. Thomas, 79 Hun, 595, 29 N. Y. Supp. 837.

76. Hoopes v. Collingwood, 10 Colo. 107.

77. See *ante*, § 92.

78. Harvey v. Cane, 34 L. T. R. 64 (1876); Ames on Bills and Notes, vol. I, p. 881; *In re* Duffy, 5 L. R., Ireland, 92; Whittle & Harrel v. National Bank, 7 Tex. Civ. App. 616.

79. *In re* Duffy, 5 L. R., Ireland, 92.

80. *Post*, §§ 843, 844; Whittle & Harrel v. National Bank, 7 Tex. Civ. App. 616.

of a bill drawn payable to the order of another, with a view to guarantee its payment by the acceptor, may be held liable as a drawer. Thus, in England, before the bill was drawn, the defendant wrote his name on the back of the paper. It was afterward filled up payable to the drawer's order, and accepted by the drawee. He was held liable as drawer.[81]

§ 144. Effect of signing a blank paper.—The authority implied by one signing a blank paper is so extensive that such paper will be valid in the hands of a *bona fide* holder, whether it be framed as a negotiable instrument or otherwise. In Virginia, where a paper was signed and indorsed in blank, and intrusted to the maker for whose accommodation it was made, it was held that a *bona fide* holder, who had advanced money upon it, and who knew that it was made in blank, could recover against such party whether it were filled up as a common promissory note or as a negotiable note.[82] So in Indiana,

81. Mathews v. Bloxsome, 33 L. J. R. 209 (1864). This case is questioned in Steele v. McKinlay, 43 L. T. R. 358 (1880), 5 App. Cas. 754, Lord Watson saying of it, "there is room for doubt whether the decision was intended to go so far as the reports state. If it was, I cannot avoid the conclusion that it is at variance with sound principle."

82. Orrick v. Colston, 7 Gratt. 189 (1850), Daniel, J., saying: "It is well settled that a blank indorsement on a negotiable instrument, blank as to date or amount at the time of the indorsement, if made for the purpose of giving a credit to the drawer, is as effectual to bind the indorser for any amount with which the instrument may be filled up by the drawer, or an innocent holder for value, as if the instrument had been completed at the time of the indorsement. In the case of Russell v. Langstaffe, 2 Doug. 514, the Court of King's Bench held, in the language of Lord Mansfield, that such an indorsement 'is a letter of credit for an indefinite sum,'—that the indorser in effect said, 'trust the drawer to any amount, and I will be his security.' So in Schultz v. Astley, 29 Eng. C. L. 414, which was the case of an acceptance written on a paper, before entirely blank, it was held that the blank acceptance was an acceptance of the bill afterward put upon it; and that there is no distinction in principle, when the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterward drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger, who becomes the drawer at the instance of the party to whom the acceptance is given. And in the case of Douglass v. Scott & Fry, decided by this court, 8 Leigh, 43, where the paper was signed in blank and indorsed in blank, and delivered to another to be filled up and used as a negotiable instrument to raise money on, the decision was founded on the proposition that the negotiable note afterward drawn over the signature of the maker, did, together with its indorsements, bind all the parties to the same extent as if the maker had signed and the indorsers indorsed the paper in its perfect form." See Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74. Mr. Conway Robinson, in his Practice

where a note was filled up as nonnegotiable, under express stipulation with the indorsers, for accommodation of the makers, that it should not be payable at bank; but the indorsee had inserted a provision making it payable "at the Bank of Indiana, at the Laporte branch," in a blank space left on the face of the note, and then transferred it, it was held that the holder could recover; and Ray, J., said: "The surety who has not scrupled to trust his principal with the semblance of a general authority to make the delivery, must stand the hazard he has incurred."[83] So where the paper was drawn in the form of a blank bill of exchange, and it was filled up by the party for whose accommodation it was drawn as a negotiable note, the party who signed the blank was held liable.[84] When indorsement is in blank, the holder may write over it anything consistent with its character; but not a waiver of demand and notice.[85]

Under Negotiable Instrument statute.—The statute provides for the filling out, and declares the effect, of instruments executed in blank.[86] It in part provides that a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount,[87] but further declares that in order

(vol. II, new ed., p. 136), dissents from the view expressed in this opinion. It may be observed that he was opposing counsel in the case when it was decided.

83. Spitler v. James, 32 Ind. 203 (1869); Gillespie v. Kelley, 41 Ind. 158; Wessell v. Glenn, 108 Pa. St. 105 (1872). See *contra*, Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74. In this case the court does not seem to have paid sufficient attention to the fact that the space left afforded opportunity for the alteration by adding the place of payment, which made the note negotiable. See *post*, §§ 1405, 1409.

84. Luellen v. Hare, 32 Ind. 211 (1869). This doctrine has been held in Indiana not to apply to a nonnegotiable note. Cronkhite v. Nebeker, 81 Ind. 322.

85. Andrews v. Simmon, 33 Ark. 771; Hood v. Robbins & Smith, 98 Ala. 484, 13 So. 574.

86. Appendix, secs. 6, 12, 13, 14, 52. By "material particular" in section 14 of the statute is not meant such particulars as are necessary in strictness to the creation of a negotiable instrument, but to any matter which is proper to be inserted in such an instrument. Johnston v. Hoover, 139 Iowa, 143, 117 N. W. 277.

87. In Madden v. Gaston, 121 N. Y. S. 951, 137 App. Div. 294, it was held that the intentional delivery of a check operates as *prima facie* authority to fill up the blanks for any amount, and the statute imposes the burden upon the drawer to show the agreement, and that its terms have been violated, if that be claimed. When there was no evidence to show that the instrument was filled up in accordance with the authority given, it was held that evidence of the maker that he gave no authority to any one to fill the blank overcomes any presumption of authority

that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given [88] and within a reasonable time.[89] A person taking such instrument from the payee, however, is upon inquiry as to his authority to fill up the blank,[90] though it has been held that the law has been so far changed by the statute that an innocent payee is not a holder in due course and cannot recover against a party who signed and delivered the instrument in blank to a third person, where the latter in filling up the blank exceeded his authority.[91]

A promissory note may be valid instrument under the statute as under the law merchant though it is undated.[92] Another section of the statute, recognizing the right of a holder to insert the true date, declares that the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him, the date so inserted is to be regarded as the true date.[93] One who has

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arising from the fact that it was delivered in blank. Equitable Trust Co. of New York v. Lyons, 129 N. Y. S. 79.

88. Appendix, sec. 14. See Union Trust Co. of New Jersey v. McCrum, 129 N. Y. S. 1078, 154 App. Div. 409. In Herman v. Gregory (Ky.), 115 S. W. 809, it was held that where a signature to a blank note was obtained on the understanding that the signer was to be surety to enable the other person to borrow money, there was no diversion when the other filled in and signed the note for an amount he individually owed as one of the purchasers of property, and made the note payable to his co-purchasers who used the note at a bank to pay the maker's indebtedness, and the first signer remained liable as surety.

89. There can be no presumption one way or the other as to the time within which blanks in a check were filled up, and therefore the burden is upon the plaintiff suing upon a check to prove that the blanks were filled up within a "reasonable time." Madden v. Gaston, 121 N. Y. S. 951, 137 App. Div. 294, holding, in the case of a check, that from October 22 to June 9 of the following year, for the completion of the instrument, was more than a "reasonable time."

90. Stanley v. Davis (Ky.), 107 S. W. 773; Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

91. Vander Ploeg v. Van Zuuk, 135 Ia. 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, holding that where a note was made out in blank by several makers and was wrongfully filled out and delivered by one of the makers to the payee, without notice to the payee that the instrument as delivered was not filled out in accordance with the authority given by the other makers to one who thus filled it out and delivered it, the payee was not a holder in due course, and could not recover from the other makers. See Hermann's Executor v. Gregory (Ky.), 115 S. W. 809, as to a note filled up in accordance with the authority given, and a discussion as to whether the common law rule had been changed by the statute.

92. Appendix, sec. 6. Bank of Houston v. Day (Mo. App.), 122 S. W. 756.

93. Appendix, sec. 13. See also secs. 6, 12.

inserted an untrue date or a date not contemplated by the parties in an instrument when he was possessed of knowledge of the true date of its issue or of the date contemplated, is not "a subsequent holder in due course" within the meaning of the statute.[94]

§ 145. Payee in blank.—Bills and notes are also often executed in full with the exception of the name of the payee, which is left blank in order that it may be afterward filled up with the name of the actual holder who demands payment, the design of this form of paper being to enable the owner to pass it off to another without incurring the responsibility of an indorser, and without risking a depreciation of its current value, which might possibly result from indorsing it "without recourse." [95] The same result might be attained by making the instrument payable to the drawer's or maker's order, or to bearer; but a bill or note with the payee blank is to almost every legal intent and purpose payable to bearer. It passes from hand to hand by delivery,[96] and if it was filled in with the wrong name, this would not affect one who was a *bona fide* holder for value.[97] Any *bona fide* holder for value may fill it up with his own name and sue upon it.[98] And

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94. Bank of Houston v. Day, 145 Mo. App. 410, 122 S. W. 756.

95. Brummel v. Enders, 18 Gratt. 895; Schooler v. Tilden, 71 Mo. 581; Harding v. State, 54 Ind. 359; Armstrong v. Harshman, 61 Ind. 52; People v. Gorham, 9 Cal. App. 341, 99 Pac. 391, citing text. Where a note, which was blank as to the payee, shows upon its face that it was intended to be made payable only to some person or to that person's order, a person in possession is not impliedly authorized to fill the blank contrary to the intention of the maker, and the maker is not estopped from setting up a defense to the note. Smith v. Willing, 123 Wis. 377, 101 N. W. 692, 68 L. R. A. 940, holding further that such a note is not a negotiable promissory note.

96. Wookey v. Pole, 4 B. & Ald. 6, 6 Eng. C. L. 323. In Elliott v. Deason, 64 Ga. 63, note was made payable "to W. L. P., or ———." Held negotiable. Steel v. Rathbun, 42 Fed. 390, citing the text; Manhattan Sav. Inst. v. New York Nat. Exch. Bank, 42 App. Div. 147, 59 N. Y. Supp. 51.

97. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166.

98. Roth v. Donnelly Grocery Co., 70 S. E. 140, Ga. App. 851; Gothrapt v. Williamson, 61 Ind. 590; Rich v. Starpack, 51 Ind. 87; Eretwell v. Carter, 78 S. C. 531, 59 S. E. 639; Frank v. Lilienfeld, 33 Gratt. 378. In Brummel v. Enders, 18 Gratt. 895, the case of a note blank originally as to the name of the payee, it was said by Joynes, J.: "The question as to the effect of such an instrument came before the Court of King's Bench in the year 1813, in the case of Crutchley v. Clarence, 2 Maule & S. 90, which is the leading case. That was an action against the drawer of a bill of exchange payable to the order of ———(the name of the payee being left blank). It was indorsed to the payee by one Vashon, and the plaintiff inserted his own name as payee, and the case was distinguished from

although thus brought in apparent privity with the maker or drawer, he may, by proving that he was not the party to whom it was first delivered, exclude defenses valid as against such first party, and enjoy all the rights of a *bona fide* holder for value and without notice.[99]

But the holder must actually fill up the blank with his name before he can recover upon the instrument, as until then it does not import a contract with him.[1] And unless so filled up, a description of it as a bill or note in an indictment would not be sustained.[2]

Russell v. Langstaffe, 2 Doug. 514 (Chitty, Jr., 415), because the bill in that case was filled up by one of the original parties. But the court overruled the objection, and held that the plaintiff was entitled to recover. Lord Ellenborough, C. J.: 'As the defendant has chosen to send the bill into the world in this form, the world ought not to be deceived by his acts. The defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill.' * * * Though the bill in this case was indorsed to the plaintiff, the title to it did not pass by the indorsement because the name of the indorser was not in the bill. It passed by the delivery. In the following year the same question came before the Court of Common Bench in an action against the acceptor of the same bill. Crutchley v. Mann, 5 Taunt. 529, 1 Eng. C. L. 179. It was objected that the authority given to the person to whom the bill was first delivered, to insert his name as payee, was not transferable from hand to hand. But the court held that the plaintiff had a right to insert his name as payee, and was entitled to recover. Upon the authority of these cases, it is laid down in all the treatises that any *bona fide* holder of a bill or note which is blank as to the name of the payee may insert his own name, and thus acquire all the rights of the payee."

99. Brummel v. Enders, 18 Gratt. 905; Frank v. Lilienfeld, 33 Gratt. 387; Nelson v. Cowing, 6 Hill, 336; Pindar v. Barlow, 31 Vt. 539; Rich v. Starbuck, 51 Ind. 87. See also chapter VII, on Consideration, § 175, and cases cited.

1. Greenhow v. Boyle, 7 Blackf. 56; Seay v. Bank of Tennessee, 3 Sneed, 568; Thompson v. Rathbun, 22 Pac. 837, citing the text. Where two officers of a corporation individually indorsed a note of the corporation, blank as to the payee, before its discount for the benefit of the corporation, and one of such officers paid the note, in an action by him against the other for contribution, the dispute being whether they signed as joint makers or as indorsers, it was error for the court to allow the plaintiff during the trial to insert the name of the bank of discount as payee, as the contention of the defendant would be weakened if not overcome thereby. Keyser v. Warfield, 100 Md. 72, 59 Atl. 189.

2. In Rex v. Randall, Russ. & Ry. C. C. 195, it was held that a bill blank as to the name of the payee did not answer the description of a bill of exchange in an indictment. But however that may be, "the cases cited abundantly establish that a party to such a bill is liable upon it as if it was filled up. It has been held, too, that while a bill or note is blank as to the payee, the holder cannot sue upon it as bearer, but that he must insert his name as payee. Greenhow v. Boyle, 7 Blakf. 56; Seay v. Bank of Tennessee, 3 Sneed, 558. But these cases fully recognize the doctrine of the case of Crutchley v. Clarence. See *ante*, §§ 144, 145, and notes. They only hold that the insertion of the name of the plaintiff, so that

§ 146. How far a holder may go in filling up blanks.—Not only may the holder of a note in which there is left a blank as to the name of the payee fill it up with his own name, but where it is delivered with such blank to a party, and by him indorsed in blank, the holder may fill up the blank in the body of it with the name of the indorser, and then complete the indorsement by filling it up to himself. He thus perfects the instrument upon its skeleton form, and makes it what it was evidently designed to be.[3]

In Massachusetts the following skeleton note—

"$1,585.90. BROOKLYN, September 20, 1858.
after date promise to pay to the order of Dec. 23,
dollars at value received.
GEO. R. IVES."

was delivered to Yale as a mere memorandum, and not to be used as a note. Yale filled it up as a note for $1,585.90, payable to his own order at the Atlantic Bank, New York, and indorsed it to the plaintiff, who discounted it for him. The court held all evidence as to any agreement between the original parties inadmissible, and the holder entitled to recover.[4]

It is clear however that a holder who knew when he took the paper that the authority to fill it up had been departed from cannot recover.[5]

§ 147. When holder exceeds authority to fill blanks.—If the holder exceed the terms of his authority in filling up the blank, he can have no benefit from it, even to the extent of his authority, for his wrongful act is an utter nullity as to himself;[6] and if the party who takes such paper from the holder have notice that he has exceeded his authority, he participates in the wrongful act by negotiating for it, and cannot recover against the party who signed the blank.[7]

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the paper may on its face import a contract with him, is necessary to enable him to sue upon it." See Rees v. Conococheague Bank, 5 Rand. 326.

3. Elliott v. Chesnut, 30 Md. 562.

4. Ives v. Farmers' Bank, 2 Allen, 236; Brummel v. Enders, 18 Gratt. 897; Cox v. Alexander, 30 Oreg. 438, 46 Pac. 794.

5. Wagner v. Diedrich, 50 Mo. 484; Clower v. Wynn, 59 Ga. 246.

6. Van Duzer v. Howe, 21 N. Y. 531; Putnam v. Sullivan, 4 Mass. 45.

7. Davidson v. Lanier, 4 Wall. 456. The court said: "The delivery of a bill of exchange signed and indorsed in blank, only authorizes the receiver to fill it up in conformity with the authority given him. If there has been no agreement, the authority is general; if there has, it must be pursued. The burden of proof that there was an agreement, and that its terms have been violated, is in such a case, upon the defendant; but if he can make the proof it will avail him. No per-

But what charges the transferee with notice is a matter on which the authorities differ. By some authorities it is held that if he knew that the paper had been signed as a blank, and filled up by force of authority by the holder, he should inquire as to the extent of such authority, and if he fails to do so, he takes the paper at his peril.[8] And Vice-Chancellor Stuart said in an English case: "If the holder has notice of the imperfection [that the signature was made in blank] he can be in no better situation than the person who gave it in blank."[9] But this qualification of Lord Mansfield's doctrine, that the blank signature is "a letter of credit for an indefinite sum," does not impress us as an improvement upon it. The paper, being limitless in its terms, is *prima facie* limitless as to the authority it confers. The holder is invested with a general authority as to that paper,[10] and the graphic phrase of Lord Mansfield describes it to perfection. High authorities, including Story and Parsons, concur in these views, which seem to us clearly the most philosophical.[11]

§ 148. **Bonds with blanks.**—A bond—that is, "a deed whereby the obligor promises to pay a sum of money to another on a day appointed"[12]—stands upon a footing entirely different from bills and notes and other negotiable instruments. It cannot be left blank either as to the sum, name of the obligee, or other material part, and filled up afterward by an agent, so as to bind the obligor. In other words, it must be perfected in every respect before it amounts to anything. The reason of the distinction is, that authority to make a deed can only be imparted to an agent by an instrument of equal dignity—that is, by deed. In an early English case, a different doctrine was announced by Lord Mansfield,[13] and it has been followed

son, unless authorized, either directly or by just inference from the nature of the transaction, can fill up a blank bill for his own benefit, nor can such a bill be enforced against the drawer and indorser in favor of any one who takes it in bad faith—that is, with knowledge that it has been filled up without authority or in fraud." Hatch v. Searles, 2 Smale & G. 147; Johnson v. Blasdale, 1 Smedes & M. 17; Hemphill v. Bank of Alabama, 6 Smedes & M. 44.

8. Van Duzer v. Howe, 21 N. Y. 531; Byles (Sharswood's ed.) [*182], 308.

9. Hatch v. Searles, 2 Smale & G. 147.

10. Chitty on Bills [*29], 38.

11. Orrick v. Colston, 7 Gratt. 189; Huntington v. Branch Bank, 3 Ala. 186; Snyder v. Van Doren, 46 Wis. 602; Story on Bills, § 222; 1 Parsons on Notes and Bills, 109. See also Edwards, 252–253, and *post*, § 843.

12. 2 Bl. Com. 346; Preston v. Hull, 23 Gratt. 602, Staples, J.

13. Texira v. Evans, cited in Master v. Miller, 4 T. R. 320; 2 Robinson's Practice (new ed.), 13.

in some American cases.[14] But that decision has been overruled in England;[15] and in the United States the doctrine of the text has been approved.[16] It may be stated however, as a limitation of this doctrine, that it does not extend so far as to apply to that peculiar class of instruments which pass under the general title of "coupon bonds." They are now universally regarded as negotiable, when so framed as to indicate an intention to make them so. And being negotiable, are governed, for the most part, by the rules applicable to commercial securities, and not by common-law principles.[17] Individual bonds, when made negotiable by statute, would doubtless stand on the same footing.

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14. Woolley v. Constant, 4 Johns. 60; *Ex parte* Decker, 6 Cow. 60; *Ex parte* Kerwin, 8 Cow. 118; Duncan v. Hodges, 4 McCord, 239; Gonslin v. Commander, etc., 6 Rich. 497.

15. Hibblewhite v. McMowrie, 6 M. & W. 200; Enthoren v. Hoyle, 9 Eng. L. & Eq. 434; Sheppard's Touchstone, 68.

16. Preston v. Hull, 23 Gratt. 602; Penn v. Hamlet, 27 Gratt. 337; Davenport v. Sleight, 2 Dev. & Bat. (Law), 381; Burden v. Sutherland, 70 N. C. 528; Bland v. O'Hagan, 64 N. C. 471. See §§ 68, 856.

17. White v. Vermont, etc., R. Co., 21 How. 575; Preston v. Hull, 23 Gratt. 613; Lyon Co. v. Savings Bank, 40 C. C. A. 391, 100 Fed. 337.

CHAPTER VI

MEMORANDA UPON BILLS AND NOTES, AND COLLATERAL AGREEMENTS

SECTION I

MEMORANDA UPON BILLS AND NOTES

§ 149. As to memoranda upon bills and notes, questions have frequently arisen as to whether or not they were to be regarded as incorporated into the instruments themselves. In an English case, where the words "with lawful interest" were written in the corner of a note after its execution, and without the maker's consent, Lord Campbell, C. J., said: "This forms part of the contract. It would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of the note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there is to be excluded." [1] And this rule has been applied in numerous English and American cases. Such memoranda, if made by agreement of the parties before signing, will bind all the parties to the instrument, and all who have, or are legally presumed to have, notice thereof, and may be pleaded by either plaintiff or defendant.[2] How far, and under what circumstances, a *bona fide*

1. Warrington v. Early, 2 El. & Bl. 763, 75 Eng. C. L. See also Benedict v. Cowden, 49 N. Y. 402; Dewey v. Reed, 40 Barb. 21; Wait v. Pomeroy, 20 Mich. 427; Bowie v. Hume, 13 App. Cas. (D. C.) 286; White v. Cushing, 88 Me. 342, 34 Atl. 164, 51 Am. St. Rep. 402.

2. Gift v. Hall, 1 Humphr. 480; Hatfield v. Griffith, 1 Lea, 301; Perry v. Bigelow, 128 Mass. 129; 2 Parsons on Notes and Bills, 539; Byles on Bills (Sharswood's ed.) [*94], 193. See *ante*, §§ 59, 60; Goldman v. Blum, 58 Tex. 636, citing the text; Solomon Solar Salt Co. v. Barber, 58 Kan. 419, 49 Pac. 524, citing text. The clause below the signature is a part of the instrument as much as the clause above the signatures; the presumption is that it was a contemporaneous agreement, and the meaning of the entire instrument is to be gathered from its four corners. Black v. Epstein, 93 Mo. App. 459, 67 S. W. 736. The words "not transferable" written in the lower left hand corner of a printed blank by adding

transferee of the paper is affected by the addition, erasure, or obliteration of such memoranda is elsewhere considered.[3]

§ 150. Illustrations of memoranda affecting negotiability.—The principle above stated has been applied, in the United States, and construed as part of the instrument, where the memorandum was written at the bottom of the note, "one-half payable in twelve months, the balance in twenty-four months;" [4] where on the lower left-hand margin was written "Brandon money," [5] and "Ints. at $12\frac{1}{2}$ per cent.;" [6] where on the margin was written, "payable in fulled cloth one year from the month of October next;" [7] where on the back of the note was written a condition making it payable in five years, in a certain contingency; [8] where the word "facilitates," signifying certain bank notes, was written on a note under the names of the subscribing witnesses; [9] where the words "[foreign bills]" were written in brackets under the note, its negotiability being thereby destroyed; [10] where, under the maker's signature, was written, "If the machine should not be delivered, this note not to be paid;" [11] where there was indorsed on a note payable on its face, on demand, a condition that it was not to be payable until the happening of a certain event,[12] or that the maker was not to be compelled to pay before a certain time; [13] where there was written under the maker's signature a memorandum that it was not to be collected until a

the letter *t* to the abbreviation "No." and writing the word "transferrable" in the short blank space an inch long between "No," and the word "Due," were held not to be so obscurely written as to deceive an innocent purchaser, and on the facts it was held that there was no fraud or negligence in making, endorsing, or delivering the note. Tanners' Nat. Bank v. Lacs, 120 N. Y. S. 669, 136 App. Div. 92. In Reeke v. Sayers, 106 Ill. App. 283 it was held that a mere memorandum on the margin of a note is not a part of the note, as to a note which contained in the margin the figure 6 and a character ordinarily used as an abbreviation for "per cent.," and that this would not authorize a judgment for interest.

3. See chapter XLIII, on Alterations, § 1407.

4. Heywood v. Perrin, 10 Pick. 228; Bowie v. Hume, 13 App. Cas. (D. C.) 286.

5. Gift v. Hall, 1 Humphr. 480.

6. Hatfield v. Griffith, 1 Lea, 300.

7. Fletcher v. Blodgett, 16 Vt. 26.

8. Henry v. Colman, 5 Vt. 403.

9. Springfield Bank v. Merrick, 14 Mass. 322.

10. Jones v. Fales, 4 Mass. 254.

11. Wait v. Pomeroy, 20 Mich. 425. See also the State v. Stratton, 27 Iowa, 424.

12. Effinger v. Richards, 35 Miss. 540.

13. Franklin Sav. Inst. v. Reed, 125 Mass. 365.

certain event transpired;[14] where the words "given as collateral security with agreement" were indorsed on the margin of a note;[15] and where the words "bank book of the depositor must accompany this order," were written under an order in a savings bank.[16] The simple memorandum that the note is issued as collateral security, it would seem, impairs its negotiability.[17] So, also, a memorandum that the note will be renewed at maturity.[18] But the mere recital that it is given to secure the payment of a certain debt, or other recital of the consideration, will not make the obligation conditional.[19]

§ 151. Memoranda on back.—It seems that the purport of the instrument is not only to be collected from "the four corners," but from "the eight corners," a memorandum on the back, affecting its operation, being regarded the same as if written on its face.[20] This view has been applied where a note payable absolutely on its face bore an indorsement that payment was not to be compelled, but to be received when convenient to the maker to make payment;[21] where a note absolute on its face bore on the back, "This note is given on the condition that if any dispute shall arise between Lady Wray and D. Hartley respecting the sale of the within-mentioned fir, then the note to be void;"[22] where there was indorsed on the back of the note that it was "to be taken for security of all such balances as J. M. may happen to owe to T. L. & Co., not extending farther than

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14. Johnson v. Heagan, 23 Me. 329.

15. Costello v. Crowell, 127 Mass. 293, Lord, J.: "Any language put upon any portion of the face or back of a promissory note, which has relation to the subject-matter of the note by the maker of it before delivery, is a part of the contract." American Nat. Bank v. Sprague, 14 R. I. 410. See *ante*, § 60.

16. White v. Cushing, 88 Me. 342, 34 Atl. 164, 51 Am. St. Rep. 402.

17. Askell v. Lambert, 16 Gray, 592; American Nat. Bank v. Sprague, 14 R. I. 410; Gibson v. Hawkins, 69 Ga. 354; *ante*, § 60.

18. Citizens' Nat. Bank v. Piollet, 126 Pa. St. 194.

19. Clanin v. Esterly Mach. Co., 118 Ind. 373; *ante*, § 60*a*.

20. Farmers' Bank v. Ewing, 78 Ky. 266; Morris v. Cain, 39 La. Ann., citing the text; *ante*, § 60; Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845, citing text; the Kalamazoo Nat. Bank v. Clark, 52 Mo. App. 593. A memorandum written on the back of a promissory note at the time of execution which limits its consideration, affects its operation, and was intended to be a part of the contract, must be regarded as a substantive part of the note. Kurth v. Farmer's & Merchant's State Bank, 77 Kan. 475, 94 Pac. 798, 15 L. R. A. (N. S.) 612, 127 Am. St. Rep. 428, quoting text.

21. Barnard v. Cushing, 4 Metc. (Mass.) 231.

22. Hartley v. Wilkinson, 4 Campb. 127 (1814).

the within-named sum of £200, but this note to be in force for six months, and no money to be called for sooner in any case;" [23] where, on the back of a note was indorsed, "the within note is given for securing certain floating advances;" [24] so where it was indorsed on the back of a note that payment was not to be expected until a mill was sold; [25] so where condition was written on the back of the note providing for deductions on certain contingencies,[26] or that the note was to be paid "in wheat at ninety-five cents a bushel." [27] So where the words, "the indorsers waive presentment, protest, and notice of dishonor," were written on the back of the note.[28]

§ 152. The New York cases do not seem to be uniform and consistent on this subject. In one case it was held that a memorandum on the back of the note that it was to be delivered as consideration for a judgment to S. & O., "was no part of the note, and the effect of it was only to show the consideration and operate as a notice to any person who might purchase the note." [29] And in another, that an indorsement on the back of a note of a condition that it was to be delivered to the payees as security for a certain acceptance, and was to be void in a certain event, did not affect its negotiability, and was not a part of it.[30] But it has been there held that a memorandum

23. Leeds v. Lancashire, 2 Campb. 205 (1809), Lord Ellenborough said: "In the hands of a *bona fide* holder who received it as a promissory note, it might possibly be considered as such, but the present plaintiffs (the payees) can only treat it as a guaranty for Marriott to the amount of £200. As to them the indorsement must be incorporated with the body of the note." But when the case came before the King's Bench, as reported in 5 Maule & S. 25 (1815), the above *obiter dictum* as to a *bona fide* holder was not repeated, and Lord Ellenborough, C. J., said: "How can it be said that this note is a negotiable instrument for the payment of money absolutely, when it is apparent that the party taking it must inquire into an extrinsic fact in order to ascertain if it be payable? By the indorsement the party takes nothing but a contingent benefit, dependent upon the happening or not of a particular dispute about the property." Bayley, J., said: "This note cannot be said to be payable, at all events." And Dampier, J., said: "The argument is, that a promissory note to pay, 'unless a dispute shall arise between A. & B.,' imports an unconditional promise to pay."

24. Cholmeley v. Darley, 14 M. & W. 344.

25. Blake v. Coleman, 22 Wis. 416.

26. Henry v. Colman, 5 Vt. 402.

27. Polo. Man. Co. v. Parr, 8 Nebr. 379.

28. Farmers' Bank v. Ewing, 78 Ky. 264.

29. Sanders v. Bacon, 8 Johns. 485 (1811). See Edwards on Bills, 147, 281.

30. Tappan v. Ely, 15 Wend. 363 (1836). To same effect, see Bowie v. Hume, 13 App. (D. C.) 286.

on the margin of a note specifying no place of payment, running "payable at the Bank of America," entered into its terms, and, being made without the maker's consent, materially altered and avoided it.[31] The like view prevailed as to a memorandum added on the face of a note, "interest to be paid semi-annually," [32] and as to a memorandum under the maker's signature, "the above note to be paid from the profits of machines when sold." [33] And in the last quoted case it was doubted whether the earlier cases could be regarded "as the deliberate adjudications of the Supreme Court of this State." [34]

§ 153. Memorandum merely to identify instrument.—If the memorandum be intended merely to identify and earmark the instrument, it will not affect its operation; [35] and it has been regarded of this character where it was indorsed upon a note by the payee that he desired his executors not to call in the money until three years after his death.[36]

§ 154. Parol evidence as to memoranda.—It is competent for either party to show by parol testimony the time when, the person by whom, and the circumstances under which a memorandum upon a bill or note was made. If made—and it will be presumed that it was made—contemporaneously with the execution of the instrument, and as a constituent part thereof,[37] it will be given full effect

31. Woodworth v. Bank of America, 19 Johns. 391 (1821), overruling same case in 18 Johns. 316 (1820). See § 1383.

32. Dewey v. Reed, 40 Barb. 17 (1863).

33. Benedict v. Cowden, 49 N. Y. 396 (1872).

34. Benedict v. Cowden, 49 N. Y. 405, Allen, J.

35. Benedict v. Cowden, 49 N. Y. 402; Brill v. Crick, 1 M. & W. 232; Fitch v. Jones, 5 El. & Bl. 238, 85 Eng. C. L.; Byles on Bills (Sharswood's ed.) [*94], 193.

36. Stone v. Metcalf, 4 Campb. 217.

37. Fletcher v. Blodgett, 16 Vt. 26. In this case, memorandum on margin of note was payable in merchantable fulled cloth one month from the month of October next. The note was for $41.50, payable one day after date, with interest annually. Held, the memorandum was part of the note, and was to be presumed to have been made at time of signing. Henry v. Colman, 5 Vt. 402. Condition written on back of note created as part of it. Jones v. Fales, 4 Mass. 253. In this case the words [foreign bills] were written on the margin of the note. Parsons, C. J., said: "It is a reasonable conclusion that these words must all be taken to be the words of the maker of the note, written before it was delivered to the promisee." Tuckerman v. Hartwell, 3 Greenl. 147. In Harvey v. Effinger, 35 Miss. 552, a written agreement was appended to or indorsed on the note that it was not to be payable until the happening of a certain event. Smith, C. J.,

as above stated; if made after its execution and with the consent of all parties, it will modify and control its operation; and if made by a stranger without the consent of any party, will be a spoliation, and be disregarded; while, if made by the holder without consent of the parties, it will vitiate and avoid it, being a material alteration.[38] And when any of these questions of fact are raised, they are to be put in issue and tried by a jury.[39] When the memorandum is a part of the instrument, parol testimony is inadmissible to alter or vary its terms, as it is part of a written contract;[40] and if it be repugnant and contradictory, such evidence is inadmissible, as it should be rejected as surplusage.[41]

§ **155.** Although an agreement be written upon the same paper that the note is written on, and yet if it be evident that it was not intended to incorporate the terms of the agreement in the instrument itself, the transferability and negotiability of the instrument will not be affected by it. Thus, where the payee of a note, at the time of taking it, wrote underneath it an agreement to take the above note in certain labor if done in six months, there being no evidence that the promisor had ever performed or offered to perform the labor, and the six months having expired, it was held that

said: "According to the well-settled rule on the subject, the note and the agreement constituted one instrument." See also Leeds v. Lancashire, 5 Maule & S. 25; *ante*, § 151, note. Professor Parsons does not seem to concur with the text. He says in vol. II, Notes and Bills, p. 544: "It has been held that words written on the back of a note are no part of the body thereof, *prima facie*, but are presumed to be done after the note is completed." This view is taken in Buy v. Sprader, 50 Miss. 330, where Simrall, J., says: "If such memoranda are at the foot or on the back of the note or other instrument when executed, they constitute a part of the contract. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed." And when the written memorandum on the back of the instrument constitutes a part only of the agreement, it is competent to prove by parol the portion of the agreement that was not reduced to writing. See Vickers v. Battershall, 84 Hun, 496, 32 N. Y. Supp. 314; Bacon v. Dodge, 62 Vt. 460, 20 Atl. 197; Edelen v. Worth, 69 Mo. App. 124, citing text; Maddox v. Wyman, 92 Cal. 674, 28 Pac. 838; Van Zandt v. Hopkins, 151 Ill. 248, 37 N. E. 845, citing text; *ante*, § 131.

38. Ibid.; Dewey v. Reed, 40 Barb. 16; Brill v. Crick, 1 M. & W. 231; Morris v. Cain, 39 La. Ann. 731.

39. Makepeace v. Harvard College, 10 Pick. 303.

40. Heywood v. Perrin, 10 Pick. 228.

41. Way v. Batchelder, 129 Mass. 361. So if it be too indefinite to admit of construction. Krouskop v. Shoutz, 51 Wis. 204.

the two instruments were not to be construed together as parts of the same contract, and that an indorsee might recover on it in his own name.[42]

SECTION II

COLLATERAL AGREEMENTS

§ 156. Contemporaneous agreements.—When there is a contemporaneous written contract affecting the terms of the bill or note, it is to be construed together with the bill or note, in so far as each may be given effect, and there is no repugnancy between them; [43] as between

42. Odiorne v. Sargent, 6 N. H. 401. See *ante*, §§ 61, 62; Ewing v. Clark, 76 Mo. 545; American Gas Co. v. Wood, 90 Me. 516, 38 Atl. 548.

43. Commercial Bank of Selma v. Crenshaw, 103 Ala. 497, 15 So. 741, citing the text; Heisler, Admr., etc. v. Lyon, 4 Colo. App. 10, 34 Pac. 841; Montgomery v. Hunt, 99 Ga. 499, 27 S. E. 701; Montgomery v. Hunt, 93 Ga. 438, 21 S. E. 59; Heitman v. Commercial Bank of Savannah, 6 Ga. App. 584, 65 S. E. 590; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Continental Ins. Co. v. Dorman, 125 Ind. 189, 25 N. E. 213; Bundrant v. Boyce (Ind. App.), 91 N. E. 968; Middaugh v. Wilson, 30 Ind. App. 112, 65 N. E. 555; McDonald v. Huestis, 1 Ind. App. 275, 27 N. E. 509; Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, citing text; Gregory v. McCormic, 120 Mo. 657, 25 S. W. 565; Lawson v. Spencer, 81 Mo. App. 169; Hawes v. Mulholland, 78 Mo. App. 493; Missouri Pac. R. Co. v. Atkinson, 17 Mo. App. 494, citing the text; Talbott v. Heinze, 25 Mont. 4, 63 Pac. 624; Fisher v. Briscoe, 10 Mont. 124, 25 Pac. 30; Specht v. Beindorf, 56 Nebr. 553, 76 N. W. 1059; Scicroe v. First Nat. Bank, 50 Nebr. 612, 70 N. W. 220; Farr v. Nichols, 132 N. Y. 327, 30 N. E. 834; Scarsdale Pub. Co.—Colonial Press v. Carter, 116 N. Y. S. 731, 63 Misc. Rep. 271; Central Trust Co. v. New York Equipment Co., 74 Hun, 405, 26 N. Y. Supp. 850; Hinsdale v. Jerman, 115 N. C. 152, 20 S. E. 294; Montgomery v. Page, 29 Oreg. 320, 44 Pac. 689; Bratton v. Lowry, 39 S. C. 383, 17 S. E. 832; Allen v. Herrick Hardware Co. (Tex. Civ. App.), 118 S. W. 1157; Gross v. Bennington, 52 Wash. 417, 100 Pac. 846; Pagal v. Nickel, 107 Wis. 471, 83 N. W. 767. See *ante*, § 81*d*. Where a note was given in payment for property, and at the same time an additional contract with an agent of the payee was made providing that the purchaser might return the property at any time within a specified time, in an action on the note the maker may prove his offer to deliver the property and his readiness to do so at any time. Alley v. Jesse French Piano & Organ Co., 148 Ala. 303, 42 So. 623. Where by a collateral contract, the payee of a note agrees that on certain conditions upon maturity of the note, he will accept in payment a stipulated number of shares in a certain company, the option to pay in stock must be exercised on the day the note matures or the note is payable thereafter only in money. Tranter v. Hibberd, 108 Ky. 265, 56 S. W. 169. When, at the time a note was given in payment of property, the payee gave a receipt for the note reserving his right, title and interest in the property in case the note was not paid at maturity, the receipt was merely a reservation by the seller of a right to secure and enforce the collection of the purchase-money debt by a seizure or reprisal of the property sold. Vapereau v. Holcombe,

the original parties to the note, any lawful condition annexed to it by a collateral written agreement may be recognized and enforced,[44] and a purchaser, after maturity, of a negotiable instrument would be bound by such an agreement when proven.[45] Thus, where a note and mortgage were executed on the same day and are parts of the same transaction, they must be construed together,[46] and especially where a

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122 Iowa, 406, 98 N. W. 279. Where the maker of a note, by a separate agreement, had the privilege of paying the note by deliveries of coal, if made before the maturity of the note, the failure to satisfy the note by such deliveries before maturity ended the privilege, and the payee could enforce payment in money. McFarlane v. York, 90 Ark. 89, 117 S. W. 773. Where the holder of a note had agreed that he would not place the notes in the hands of an attorney for collection or suit, provided he was notified by 11 o'clock of that day that the money was ready to pay off said notes, this meant a personal notice that the money was ready, and a notice about 12 o'clock that day that parties wanted to talk to him over the telephone was not a compliance with the condition. Honaker v. Jones (Tex. Civ. App.), 115 S. W. 649. A separate agreement signed by the agents of the payee of a note, in their individual capacity and not purporting to bind their principal, and in fact made outside the scope of their authority, is not admissible in evidence to bind the holder in an action on the note. Thomas v. H. C. Bagley & Co., 119 Ga. 778, 47 S. E. 177. A written agreement, made by the payee of a promissory note with the maker thereof, evidencing a part of the contract between them, stipulating that the maker is never to be sued on the note, relieves the maker from all liability upon the note; and a subsequent voluntary promise of the maker to pay the note, made without consideration, to the executor of the payee, is a *nudum pactum*, and not enforceable. Monroe v. Martin, 137 Ga. 134, 73 S. E. 341.

44. Goodwin v. Nickerson, 51 Cal. 166; State Bank of Indiana v. Cook, 125 Ia. 111, 100 N. W. 72 (with respect to a condition as to the payment of the notes); Lebanon Sav. Bank v. Penney (Minn.), 46 N. W. 331, citing the text; Adeu v. Doub, 146 N. C. 10, 59 S. E. 162; Keller v. Cohen, 217 Pa. 522, 66 Atl. 862 (that the note was to be paid out of a particular fund); State Bank v. Burton-Garden, 14 Utah, 420, 48 Pac. 402; Solenberger v. Gilbert, 86 Va. 778, 11 S. E. 789. The right of the maker to rely upon the contemporaneous contract can be taken from him only by discounting the note in bank, thereby raising it to the dignity of a foreign bill of exchange, as provided in Ky. St. § 483. Tranter v. Hibberd, 108 Ky. 265, 56 S. W. 169. Where an agreement was entered into contemporarily with the execution of a note that the maker should not be primarily liable, and provide affirmatively how payment should be made, and the note was given for appearances in order to avoid question with the bank examiner, the maker of the note is not liable. National Bank of Kennett Square v. Shaw, 218 Pa. St. 612, 67 Atl. 875.

45. Munro v. King, 3 Colo. 238.

46. Ray v. Baker, 165 Ind. 74, 74 N. E. 619, holding that where a mortgage securing a principal note and coupon interest notes provided that the note should become due upon the event of default being made in the payment of interest, one who purchased the notes after failure of the maker to pay at maturity the first coupon interest note could not be regarded as a holder in good faith, as the prin-

note refers on its face to a mortgage, the conditions and stipulations embodied in the mortgage must be construed to enter into and constitute a part of the note.[47] So, where a note is payable in five years, with interest at 10 per cent., and at the time of its execution a mortgage is given to secure its payment, in which it is stipulated that interest shall be payable annually, the mortgage as between the parties will control the payment of interest;[48] where a mortgage, given as security to a note, authorizes the mortgagee, if he feels unsafe or insecure at any time to declare the note due at his option, he has the right to declare it due at any time he has reasonable grounds for feeling unsafe and insecure;[49] and when the mortgage contains a provision rendering the note nonnegotiable, a purchaser of the note is in no better position than the payee named in the note.[50] And, if there be a contemporaneous written contract recognizing the note, and promising to pay an additional sum on a contingency, for the same consideration, it is a good bargain, and merges all prior stipulations,[51] and the payee and maker of a note may make a separate agreement that when the note comes due the maker and the payee may have a settlement by setting off certain claims against the note which otherwise would not be the subject of set-off.[52] The time of payment, as fixed in the note, may be controlled by a separate written agreement

cipal note had become absolutely due and payable before it was transferred. See also Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907; Trustees of Westminster College v. Piersol, 161 Mo. 270, 61 S. W. 811; Bauzer v. Richter, 123 N. Y. S. 678, 68 Misc. Rep. 192. Where a promissory note provides that default in the payments of interest shall mature the whole debt, at the option of the holder and a mortgage given to secure payment of the note provides that defaults shall mature the debt, but makes no mention of an option in the holder, the provision in the note will control. Kennedy v. Gibson, 68 Kan. 612, 75 Pac. 1044.

47. Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598. See also *ante*, § 51*a*.

48. Muzzy v. Knight, 8 Kan. 456. See also Meyer v. Graeber, 19 Kan. 165; Dobbins v. Parker, 46 Iowa, 358; *post*, § 835; Clark v. Jones, 93 Tenn. 639, 42 Am. St. Rep. 931, 27 S. W. 1009; Evans v. Baker, 5 Kan. App. 68; Phelps v. Mayers, 126 Cal. 549, 58 Pac. 1048. *Contra*, Keys v. Lardner, 55 Kan. 331, 40 Pac. 644.

49. Warren v. Osborn (Tex. Civ. App.), 97 S. W. 851.

50. Allen v. Dunn, 71 Nebr. 831, 99 N. W. 680.

51. Fiske v. Williams, 4 App. Div. 488, 38 N. Y. Supp. 899; Stutts v. Strayer, 60 Ohio St. 384, 54 N. E. 368, 71 Am. St. Rep. 723; Cuthbert v. Bowie, 10 Ala. 163. Where two rent notes were given on an agreement that one was to be paid in cash and the other in services to be performed on the farm, such work to be designated by the lessor, the lessor could not defeat this part of the agreement by refusing to designate work and recover money payment on the note. Hume v. Hale, 146 Mo. App. 659, 125 S. W. 871 (1910).

52. McGuiness v. Kyle, 94 N. E. 700, 208 Mass. 443.

made at the time of the execution of the note, which will bind subsequent parties with notice of the agreement.[53]

The foregoing must be understood as fully recognizing the principle that any agreement between the payee and the maker of a note not written on its face could not affect a *bona fide* indorsee for value, and without notice,[54] though it would be binding, of course, upon an indorsee having notice.[55]

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53. Supporting the principle announced in the text, see Leach v. Hill, 160 Iowa, 171, 76 N. W. 667; Mahaska County Bank v. Christ, 82 Iowa, 56, 47 N. W. 886; Jacobs v. Mitchell, 46 Ohio St. 605; Glass v. Adone & Lobit, 39 Tex. Civ. App. 21, 86 S. W. 798. A note payable "one day after date," but made together with an agreement that the note is not to become due until certain state land is awarded to the maker after making the proper application therefor, is due as soon as the land is awarded to the maker of the note as a purchaser, regardless of when he made the application, or when the land was placed upon the market for sale to actual purchasers. Taylor v. McFatter (Tex. Civ. App.), 109 S. W. 395 (1908). Where citizens of a city subsidized the establishing and carrying on of a business, and for the money advanced by them the manufacturer gave his note due in ten years, to be credited as paid on the note with one tenth of the amount paid each year for labor, a collateral contract referred to in the note providing that the balance due upon the note should becone due and payable on the abandonment or permanent stopping of the operation of the plant, the note has become due and payable when there has been a voluntary stopping of all active operation of the plant continuing for nearly two years without prospect of change. Castle v. Logan, 140 Fed. 707.

54. First Nat. Bank v. Alexander, 152 Ala. 585, 44 So. 866; Bothell v. Fletcher & Stobaugh, 94 Ark. 100, 125 S. W. 645; Edmonston v. Ascough, 43 Colo. 55, 95 Pac. 313; First Nat. Bank v. Mineral Farm Consol. Min. Co., 17 Colo. App. 452, 68 Pac. 981; Mater v. The American Nat. Bank of Denver, 8 Colo. App. 325; 46 Pac. 221; Wilkes v. Pope, 4 Ga. App. 36, 60 S. E. 823; Beattyville Bank v. Roberts, 117 Ky. 689, 78 S. W. 901; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; Hunter v. Johnson, 119 Mo. App. 487, 94 S. W. 311, citing text; Hodges v. Shuler, 24 Barb. 68; Heinbach v. Doubleday, Page & Co., 114 N. Y. S. 278, 130 App. Div. 34; Higgins v. O'Donnell, 22 N. Y. Supp. 610, 68 Hun, 100. While an accommodation maker can impose any restrictions upon the use of accommodation paper that he may see fit at the time it is issued, still, unless such restrictions are written upon the paper or otherwise brought to the knowledge of the transferee for value before he has purchased the paper, such restrictions constitute no defense to the paper. Keenan v. Blue, 240 Ill. 177, 78 N. E. 553. An accommodation indorser of a note, who paid full value for the note before maturity is not affected by a written agreement between the maker and the payee under the terms of which the note had been given, when such purchaser had no knowledge of the agreement at the time of indorsement, in the absence of bad faith. Aldrich v. Peckham, 74 N. J. L. 711, 68 Atl. 345. Sureties cannot show, by parol, that the payee of a note told them when they signed that he would not require them to pay the note. Altman v. Anton, 91 Iowa, 612, 60 N. W. 191.

55. Johnson County Savings Bank v. Redfearn, 141 Mo. App. 386, 125 S. W.

§ 157. Subsequent agreements.—After a bill or note has been executed and delivered, it is a subject of contract like any other property or chose in action;[56] and evidence therefore will be admitted to show a subsequent bargain upon a good consideration to extend the time of payment,[57] or an agreement that payment might be made to

224. Even if a payee did promise not to negotiate or transfer the note, this would not, alone, afford a defense against a purchaser with notice, unless it should also be found that the maker also had a defense to it as against the payee. State Bank of Indiana v. Mentzer, 125 Iowa, 101, 100 N. W. 69. Where a negotiable promissory note was executed in payment of the premiums on some life insurance policies, and at the time of the delivery of the note to the payee, who was agent for the insurance company, the payee executed a written agreement that if the maker of the note, within a stipulated time, investigated the company and found it not satisfactory or as represented, the note or the amount thereof in cash would be refunded to the maker by the payee, it was held that the contemporaneous agreement did not constitute the delivery of the note a conditional delivery or deny to the payee the right to transfer the same, and that one who purchased the note in due course of business, before maturity, for a valuable consideration, could recover in an action thereon, although at the time of the transfer he had notice of the contemporaneous agreement, as the refund of the note might be made by a refund of the amount paid or by return of the note. Farmers' Bank of Roff v. Nichols, 25 Okl. 547, 106 Pac. 834, 138 Am. St. Rep. 931. The burden of proof, as to a collateral agreement that a note should be paid only out of the proceeds of a certain estate, is upon the maker to show that notice of the agreement reached an assignee before he paid in full for the note the sum for which he bought it. Norlin v. Becker, 138 Ill. App. 488. The maker of a negotiable note which on its face purports to be for value received, and negotiated before maturity, cannot escape liability upon what is at most a mere guess that the purchaser had knowledge at the time of the purchase of an agreement between the maker and the payee. Heinbach v. Doubleday, Page & Co., 114 N. Y. S. 278, 130 App. Div. 34.

56. Heaton v. Myers, 4 Colo. 63.

57. Solomons v. Jones, 3 Brev. 54; Moffatt v. Blake, 145 Fed. 40; Bell v. San Francisco Savings Union, 153 Cal. 64, 94 Pac. 225; Drake v. Pueblo Nat. Bank, 44 Colo. 49, 96 Pac. 999 (as to the consideration of an unrecorded United States patent to land issued to and standing in the name of the maker—held sufficient); Abraham Lincoln Building & Homestead Ass'n v. Zuelk, 124 Ill. App. 109; Lahn v. Koep, 139 Ia. 349, 115 N. W. 877; Fisher v. Stevens, 143 Mo. 181, 44 S. W. 769, text cited; Commercial Bank v. Nart, 10 Wash. 303, 38 Pac. 1114. A mere request for an extension is not sufficient. Woolwine v. Storrs, 148 Cal. 7, 82 Pac. 434, 113 Am. St. Rep. 183. Where the parties entered into a mutual oral agreement whereby the defendant bound himself to keep the money and pay interest thereon for a specified time beyond the written date of its maturity, and the plaintiff extended the time of payment for the period agreed upon, such mutual promises were a sufficient consideration, each for the other. Lahn v. Koep, 139 Ia. 349, 115 N. W. 877 (1908). Where an extension of time was agreed upon for a period of two months at a charge of $50 for each of the two months in addition to the regular interest named in the note, the agreement for the additional charge re-

a third person,[58] or that the contract for which the paper was given has been rescinded, and thus the consideration failed.[59] But where a note contains a stipulation to the effect that the makers agreed to waive notice of protest and extension of time, it cannot be shown that after the note was signed the payee agreed to collect it at maturity, when no consideration was shown for such an agreement.[60]

§ 158. Discharge by subsequent agreement.—Where there is an agreement subsequent to the execution of the instrument, upon a valid consideration, to do or receive something else for and instead of the note, and such agreement has been actually carried out, it operates as a discharge of the instrument, and there can be no recovery upon it.[61] But if the agreement be still executory, it has been held that it must be enforced in another suit. Thus, a defense to a note payable in one year, that an oral collateral agreement provided that payment should not be demanded until the expiration of five years, is no bar to a suit brought before the lapse of five years.[62] So, where the payee of a note, who had sold a certain article, warranted it, and promised, if bad, to furnish a duplicate before the note should be paid, it was held no defense to the note.[63] Peculiar statutes may, in some States, change these common-law principles.

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lated only to the two months, and not to such further time in excess of the two months as the payee might voluntarily refrain from suing on the note. Rowland v. Watson, 4 Cal. App. 476, 88 Pac. 495 (1906). It is not necessary that in order to make an agreement for an extension of time valid the time should have been extended for some definite period, as between the parties. Drake v. Pueblo Nat. Bank, 44 Colo. 49, 96 Pac. 999; see, *post*, § 1319, as to definiteness of period to release sureties. But the agreement being independent of and collateral to the original contract, such extension does not continue the commercial characteristics of the note as live unmatured negotiable paper. Swan v. Craig, 73 Nebr. 182, 102 N. W. 471, citing text to the general proposition.

58. Low v. Treadwell, 12 Me. 441.

59. Allen v. Furbish, 4 Gray, 504; Newton v. Jackson, 23 Ala. 335; Rogers v. Bedell, 97 Tenn. 240, 36 S. W. 1096, cited in note 10 to § 813.

60. First Nat. Bank of Milan v. Wells, 98 Mo. App. 573, 73 S. W. 293.

61. Crossman v. Fuller, 17 Pick. 171. As illustrative of the general doctrine of the text, see Steven v. Lord, 84 Hun, 353, 32 N. Y. Supp. 309.

62. Dow v. Tuttle, 4 Mass. 414; 2 Parsons on Notes and Bills, 530, 531. *Contra*, Grafton Bank v. Woodward, 5 N. H. 99; Erwin v. Saunders, 1 Cow. 249.

63. Kelso v. Frye, 4 Bibb, 493. It has also been held in New York, that where a promissory note is given for a proper consideration, and an oral agreement that it shall not be collected, or that its payment shall not be enforced, is entirely nugatory, and an action may be maintained upon the note when it becomes due,

§ 159. Agreements to renew.—An agreement to renew a bill or note would be binding,[64] but unless it otherwise expressed the number of times of renewal, it would be construed as an agreement to renew once only.[65] If contemporaneous with the execution of the instrument, such agreement would not be binding unless in writing, for the reason that it would contradict the terms of a written contract, and parol evidence for that purpose is inadmissible. But if after the note is made, such agreement, though oral, would be binding if for a consideration.[66] In an action on a note payable in ninety days from date, but containing on its face a provision that if the maker pay one-half the note, and the interest on the other half, in advance, for ninety days, the payment of that half should be extended for that further length of time—it should be described according to its terms in a declaration, and a description of it as payable in ninety days from date would be a variance.[67] But if the agreement for extension or renewal were on a separate paper, it should not be noticed in the declaration.[68] In England it has been held that when there has been a valid subsequent agreement for renewal, the defendant must show that he applied for a renewal, or the plaintiff will prevail.[69]

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notwithstanding such promise. See Mead v. National Bank of Pawling, 89 Hun, 102, 34 N. Y. Supp. 1054.

64. Innes v. Munro, 1 Exch. 473. But an offer to renew, not accepting before suit filed, would not constitute agreement to renew. Albertype Co. v. Kent & Stanley Co., 19 R. I. 561.

65. Innes v. Munro, 1 Exch. 473.

66. Grafton Bank v. Woodward, 5 N. H. 99; Fleming v. Gilbert, 3 Johns. 520; Hoare v. Graham, 3 Campb. 57; Gibbon v. Scott, 2 Stark. 286. Compare Ellis v. Randle, 24 Tex. Civ. App. 475; Wolz v. Parker, 134 Mo. 458, 35 S. W. 1149; Commercial Bank v. Wood, 52 Mo. App. 214; American Nat. Bank v. Love, 62 Mo. App. 378; Henehan v. Hast, 127 Cal. 656; New London Credit Syndicate v. Neale, 2 Q. B. 487 (1898).

67. Woodstock Bank v. Downer, 27 Vt. 482; Barnard v. Cushing, 4 Metc. (Mass.) 230.

68. Smalley v. Bistol, 1 Mich. 153.

69. Gobbin v. Scott, 2 Stark. 286.

CHAPTER VII

CONSIDERATION OF NEGOTIABLE INSTRUMENTS

§ 160. By consideration is meant a benefit or gain of some kind to the party making the promise, or a loss or injury of some kind to the party to whom it is made. By the common law a promise made without consideration was invalid, and in order to enforce any contract it was necessary to aver and prove a consideration.

The most ancient exception to this rule was made in reference to promises under seal, the solemn act of the party in attaching a seal to the evidence of his contract being regarded as importing a consideration and estopping him from denying it. The necessities of trade soon produced another relaxation of the rule; and by the usage and custom of merchants, bills of exchange and promissory notes came to be regarded as *prima facie* evidences of consideration; and peculiar qualities were accorded to them which were possessed by no other securities for debt. These qualities, so far as they relate to the consideration of such instruments, we propose now to discuss.

SECTION I

WHAT INSTRUMENTS IMPORT A CONSIDERATION

§ 161. There is no doubt that if the instrument sued on be a bill of exchange—although it lacks the words "payable to order," or "bearer," which are essential to its negotiability—it is unnecessary to aver or prove a consideration, for it imports a consideration in itself by the very fact that it is a bill of exchange.[1] But if it is shorn

1. Averett's Admr. v. Booker, 15 Gratt. 169 (1859); Josceline v. Lassere, 10 Mod. 294, 317 (1714); Haydock v. Lynch, 2 Ld. Raym. 1563; Louisville R. Co. v. Caldwell, 98 Ind. 251, citing the text; Cowan v. Hallack, 9 Colo. 576, citing the text; Dalrymple v. Wyker, 60 Ohio St. 108, 53 N. E. 713; Cox v. Sloan, 158 Mo. 411, citing text; Milino Nat. Bank v. Cobbs, (Tex. Civ. App.) 128 S. W. 151. Where an order drawn by a debtor for his creditor on a third person was accepted, it does not matter that there was no consideration passing to the acceptor, when the creditor relied on the acceptance, paying no further attention to the debtor, and while doing so the debt became barred. Chattanooga Grocery Co. v. Livingston, (Tenn. Ch. App.) 59 S. W. 470 (1900). Where an owner of property

of its character as a bill of exchange by being made payable out of a particular fund, or upon a condition, or in a different medium than money, it does not, *per se*, import a consideration. And consideration must be averred and proved;[2] unless it be stated on its face that it was given for "value received," or some equivalent, or there are expressions in it inconsistent with any other theory than that upon a consideration, in which cases it would be *prima facie* evidence of consideration.[3] If its terms are just as consistent with the existence of consideration as they are with the theory of a total want thereof, for instance, a draft addressed to "the trustee of N. and A.," directing the payment of a sum "out of any money in his hands belonging to me,"—it would not afford such a legal presumption of consideration as to dispense with proof of it.[4] If an order be so drawn as to imply that the drawee has funds in his hands to meet it, acceptance of it is an admission of the funds in hand and their sufficiency.[5]

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accepted an order for a certain amount drawn by a contractor in favor of a material man, and the owner has paid a part of the order, the balance of the order cannot be recovered, when the drawee never credited the drawer with the amount of the order, or any part of it, except as it was paid, when the order was accepted under the mistaken belief that the amount covered all liens and claims against the property, and the contract price has been fully paid. Canady, Gillium & Key v. Webb (Ky.), 80 S. W. 172.

2. Averett's Admr. v. Booker, *supra*; Atkinson v. Manks, 1 Cow. 691; De Forest v. Frary, 6 Cow. 151; Belderback v. Burlingame, 27 Ill. 338, order payable "in lumber"; Josceline v. Lassere, 10 Mod. 294, 317 (1714); Haydock v. Lynch, 2 Ld. Raym. 1563: 1 Robinson's Practice (new ed.), 143.

3. Averett's Admr. v. Booker, 15 Gratt. 169; Frank v. Irgens, 27 Minn. 43; 1 Parsons on Notes and Bills, 226, 228, note. See Joliffe v. Higgins, 6 Munf. 3; Booth v. Dexter Fire Engine Co., 118 Ala. 369, 24 So. 405. In an action by the holder against the drawer of a domestic bill of exchange which has been discounted at a bank, evidence showing the drawing of the bill and the failure of the drawee to accept, or a failure on the part of the acceptor to pay according to the tenor of the bill, makes a *prima facie* case, and any matter relied upon to discharge the drawer must be set up by way of defense. Bank of Richland v. Nicholson, 120 Ga. 622, 48 S. E. 240.

4. Averett's Admr. v. Booker, 15 Gratt. 170, Lee, J., saying: "Taking all the terms of the paper together they are at least consistent with the theory of the absence of all considerations, as they are with that of any value received. The terms of the order would admit equally well of several different constructions. The drawer might have known that he had just such a sum in the hands of the drawee, and intended merely to give authority to the latter to deliver the same to the payee for him; or without knowing whether the trustee had received funds for him or not, might have merely given the order, if he had, to authorize the payee to receive them for him as agent."

5. Varner v. Nobleborough, 2 Greenl. 123; Maber v. Massias, 2 Bl. Rep. 1072.

§ 162. At common law an action of debt cannot be sustained upon a promissory note, as of itself importing a debt; but the plaintiff must declare upon the contract as in assumpsit, and must both aver and prove a valuable consideration. And the note, though it could not be declared on, might be given in evidence in support of the contract stated, as, for instance, on account for money lent.[6] One effect of the English statute of Anne, which has been quoted,[7] was, that an action of debt might be maintained on a promissory note without alleging a consideration, and, of consequence, without proving any,[8] that is to say, that a negotiable note implies or imports a valid consideration,[9] and there is a presumption in favor of its sufficiency,[10] and, consequently, that the production of a negotiable note makes a *prima facie* case.[11] And such is the effect of all statutes which make

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6. Peasley v. Boatwright, 2 Leigh, 198 (1830); Jackson v. Jackson, 10 Leigh, 452 (1839); Bourne v. Ward, 51 Me. 191; Bristol v. Warner, 19 Conn. 7; Bircleback v. Wilkins, 22 Pa. St. 26; Clarke v. Martin, 2 Ld. Raym. 757; Story v. Atkins, 2 Ld. Raym. 1430; Trier v. Bridgman, 2 East, 359.

7. *Ante*, § 5.

8. Peasley v. Boatwright, 2 Leigh, 198; Sprague v. Sprague, 80 Hun, 285, 30 N. Y. Supp. 162; Wood v. Flanery, 89 Mo. App. 632, citing text; Alexander v. Munroe, 54 Or. 500, 101 Pac. 903, 103 Pac. 514. Where promissory notes were executed and delivered in due form, it does not follow that they are without consideration when a collateral written contract was not properly executed and is of no force or validity. Owens v. National Hatchet Co., 147 Ia. 393, 121 N. W. 1076.

9. Rogers v. Rogers, 6 Penne. (Del.) 267, 66 Atl. 374 (until the contrary appears from the evidence); Ellison v. Simmons, 6 Penne. (Del.) 200, 65 Atl. 591; Being v. Bank of Kingston, 5 Ga. App. 578, 63 S. E. 652; Zimbleman & Otis v. Finnegan, 141 Iowa, 358, 118 N. W. 312; Dawson v. Wombles, 123 Mo. App. 340, 100 S. W. 547; Niles v. United States Ozocerite Co., 38 Utah, 367, 113 Pac. 1038.

10. Moore v. Gould, 151 Cal. 723, 91 Pac. 616; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677; Woodworth v. Veitch, 29 Ind. App. 589, 64 N. E. 932; Power v. Hambrick (Ky.), 74 S. W. 660; Mussey v. Dempsey, 113 N. Y. S. 271, 60 Misc. 317; Hicok v. Bunting, 86 N. Y. S. 1059, 92 App. Div. 167. Though a note does not contain the recital "for value received," yet when it is negotiable in form there is a presumption that such a note is based upon a consideration. Taylor v. Taylor's Estate, 138 Mich. 658, 101 N. W. 832. The giving of a check is presumptive evidence of the payment of a debt. Meyer v. Doherty, 133 Wis. 398, 113 N. W. 671 (1907). Metal checks issued by an employer and containing a promise to pay, are presumed to be based on an adequate consideration. Kentucky Coal Mining Co. v. Mattingly, 133 Ky. 526, 118 S. W. 350.

11. Brown v. Johnson Bros., 135 Ala. 608, 33 So. 683; Martin v. Foster, 83 Ala. 213, 3 So. 422; Creditors' Union v. Lundy, 16 Cal. App. 567, 117 Pac. 624; McMickeir v. Safford, 100 Ill. 102, affirmed 197 Ill. 540, 64 N. E. 540; Harper v. Davis, 115 Md. 349, 80 Atl. 1012.

promissory notes negotiable,[12] or which authorize actions of debt upon them though nonnegotiable. But such notes as are not negotiable by statute, or upon which no action of debt is authorized by statute, remain as at common law; and not importing a consideration, it must be alleged and proved.[13]

§ **163.** These general principles are affected more or less by statutes in the United States, and it has been said by a learned author that the only conclusion to which he is led by the authorities respecting nonnegotiable notes is that in some of the States the "presumption of consideration would be denied, and in others, perhaps admitted." [14] It is quite certain however that the transferee of a nonnegotiable instrument can stand on no better footing respecting the original parties than his transferrer, and that the consideration may be inquired into, though "value received" is expressed.[15] Whenever a note is expressed to be "for value received," or states a consideration, it is *prima facie* evidence of consideration,[16] though it may not be negotiable, and whether it be payable in money or specific articles.[17]

12. Glasscock v. Glasscock, 66 Mo. 627; Carnwright v. Gray, 127 N. Y. 92, 27 N. E. 835, 24 Am. St. Rep. 424, citing text.

13. Peasley v. Boatwright, *supra*, Averett's Admr. v. Booker, 15 Gratt. 165; Courtney v. Doyle, 10 Allen, 123. In this case the note ran, "I promise to pay A. B. three hundred dollars with interest from date (signed) C. D." Held, that consideration must be averred and proved.

14. 1 Parsons on Notes and Bills, 227. In Kimball v. Huntington, 10 Wend. 675, a note running, "Due A. B. $325 payable on demand," was held to import consideration. In the case of Mortimer v. Chambers, 63 Hun, 335, 17 N. Y. Supp. 874, held, that a nonnegotiable note imports a consideration, as against a devisee and its production makes a *prima facie* case against him, the court saying: "We have examined the statute and the authorities cited but find nothing in them which sustained the view contended for. And in Carnright v. Gray, 57 Hun, 518, 11 N. Y. Supp. 278, it was held that a nonnegotiable note imported a consideration as against the executors of the deceased maker as well as the maker himself. If the question were a new one, we should be inclined to adopt the view expressed by Learned, J., in the very able and exhaustive dissenting opinion which he wrote in that case, and held that a nonnegotiable note does not import a consideration against anybody. But that case holds to the contrary, and there is other authority to the same effect."

15. Chamberlain v. Gorham, 20 Johns. 144; 1 Parsons on Notes and Bills, 228; Edwards on Bills, 217. See Gardner v. Walsh, 95 Mich. 505, 55 N. W. 355; Fink v. Chambers, 95 Mich. 508, 55 N. W. 375.

16. Redding v. Redding, 69 Vt. 503, 38 Atl. 230.

17. Walrad v. Petrie, 4 Wend. 575; Bourne v. Ward, 51 Me. 191; Edwards on Bills, 210; 1 Parsons on Notes and Bills, 226; Noyes v. Smith, 2 New Eng. Rep. 705; Frank v. Irgens, 27 Minn. 43. Competent to show other and additional con-

The plaintiff may rely upon the strength of this presumption, but if, anticipating an attack upon the consideration, he should fail to establish it affirmatively, he will be no longer aided by the statement which the instrument contains.[18] The transferee of a nonnegotiable note must aver and prove consideration for the transfer.[19]

Under Negotiable Instrument statute.—Under the express terms of the statute, every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration;[20] such presumption arises though there is no recital of a valuable consideration therein,[21] and where a person has accepted a bill of exchange, he is presumed to have accepted it for a valuable consideration.[22] But under that rule and further provisions,[23] such an instrument is open to the defense of want of consideration,[24] as against all persons but a holder in due course.[25]

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sideration than that named in the instrument. Hill v. Whidden, 158 Mass. 267, 33 N. E. 526. A promissory note, although a proviso annexed thereto destroys its negotiability, purports a valuable consideration. Pyle v. Gallaher, 6 Pen. (Del.), 407, 75 Atl. 373.

18. Bruyn v. Russell, 52 Hun, 17.

19. Barrick v. Austin, 21 Barb. 241.

20. Appendix, sec. 24. Towles v. Tanner, 21 App. D. C. 530; Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490.

21. Ryan v. Sullivan, 128 N. Y. S. 632, 143 App. Div. 471.

22. National Park Bank v. Saitta, 111 N. Y. S. 927, 127 App. Div. 624, affirmed 196 N. Y. 548, 89 N. E. 1106, wherein the court quoted from Heuertennatte v. Morris, 101 N. Y. 63, 4 N. E. 1, 54 Am. Rep. 657, as follows: "If a party becomes a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor than an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. * * * By such acceptance the drawee admits the truth of the representation, and having obtained a suspension of the holder's remedies against the drawer and on extension of credit by his admission, is not afterward at liberty to controvert the fact as against a *bona fide* holder for value of the bill."

23. Appendix, secs. 28, 56.

24. St. Paul's Episcopal Church v. Fields, 81 Conn. 670, 72 Atl. 145; Fassett v. Boswell (Or.), 117 Pac. 302. Where a person was appointed agent to negotiate a loan by means of a note payable to his order, and such person transferred the note as security for a loan, the relation of the maker and the payee is governed by the law of principal and agent and not by the law merchant, and the maker cannot plead want of consideration as between himself and the payee, his agent. Sublette v. Brewington, 139 Mo. App. 410, 122 S. W. 1150.

25. Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548; Johnson County Sav. Bank v. Rapp, 47 Wash. 30, 91 Pac. 382.

§ 164. Weight of evidence.—Many cases hold that, as a bill or negotiable note imports a consideration, this requires the defendant to carry the burden of proof of a plea of no consideration.[26] Some of the cases supporting the foregoing rule will be found to rest upon statutory provisions declaring that such an instrument shall be deemed *prima facie* evidence of consideration. Though the instrument imports a consideration, the better rule would seem to be, especially in the absence of any statutory provision declaring this *prima facie* effect, that when evidence has been introduced to rebut the presumption which it raises, the burden is upon the plaintiff to satisfy the jury upon all the evidence, and by the preponderance of evidence that there was a consideration.[27] The production of the

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26. Towles v. Tanner, 21 App. D. C. 530; Gates v. Morton Hardware Co., 146 Ala. 692, 40 So. 509; Ragsdale v. Gresham, 141 Ala. 308, 37 So. 367; Brown v. Johnson Bros., 135 Ala. 608, 33 So. 683; Martin v. Foster, 83 Ala 213, 3 So. 422; Thompson v. Thompson, 140 Cal. 545, 74 Pac. 21; Creditors' Union v. Lundy, 16 Cal. App. 567, 117 Pac. 624; Ruth v. Krone, 10 Cal. App. 770, 103 Pac. 960; Wehner v. Bauer, 10 Cal. App. 171, 101 Pac. 417; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677; Gallagher v. Kiley, 115 Ga. 420, 41 S. E. 613; Webb v. Simmons, 3 Ga. App. 639, 60 S. E. 334; McMicken v. Safford, 100 Ill. App. 102, affirmed 197 Ill. 540, 64 N. E. 540; Chicago Title & Trust Co. v. Ward, 113 Ill. App. 327; Perry State Bank v. Elledge, 109 Ill. App. 179; Ewen v. Templeton, 148 Ill. App. 46; Holmes v. Horn, 120 Ill. App. 359; Luke v. Koenen, 120 Iowa, 103, 94 N. W. 278; Culbertson v. Salinger & Brigham (Iowa), 117 N. W. 6; Bronston's Adm'r v. Lakes, 135 Ky. 173, 121 S. W. 1021; Arnett v. Pinson (Ky.), 108 S. W. 852; Cox v. Cox's Ex'r. (Ky.), 79 S. W. 220; Kiesewetter v. Kress (Ky.), 70 S. W. 1065; Glascock v. Glascock, 217 Mo. 362, 117 S. W. 67; Bogie v. Nolan, 96 Mo. 85; Merchants' Nat. Bank v. Brisch, 140 Mo. App. 246, 124 S. W. 76; Winfrey v. Ragan, 136 Mo. App. 250, 117 S. W. 83; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; Tapley v. Herman, 95 Mo. App. 537, 69 S. W. 482, Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 39; Durland v. Durland, 153 N. Y. 67, 47 N. E. 42; Foote v. Valentine, 48 Hun, 475; Emerson v. Sheffer, 98 N. Y. S. 1057, 113 App. Div. 19; New York Metal Ceiling Co. v. Leonard, 96 N. Y. S. 187, 48 Misc. 500; Harris v. Buchanan, 91 N. Y. S. 484, 100 App. Div. 403; Columbian Conservatory of Music v. Dickenson, 158 N. C. 207, 73 S. E. 900; Tinker v. Midland Valley Mercantile Co., 25 Okl. 160, 105 Pac. 333; South Dakota Cent. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120; Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706. In an action against a surety, the defense being want of consideration, under a statute the burden of showing that there was no consideration for the note rests upon the defendant; the execution of the note being admitted. Frick Co. v. Hoff (S. D.), 128 N. W. 495. If the defendant shows that the consideration of a note was a promise of the payee to do certain things in the future, the burden is still on him, in order to make a defense of failure of consideration complete, to show that the promise was broken. Webb v. Simmons, 3 Ga. App. 639, 60 S. E. 334.

27. Best v. Rocky Mountain Nat. Bank, 37 Colo. 149, 85 Pac. 1124, 7 L. R. A.

note, as has been said, is a *prima facie* evidence of a consideration, sufficient, if not rebutted, to maintain the plaintiff's case. But to hold that such an admission in the note of a consideration therefor (as the words "value received") changes the burden of proof, and compels the defendant to assume it, would be to hold that such an admission when made orally, and when not contained in the instrument, would have the same effect.[28] And again: "As the burden is on the plaintiff to prove a good consideration (for the note), if the whole evidence offered on both sides leaves it in doubt whether there was a good consideration or not the plaintiff fails of making out his case, and the defendant will be entitled to a verdict." [29] But if the defendant allege a failure of the consideration, the burden will be upon him to prove it,[30] and also upon a defense of illegality of considera-

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(N. S.), 1035; McCallum v. Driggs, 35 Fla. 277, 17 So. 407; Small v. Clewley, 62 Me. 155; Slate v. Flye, 26 Me. 312; Black River Savings Bank v. Edwards, 10 Gray, 387; Crowingshield v. Crowingshield, 2 Gray, 529; Burnham v. Allen, 1 Gray, 501; Delano v. Bartlett, 6 Cush. 364; Smith v. Kinney, 32 Nebr. 162; Seurch v. Miller, 9 Nebr. 30; Campbell v. McCormack, 90 N. C. 492; Kenney v. Walker, 29 Oreg. 41; Flint v. Phipps, 16 Oreg. 448; Gutta Percha & Rubber Mfg. Co. v. Cleburne (Tex. Civ. App.), 107 S. W. 157. In Lombard v. Bryne, 194 Mass. 236, 80 N. E. 489, the court said: "This is not like a case where the defendant seeks to avoid the effort of *prima facie* evidence by the proof of an independent fact outside of the issue, whereby he is relieved from liability. In such a case the defendant has the burden of proving the fact, and if he fails, the original *prima facie* case prevails." The rule is not changed merely because the note contains the words "value received." Huntington v. Shute, 180 Mass. 371, 62 N. E. 380, 91 Am. St. Rep. 309. Distinguishing want of consideration and failure of consideration, the court in Ginn v. Dolan, 81 Ohio St. 121, 90 N. E. 141, said: "A plea of failure of consideration, or of payment, presents a case very different from this. These defenses, as it were, confess and avoid. They are affirmative defenses, and upon such the burden is upon the defendant from the beginning to the end."

28. Commonwealth v. McKie, 1 Bennett & Heard's Leading Criminal Cases, note 16, Am. Rep. 412; Small v. Clewley, 62 Me. 155; Bruyg v. Russell, 60 Hun, 281, 14 N. Y. Supp. 591, quoting with approval the text.

29. Burnham v. Allen, 1 Gray, 501; Small v. Clewly, 62 Me. 155; Whitney v. Clary, 145 Mass. 159; Perley v. Perley, 144 Mass. 107; Manistee Nat. Bank v. Seymour, 64 Mich. 74.

30. Lynds v. Van Valkenburgh, 77 Kan. 24, 93 Pac. 615; Sollenberger v. Stevens, 46 Kan. 386, 26 Pac. 690; Kearney v. Whitehead, 34 La. Ann. 530; McCormick Machine Co. v. Jacobson, 77 Mich. 584; Marquette Nat. Bank v. Stearns, 111 Minn. 218, 126 N. W. 726; Rhodes v. Guhman, 137 S. W. 88, 156 Mo. App. 344; Crosby v. Ritchey, 47 Nebr. 924, 66 N. W. 1005; Violet v. Rose, 39 Nebr. 660, 58 N. W. 216; Sprague v. Sprague, 80 Hun, 285, 30 N. Y. Supp. 162; Masterson v. F. W. Heitmann & Co., 38 Tex. Civ. App. 476, 87 S. W. 227; Kampman

tion,[31] or that it was obtained by false or fraudulent representations [32] or by duress.[33]

Under Negotiable Instrument statute.—Under the statute,[34] the burden of showing that there was a want of consideration rests upon the defendant, and if the defendant offers any evidence that shows or tends to show want of consideration, then it is incumbent upon the plaintiff to show by a fair preponderance of evidence, upon the whole case, that there was consideration. [35]

§ 165. Proof of consideration when bill or note is in hands of third parties.—When the bill or note has passed into the hands of a third party, we have already seen that the defendant, if he be not the immediate indorser of the indorsee, has a double burden imposed upon him. He must show in such cases not only the want or failure of the original consideration, but he must go farther and show want or failure of the consideration between the plaintiff and his immediate indorser. It is important to observe, however, that the rules of evidence conform themselves, in some respects, to suit the circumstances under which the parties are presumed to be placed; and there are two leading principles which are well settled.

The *first* is, that proof of a total want of consideration, as that the bill or note was executed for accommodation, or was intended as a gift, or was given for a balance erroneously supposed to be due, will not shift it upon the plaintiff to show that he acquired it upon a sufficient consideration,[36] and subsequent failure of consideration

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v. McCormick, 24 Tex. Civ. App. 462; Citizens' Savings Bank v. Houchens, 64 Wash. 275, 116 Pac. 866 (as to breach of warranty). See *post*, § 165.

31. Alabama Nat. Bank v. C. C. Parker & Co., 146 Ala. 513, 40 So. 987; Pritchett v. Sheridan, 29 Ind. App. 81, 63 N. E. 865; Fisher v. Fisher, 8 Ind. App. 665, 36 N. E. 296; Yowell & Williams v. Walker, 118 La. 28, 42 So. 635; Tinker v. Midland Valley Mercantile Co., 25 Okl. 160, 105 Pac. 333. But in Edisto Phosphate Co. v. Sandford, 112 Ala. 493, it was held that on an allegation that the note was given for the purchase of goods and that the plaintiff did not have a license authorizing the sale, the burden was on the plaintiff to show that he did have a license.

32. Halliwell Cement Co. v. Stewart, 103 Mo. App. 182, 77 S. W. 124; Citizens' Savings Bank v. Houchens, 64 Wash. 275, 116 Pac. 866; Pierce v. Stolhand, 141 Wis. 286, 124 Pac. 259.

33. Bullard v. Smith, 28 Mont. 387, 72 Pac. 761.

34. Appendix, sec. 24.

35. Bringman v. Von Glahn, 75 N. Y. S. 845, 71 App. Div. 537; Ginn v. Dolan, (Ohio) 90 N. E. 141.

36. See chapter XXIV, on *Bona Fide* Holder, §§ 777, 810, secs. ii and vii.

stands on the same footing.[37] Respecting accommodation bills, it was said by the Court of Exchequer, Lord Abinger delivering the opinion:[38] If a man comes into court without any suspicion of fraud, but only as the holder of an accommodation bill, it may fairly be presumed that he is a holder for value. The proof of its being an accommodation bill is no evidence of the want of consideration in the holder. If the defendant says, I lent my name to the drawer for the purpose of his raising money upon the bill, the probability is that money was obtained upon the bill. Unless, therefore, the bill be connected with some fraud, and a suspicion of a fraud be raised from its being shown that something has been done with it of an illegal nature—as that it has been clandestinely taken away, or has been lost or stolen, in which case the holder must show that he gave value for it—the *onus probandi* is cast upon the defendant."

§ **166.** Second.—But if the defendant show that there was fraud or illegality in the origin of the bill or note, a new coloring is imparted to the transaction. The plaintiff, if he has become innocently the holder of the paper, is not permitted to suffer; but as the knowledge of the manner in which it came into his hands must rest in his bosom, and the means of showing it must be much easier to him than to the defendant, he is required to give proof that he became possessed of it for a sufficient consideration.[39]

This rule was first laid down by Parke, J., in Heath v. Sansom, 2 B. & Ad. 291, dissenting from the opinion of the court, but it is now well settled in England as well as in the United States. Whitaker v. Edmunds, 1 Moody & R. 366; Mills v. Barker, 1 M. & W. 425; Percival v. Frampton, 2 Cromp., M. & R. 180; Ellicott v. Martin, 6 Md. 509; Ross v. Bedell, 5 Duer, 465; Harger v. Worrall, 69 N. Y. 370; Ewing v. Clark, 76 Mo. 545; School District v. Sheidley, 138 Mo. 672, 40 S. W. 656, 60 Am. St. Rep. 576; Murphy v. Gumaer, 12 Colo. App. 480, 55 Pac. 951, citing and approving text. In an action by an indorsee who is not a *bona fide* holder of the note, a defense of failure or want of consideration is the same as if the payee were suing. Iowa Nat. Bank v. Sherman, 23 S. D. 8, 119 N. W. 1010 (1909).

37. Wilson v. Lazier, 11 Gratt. 477; Knight v. Pugh, 4 Watts & S. 445.

38. Mills v. Barber, 1 M. & W. 425.

39. See §§ 810, 819; Crampton v. Perkins, 65 Md. 24; Second Nat. Bank v. Brady, 96 Ind. 508, citing the text; Mace v. Kennedy, 68 Mich. 389; McNamara v. Gargett, 68 Mich. 454; Sutton v. Beckwith, 68 Mich. 300. The three last-named cases are known in Michigan as the "Bohemian Oat Cases." Jones v. Hanna, 22 Pac. 884, citing the text; Vathir v. Zane, 3 Gratt. 246. In Harvey v. Towers, 6 Exch. 656, Pollock, C. B., said: "It is now well settled that if a bill be founded in illegality or fraud, or has been the subject of felony or fraud, upon that being proved, the holder is compelled to show that he gave value for it."

If he is innocent, the burden must generally be a light one; and if guilty, it is but a proper shield to one who would be, but for its protection, his victim.

§ 167. It was formerly considered necessary, in order to enable the defendant to put the plaintiff on proof of consideration, that defendant should have given the plaintiff notice to prove consideration;[40] but it is well settled now that no such notice is necessary, and it is seldom given.[41] It was, also, formerly held that where the consideration given by the plaintiff was disputed, and a notice to that effect had been given, the plaintiff must go into his whole case, in the first instance, and could not reserve proof of consideration as an answer to the defendant.[42] But now the plaintiff is only required to give affirmative proof of consideration after the defendant has given evidence tending to rebut the *prima facie* case which the production of the instrument makes out.[43]

SECTION II

BY WHAT LAWS THE LEGALITY OF CONSIDERATION IS DETERMINED—CONFEDERATE OBLIGATIONS

§ 168. The laws in force at the time a note is given determine its legality and effect; and where a law prohibiting the sale of spirituous liquors has been repealed, it does not thereby validate a note given

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Smith v. Braine, 16 Q. B. 244, overruling Brown v. Phillpot, 2 Moody & R. 285; Bailey v. Bidwell, 13 M. & W. 73; Sperry v. Spaulding, 45 Cal. 544; Campbell v. Patton, 113 N. C. 481, 18 S. E. 687, citing and approving text; Cunningham v. Scott, 90 Hun, 410, 35 N. Y. Supp. 881. In this connection, see authorities cited in notes to section 791. Commercial Bank v. Burgwyn, 108 N. C. 62, 12 S. E. 952, 23 Am. St. Rep. 49, citing text; Hazard v. Spencer, 17 R. I. 561, 23 Atl. 729, citing text; Knowlton v. Schultz, 6 N. Dak. 417, 71 N. W. 550; Rossiter v. Loeber, 18 Mont. 372, 45 Pac. 560, quoting text.

40. Paterson v. Hardacre, 4 Taunt. 111; Byles on Bills (Sharswood's ed.) [*115, 116], 221, note *d*.

41. Mann v. Lent, 1 M. & W. 240, 10 B. & C. 877 (21 Eng. C. L.); Bailey v. Bidwell, 13 Mees. & W. 75.

42. Delaney v. Mitchell, 1 Stark, 439 (2 Eng. C. L.).

43. Byles (Sharswood's ed.) [116], 221, note *d*; Rossiter v. Loeber, 18 Mont. 372, 45 Pac. 560, quoting text; Taylor v. Taylor's Estate, 138 Mich. 658, 101 N. W. 832.

in violation of the statute when it was in force; and a renewal of the note will be tainted with the original illegality.[44]

§ 169. The legality of the consideration of a contract is to be determined by the laws of the State or country where the contract is made, and not by those of the State or country where the suit is brought. The rules of every nation from comity admit that the laws of every other nation in force within its own limits ought to have the same force everywhere, so far as they do not prejudice the rights of other governments or their citizens.[45] The rule is founded not merely on the convenience, but on the necessity of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse or commerce with each other,[46] or even for social order to exist.

§ 170. Confederate transactions.—These principles have been applied by the courts of the United States, since the close of the war against the Confederate States, to instruments executed during the war for the loan of Confederate States treasury notes, or which were payable in that medium—it having been the only currency in general circulation within the Confederate lines; and also to those executed

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44. Holden v. Cosgrove, 12 Gray, 216. See §§ 871, 970. But if the note given was in consideration of a transaction growing out of the liquor traffic at a time when said traffic was legal, a subsequent enactment by the legislature declaring said traffic to be illegal will not render illegal the consideration supporting said note. Phillips v. Gifford, 104 Iowa, 458, 73 N. W. 1033.

45. See chapter XXVII, on Conflict of Laws, § 865 *et seq.*; Thorington v. Smith, 8 Wall. 11. Chief Justice Chase after speaking of the supremacy of the Confederate Government in the seceded States, says: "It must follow as a necessary consequence from this actual supremacy of the insurgent government, as a belligerent within the territory where it circulated, and from the unity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be void for that reason only, as made in aid of the foreign invasion in the one case, or of domestic insurrection in the other. They have no necessary relations to the government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely serve the ends of the unlawful government, are without blame, except when they have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation." Approved in Cook v. Lillo, 103 U. S. (13 Otto) 793.

46. Boyce v. Tabb, 18 Wall. 548. See § 866.

in payment of hire or purchase money of slaves after slavery had been abolished.

The United States Supreme Court has held unanimously that a promissory note payable in Confederate States treasury notes, made between parties within the lines of the Confederate States during the war, was not executed upon an illegal consideration, unless it was executed with the intent to aid the Confederate cause;[47] and the courts of some of the reconstructed Southern States and of the other States have adopted similar views.[48] Confederate currency having been the only medium of exchange in the Confederate lines for the better part of the war, any other view would seem peculiarly rigorous and cruel, and utterly opposed to that spirit of comity and humanity which should ameliorate as far as possible the disadvantages and hardships of conflicts between nations. But partisan judges have not been lacking in the conquered States, and their extreme and violent notions have found expression in decisions which will remain as an enduring stain upon the records of the American judiciary.[49]

§ 171. Bonds issued by the convention of a secession State to raise revenues to carry on war against the United States have been held by the United States Supreme Court to be upon an illegal consideration.[50]

§ 172. Promissory notes for slaves.—In respect to promissory notes given for slaves, before President Lincoln's emancipation proclamation was issued, the Supreme Court of the United States has set the question of their validity at rest. It has been decided by that tribunal that a note dated March 26, 1861, and given for a slave, could be recovered upon, notwithstanding that slavery was abolished on the 1st of January, 1862, and the contract of sale contained the

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47. Osborn v. Nicholson, 13 Wall. 656.

48. Rodes v. Patillo, 5 Bush, 271; Rivers v. Moss, 6 Bush, 600; Dearing v. Rucker, 18 Gratt. 426; Boulware v. Newton, 18 Gratt. 708; Lohman v. Crouch, 19 Gratt. 331; Magill v. Manson, 20 Gratt. 527; Green v. Sizer, 40 Miss. 350; Murrell v. Jones, 40 Miss. 565.

49. Note for loan of Confederate States, treasury notes void: Lawson v. Miller, 44 Ala. 616; Calfee v. Burgess, 3 W. Va. 274; Prigeon v. Smith, 31 Tex. 171; Reavis v. Blackshear, 30 Tex. 753. Contracts solvable in Confederate money held void. Blossat v. Sullivan, 21 La. Ann. 565; Latham v. Clark, 25 Ark. 574. And this has been held to apply, although the paper, on its face, was payable simply in dollars. Donley v. Tindall, 32 Tex. 43.

50. Hanauer v. Woodruff, 15 Wall. 439.

warranty, "the said negro to be a slave for life," [51] and also notwithstanding the Thirteenth Amendment to the Constitution, made in 1865, by which it is ordained that "neither slavery nor involuntary servitude shall exist in the United States nor in any place subject to their jurisdiction."

In the State tribunals of the Southern States, where this question has been of much consequence, conflicting views have been taken, but many of the cases concur in judgment with the Supreme Court of the United States,[52] and in other States of the Union, both before and since the war, the principles of these decisions have been asserted.[53]

§ **173**. A recovery upon instruments executed for slaves, or for Confederate money, has been sought to be prevented by articles in the new Constitutions of some of the States, denying jurisdiction to the courts to enforce them; or in some such language declaring that they shall be deemed void. But such declarations, whether of a State Constitution or of a legislative enactment, evidently violate the provision of the national Constitution prohibiting the passage of any law impairing the obligation of a contract. The United States Supreme Court has so held,[54] and the decision is obviously just; but some of the Southern tribunals have held otherwise.[55]

In some of the States it has been held that notes for slaves sold after Lincoln's emancipation proclamation were as valid as those for slaves sold before,[56] and according to the principles of the text, which the authorities amply sustain, there can be substantially no difference in

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51. Osborn v. Nicholson, 13 Wall. 655; Boyce v. Tabb, 18 Wall. 548. In Fitzpatrick v. Hearne, 44 Ala. 171, it was held that a warranty on the sale of slaves "that the title of said slaves was warranted for the life of said negro slaves," was not broken by the subsequent emancipation of the slaves. To same effect, Hand v. Armstrong, 34 Ga. 232; Wilkinson v. Cook, 44 Miss. 367; McNealy v. Gregory, 13 Fla. 417.

52. McElvain v. Mudd, 44 Ala. 48; Thompson v. Warren, 5 Coldw. 644; Dowdy v. McClallan, 52 Ga. 408; Calhoun v. Calhoun, 2 S. C. 283. *Contra*, Laprice v. Bowman, 20 La. Ann. 234; Lytle v. Wheeler, 21 La. Ann. 192.

53. Roundtree v. Baker, 53 Ill. 241, in which case it was held that an obligation for the purchase of a slave in Kentucky, when slavery was legal, might be sued upon in Illinois, and the subsequent abolition of slavery did not affect the note.

54. White v. Hart, 13 Wall. 646; Boyce v. Tabb, 18 Wall. 548; McElvain v. Mudd, 44 Ala. 48; McNealy v. Gregory, 13 Fla. 417.

55. Graham v. Maguire, 39 Ga. 531; Green v. Clark, 21 La. Ann. 567; Lawson v. Miller, 44 Ala. 616; Barrow v. Pike, 21 La. Ann. 14.

56. McElvain v. Mudd, 44 Ala. 48; Hall v. Keese, 31 Tex. 504.

the cases, the Confederate Government being in power and protecting slavery within its lines as a legal institution. But the Supreme Court of the United States, in the case above quoted, especially withheld any opinion as to cases arising after emancipation.

SECTION III

BETWEEN WHAT PARTIES THE CONSIDERATION IS OPEN TO INQUIRY

§ **174. Who are parties privy in negotiable instruments.**—The same rule which admits inquiry into the consideration of negotiable paper between the original payor and payee extends to admit such inquiry in any suit between parties between whom there is a privity. That is to say, between the immediate parties to any contract evidenced by the drawing, accepting, making, or indorsing a bill or note, it may be shown that there was no consideration (as, that it was for accommodation);[57] or that the consideration has failed, or a set-off may be pleaded; but as between other parties remote to each other, none of these defenses are admissible. It becomes important then to determine who are to be regarded as the immediate parties, or parties between whom there is a privity, to a negotiable instrument, and who are remote. Among the former may be classed: (1) The drawer and acceptor of a bill;[58] or (2) The drawer and payee[59] of a bill as a general

57. Murphy v. Keyes, 39 N. Y. Sup. Ct. 18; Bank of British North America v. Ellis, 6 Sawy. 98; Wilson v. Ellsworth, 25 Nebr. 246; Remington v. Dental Mfg. Co., 101 Wis. 307, 77 N. W. 178; Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32; Hawkins *et al.* v. Collier, 101 Ga. 145. And accordingly it has been held that as between the maker and the payee parol evidence is admissible to show that the consideration is different from that recited in the note. See Burke v. Napier, 106 Ga. 327; Smith v. Kinney, 32 Nebr. 162, 49 N. W. 341; Fall v. Glover, 34 Nebr. 522, 52 N. W. 168; Fellers v. Penrod, 57 Nebr. 463, 77 N. W. 1085; Branch v Howard, 4 Tex. Civ. App. 271, 23 S. W. 478; Stapylton v. Taegue, 29 C. C. A. 229, 85 Fed. 407. See *ante*, § 81*a*. Though the promise, being made by the cashier of a bank and beyond his authority, did not bind the bank, if the note had been made without consideration it could not be enforced. State Bank v. Forsyth, 41 Mont. 249, 108 Pac. 914.

58. Thomas v. Thomas, 7 Wis. 476, where it was held that acceptors could show as against drawers that they accepted for too much. Spurgin v. McPheeters, 42 Ind. 527; Trego v. Lowry, 8 Nebr. 238. When a check was given to the payee without consideration, and the drawee refused to pay it, the payee had no right of action thereon against the drawer. Roney v. Dunleary, 39 Ind. App. 108, 79 N. E. 398 (1906).

59. McCulloch v. Hoffman, 10 Hun, 133; Spurgin v. McPheeters, 42 Ind. 527.

rule; (3) The maker and payee of a note;[60] and (4) The indorser and immediate indorsee of a bill or note.[61]

§ 174a. Who are remote parties in negotiable instruments.—But the want of consideration, or the failure thereof, cannot be pleaded in a suit brought: (1) By an indorsee against the maker of a note;[62]

Where a promissory note is executed and delivered, and suit instituted in name of original payee, and defendant in his answer pleads want of consideration, alleging that deed to property had been placed in escrow by payee, to be delivered to the maker of the note on its payment, and also alleging that the payee had withdrawn said deed from escrow before commencing his suit, he should be permitted to prove such facts. Maydole v. Peterson, 7 Idaho, 502, 63 Pac. 1048.

60. Puget de Bras v. Forbes, 1 Esp. 117; Jeffries v. Austin, 2 Stra. 674; Saul v. Southern Seating etc., Co., 6 Ga. App. 843, 65 S. E. 1065; Lacey v. Hutchinson, 5 Ga. App. 865, 64 S. E. 105; Kennedy v. Goodman, 14 Nebr. 585; Voice v. Rosenberry, 12 Nebr. 448, a case where the alleged consideration moved, not from the payee, but from a third party, creditor of the maker, who caused the note to be executed to the payee; Flaum v. Wallace, 103 N. E. 296, 9 S. E. 571; Johnson v. Parshley (Or.), 117 Pac. 661; Ellison v. Simmons, 6 Penne. (Del.) 200, 65 Atl. 591; Pyle v. Gallaher, 6 Penne. (Del.) 407, 75 Atl. 373; Rouse, Hempstone & Co. v. Sarratt, 74 S. C. 575, 54 S. E. 757. A surety may defend upon the ground of an absence or failure of consideration of a promissory note to which he is a party, if the action thereon is by the original payee. Menzel v. Primm, 6 Cal. App. 204, 91 Pac. 754 (1907). If a note was made and delivered to an attorney for his client, and delivered by him to the client, being payable on its face to the attorney or bearer, the absence of a consideration between the attorney personally and the maker of the note would not affect its status, but the question would turn upon whether there was a valid consideration as between the client and the maker. Dicks v. Andrews, 132 Ga. 601, 64 S. E. 788.

61. Easton v. Pratchett, 1 Cromp., M. & R. 798, 2 Cromp., M. & R. 542; Holiday v. Atkinson, 5 B. & C. 501; Abbott v. Hendricks, 1 M. & G. 791; Platt v. Snipes, 43 Ark. 23; Spurgin v. McPheeters, 42 Ind. 527; Klein v. Keyes, 17 Mo. 326; Brannock v. Magoon, 141 Mo. App. 316, 125 S. W. 535; Clement v. Reppard, 15 Pa. St. 111; Barnett v. Offerman, 7 Watts, 130; Bank of the Ohio Valley v. Lockwood, 13 W. Va. 392. The indorsement of a note by a bank by its cashier after it had been delivered to the bank was not without consideration, when the note had been accepted by the bank by the cashier and director in violation of law, in disregard of their obligations to the bank, and subjected themselves to removal if they failed to restore the money unlawfully loaned. McAtee v. Shade, 185 Fed. 442.

62. Price v. Keen, 40 N. J. L. 332; *post*, § 814; Etheridge v. Gallagher, 55 Miss. 464; Burnes v. Scott, 117 U. S. 582; Chemical Light Co. v. Howard, 148 Mass. 359; Cooke v. Pearce, 23 S. C. 240; Hawkins v. Neal, 60 Miss. 257; Coffing v. Hardy, 86 Ind. 372; Bearden v. Moses, 7 Lea, 459; Potter *et al.* v. Sheets, 5 Ind. App. 506, 32 N. E. 811; Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632, text cited; Banister v. Kenton, 46 Mo. App. 464; Grand River Cottage v. Robertson, 72 Mo. App. 7. In a suit by an indorsee of a promissory

(2) By an indorsee against a prior, but not his immediate, indorser;[63] (3) By the indorsee against the acceptor of a bill,[64] nor by the payee against the acceptor of a bill, as a general rule.[65] They are regarded

note against the maker thereof, the defendant cannot controvert the title of the plaintiff upon the ground of an assignment by him as executor to himself as an individual, such assignment not being void, but merely voidable at the election of those who are parties at interest in the estate represented by the executor. Tyson v. Bray, 117 Ga. 689, 45 S. E. 74. In an action by the transferee of a note against the maker, the maker cannot set up a defense of want of consideration for the transfer or that the transferrer was so weak mentally as to have been overreached by the transferee; if the transferrer had been insane, this would have rendered the note and transfer void. Walker v. Winn, 142 Ala. 560, 39 So. 12, 110 Am. St. Rep. 50.

63. Etheridge v. Gallagher, 55 Miss. 464; 1 Parsons on Notes and Bills, 176.

64. Flower v. Sadler, 10 Q. B. Div. 572, 37 Eng. Rep. 453, Cotton, L. J., saying: "The defense in this case is that the bills were indorsed (by the drawer) upon an illegal consideration. * * * I am of opinion that, in strict law, the defendant cannot raise this point, for he is an acceptor, and in order to escape liability, he must show that the bills of exchange were indorsed to the plaintiff in fraud of himself." See also Gresham v. Ragsdale, 145 Ala. 683, 40 So. 99; Johnson County Sav. Bank v. Kramer, 42 Ind. App. 548, 86 N. E. 84.

65. Hoffman & Co. v. Bank of Milwaukee, 12 Wall. 181; Law v. Brinker, 6 Colo. 556; Flournoy v. First Nat. Bank, 79 Ga. 814; Tolerton Stetson Co. v. Anglo-California Bank, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777; Vanstrum v. Liljengren, 37 Minn. 191; Blaisdell Jr. Co. v. Citizens' Nat. Bank, 96 Tex. 626, 75 S. W. 292, 62 L. R. A. 968, 97 Am. St. Rep. 944. In Laflin & R. Powder Co. v. Sinsheimer, 48 Md. 411, Robinson, J., said: "The payee or holder gives value to the drawer, and if he is ignorant of the equities between the drawer and acceptor, he is in the position of a *bona fide* indorsee." In Arpin v. Owens, 140 Mass. 144, a consignor who had been in the habit of drawing bills of exchange on his consignee, with bills of lading attached to the drafts drawn, drew bills on him with forged bills of lading attached to the drafts, and had the drafts, with the forged bills of lading so attached, discounted in the ordinary course of business by a bank ignorant of the fraud, and the consignee, not knowing of the forgery, paid the drafts, and it was held that there was no recourse by the consignee against the bank. See the opinion of the court, p. 190. In Marsh v. Low, 55 Ind. 271, breach of warranty on sale of personal property by the drawee to drawer was held no defense to acceptor. The rule does not apply to nonnegotiable paper. Hunt v. Williams, 10 Atl. 645. An exception to the rule is found in those cases where the acceptance is qualified or conditional, as, *e. g.*, "Subject to contract." Haseltine v. Dunbar, 62 Wis. 162. When at the time an order was drawn, the drawer was indebted to the payee and the drawee owed the drawer an amount sufficient to pay the order, the acceptance of the order rendered the drawee the principal and original debtor to the payee of the order for the entire amount of the order, and the acceptor could not, in an action on the order, introduce evidence purporting to show a want of consideration for drawing the order. Ragsdale v. Gresham, 141 Ala. 308, 37 So. 367.

as remote parties to each other, and between such parties two distinct considerations must be inquired into in order to perfect a defense against the holder: (1) The consideration which the defendant received for his liability; and (2) That which the plaintiff gave for his title.[66] And if any intermediate holder gave value for the instrument, that intervening consideration will sustain the plaintiff's title.[67]

§ **175. Real relations of parties.**—Who are the immediate parties to a bill or note, however, does not always appear on its face. The name of the payee is often left blank, or there is an indorsement in blank upon the instrument, and in such cases when the blank is filled up with the holder's name, he would appear to be the original payee or indorsee.[68] In such cases the holder may show that his ostensible is not his real relation to the paper; and the want or failure of consideration cannot be pleaded against him if he show that it has passed through intermediate hands, and that he is not the immediate promisee of the party attempting the defense.[69]

And so the holder of a note who is the payee may show that the transaction originally was in the form of a note made by the maker

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66. Hoffman & Co. v. Bank of Milwaukee, 12 Wall. 181; Goetz v. Bank of Kansas City, 119 U. S. 556; Craig v. Sibbett, 15 Pa. St. 240; United States v. Bank of Metropolis, 15 Pet. 393; Swift v. Tyson, 16 Pet. 1; Robinson v. Reynolds, 2 Q. B. 196 (42 Eng. C. L.); Thiedemann v. Goldsmith, 1 De Gex, F. & J. 4; Hunter v. Wilson, 19 L. J. Exch. 8, 4 Exch. 489; Spurgin v. McPheeters, 42 Ind. 527; National Park Bank v. Saitta, 111 N. Y. S. 927, 127 App. Div. 624, affirmed 196 N. Y. 548, 89 N. E. 1106, citing text.

67. Byles on Bills (Sharswood's ed.), 236; 1 Parsons on Notes and Bills, 192; Hunter v. Wilson, 4 Exch. 489; Boyd v. McCann, 10 Md. 118; Howell v. Crane, 12 La. Ann. 126; Watson v. Flanagan, 14 Tex. 354; Roscoe on Bills, 111; Kyd on Bills, 277; Story on Bills, § 188; Johnson on Bills, 80. See chapter XXIV, on Rights of *Bona Fide* Holder or Purchaser, § 803 *et seq.* Farber v. National Forge & Iron Co., 140 Ind. 54, 39 N. E. 239, citing the text.

68. Brummel v. Enders, 18 Gratt. 873; Hoffman & Co. v. Bank of Milwaukee, 12 Wall. 193.

69. *Ibid.;* Cagle v. Lane, 49 Ark. 467, citing the text; Munroe v. Bordier, 8 C. B. 862; Arbouin v. Anderson, 1 Q. B. 498; Glasscock v. Rand, 14 Mo. 550; Horn v. Fuller, 6 N. H. 511; *ante,* § 145, 81*b;* Bank v. Layne, 101 Tenn. 45, 46 S. W. 762; Bank v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100; Montgomery v. Page, 29 Oreg. 320, 44 Pac. 689; Lockhart v. Ballard, 113 N. C. 292, 18 S. E. 34; Reynolds v. Roth, 61 Ark. 317, 33 S. W. 105. In an action against several persons on a check, one sued as the maker and the others as indorsers, the payee may show by parol that, although the form was that of an indorsement, the parties were joint makers or sureties. James v. Calder, 7 Ga. App. 107, 67 S. E. 1125.

for the accommodation of one who indorsed it to the holder; and that it was renewed by the original maker, who substituted the holder as payee. The rights of the parties having been fixed by the original note, the new one would be upon sufficient consideration as between the payee and the holder.[70]

If the note were made to the payee for his accommodation, and indorsed by him to a holder who parts with nothing on the faith of its transfer, and had notice of its accommodation character, upon these facts appearing, the holder could not recover.[71] And an accommodation maker is entitled to the benefit of any defense which the payee has against his indorsee.[72]

§ 176. As parol evidence is admissible to show that the relation of the parties to a promissory note is different from its legal effect,[73] it may be shown that there was an agreement that one signer should assume the relations of principal as to the other,[74] so, also, that the drawer is the primary debtor, and bound to the acceptor, although as to third parties the acceptor would be the principal. As, for instance, where the acceptance has been upon letters of credit,[75] or for the drawer's accommodation.[76] So, if A., for a good consideration moving from B. to him, should procure C. to make his note in favor of B., it would seem that it would be no sufficient answer in an action by B. against C. that the latter received no consideration from A.,[77] or that it had failed.[78] But if it were shown that there was no con-

70. Mathias v. Kirsch, 87 Me. 526, 33 Atl. 19.

71. Powers v. French, 1 Hun, 582; Schultz v. Noble, 77 Cal. 79; Hood v. Robbins & Smith, 98 Ala. 484, 13 So. 74.

72. Schwartzkopf v. Hill (Pa.), 3 Cent. 913.

73. Enterprise Brewing Co. v. Canning, 210 Mass. 288, 96 N. E. 673.

74. Canney v. Corey (Me.), 83 A. 662.

75. Turner v. Browden, 5 Bush, 216.

76. Turner v. Browden, 5 Bush, 216. See also Stark v. Alford, 29 Tex. 260; Trego v. Lowery, 8 Nebr. 238.

77. *Ibid.;* Railroad v. Chamberlain, 44 N. H. 497; Lea v. Cassen, 61 Ala. 312; Yeatman v. Mattison, 59 Ala. 382.

78. South Boston Iron Co. v. Brown, 63 Me. 139, Barrows, J.: "Where, at the request of the party with whom he deals, one makes his promissory note, which is to be a partial payment, for a piece of work to be done for him, payable to a third party, who is a creditor of the party with whom he contracts for the work, and it is credited by the payor to such party, in good faith, the maker cannot set up the defense of failure of consideration as between himself and the party with whom he deals in defense of a suit upon such note in the name of the payee." Brown v. Weldon, 27 Mo. App. 259, citing the text.

sideration between A. and C. the maker, or that such consideration had failed, it would then be necessary for the payee B. to show a consideration moving from him to A.[79]

And if the consideration between the party requesting the execution of the note and the maker were illegal, the note would not be valid, notwithstanding the consideration between such party and the payee were good, if the payee knew the consideration moving the maker were illegal. To hold otherwise would furnish an easy subterfuge to escape the consequences of illegal dealings. Thus, where A. was indebted to B. for intoxicating liquors sold in violation of law, and B. was indebted to C. for a legal consideration, and A., at B.'s request, executed a note with mortgage to C., who knew the illegality of the debt to B., it was held that such note and mortgage was invalid.[80]

So, if A., for a good consideration moving from B. to him, authorizes him to draw a bill on C. to a certain amount on his (A.'s) account, and B. draws accordingly, and C. accepts, C. will be absolutely bound to B., the drawer, as to any subsequent *bona fide* holder for value.[81] But the consideration of the acceptance failing, we should think the consideration for the authority from A. to B. would have to be proven.[82]

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79. Aldrich v. Stockwell, 9 Allen, 45. The defendant offered to show that the note was for a water-wheel sold by Thompson to him with warranty, which had failed, the wheel being worthless, and had been made payable to plaintiff at Thompson's request. The court below ruled that these facts constituted no defense, but the Supreme Court held otherwise, and Gray, J., said: "If such were the facts, the defendant was entitled to treat the sale as a nullity; and the proof of entire failure of consideration would have rebutted the presumption of consideration arising from the admission of the making of the note, and would have established a complete defense as between the original parties to the note. One consideration of the note having been proved, there could be no presumption, in the absence of evidence, that there was any other, and the defendant was not, therefore, obliged to prove that there was no other consideration for the note. If there was any other consideration, it was for the plaintiff to show it. As the case stood, the plaintiff might have held the note in trust, or as agent for Thompson. The presiding judge, by ruling that the facts offered to be proved by the defendant would constitute no defense, left nothing upon which he could go to the jury. The verdict to which he submitted under this ruling must, therefore, be set aside. Upon a new trial, it will be open to the plaintiff to show, if he can, that the consideration which failed was not the only consideration for the note, but there was another valuable consideration for it moving from the plaintiff to Thompson."

80. Baker v. Collins, 9 Allen, 253.

81. Wilson v. Crosnoe, 53 Mo. App. 241, citing text; Pillaus v. Van Mierop, 3 Burr. 1663; 1 Parsons on Notes and Bills, 183.

82. Aldrich v. Stockwell, 9 Allen, 45.

If the original consideration were tainted with fraud or illegality, or has failed in whole or in part, and the bill or note has passed into the hands of a *bona fide* holder for value without notice, yet if it be returned for a valuable consideration to the payee who is a privy to the original consideration, he could stand upon no better footing than if the instrument had remained in his hands.[83]

§ 177. Defenses between privy parties.—That the bill or note has been lost or stolen,[84] or was executed under the exercise of undue influence,[85] or under duress,[86] or under fraudulent misrepresenta-

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83. Sawyer v. Wisewell, 9 Allen, 42; Kost v. Bender, 25 Mich. 516 (see *post*, § 805); Cline v. Templeton, 78 Ky. 550.

84. Mills v. Barber, 1 M. & W. 425.

85. Bade v. Feay, 63 W. Va. 166, 61 S. E. 348 (1908).

86. Southern Hardware & Supply Co. v. Lester, 166 Ala. 86, 52 So. 328 (as to a check obtained by duress); Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912; Clark v. Peace, 41 N. H. 414; Griffith v. Sitgreaves, 90 Pa. St. 161; City Nat. Bank v. Kusworm, 91 Wis. 166; City Nat. Bank of Dayton, Ohio, v. Kusworm, 88 Wis. 89; Knott v. Tudyman, 86 Wis. 164, 56 N. W. 632. See § 847. If a note and mortgage were void because contrary to public policy on account of duress, their delivery without duress would not render them valid. Henry v. State Bank of Laurens, 131 Ia. 97, 107 N. W. 1034. In Nebraska Mut. Bond Ass'n v. Klee, 70 Nebr. 383, 97 N. W. 476, the court said that this State has taken its place in line with the more advanced position; to constitute duress sufficient to avoid a contract in this State, the means adopted need only be of a character necessary to overcome the will and desire of the injured party, whether that person be below or above the average person in firmness and courage, and whether the means employed come within the common law definition of duress or otherwise; and under this view of the law, the jury is properly directed to inquire into the mental capacity of the defendant, and whether the threats, whatever they were, probably deprived him of his free will, inducing him to make a contract that he would not otherwise have made, rather than to the particular threats made to see whether they meet with an arbitrary standard which may or may not be applicable to the person injured. In the following cases the circumstances were held to show duress: Brueggestradt v. Ludwig, 184 Ill. 24, 56 N. E. 419, affirming 82 Ill. App. 435 (conduct amounting to moral duress); Henry v. State Bank of Laurens, 131 Ia. 97, 107 N. W. 1034 (threat to a woman to prosecute her brother); Thompson v. Hicks (Tex. Civ. App.), 100 S. W. 357 (threat to prosecute for a criminal offense, where the payee was not connected with the crime, and though the offense was actually committed); Delta County Bank v. McGranahan, 37 Wash. 307, 79 Pac. 796 (threat of criminal prosecution of maker's husband). Under a statute providing that an apparent consent is not real or free when obtained through duress, and that "duress consists in unlawful detention of the property of any such person," where an order was obtained from the drawer as a condition to releasing property which was held under an attachment issued without jurisdiction, the property was illegally detained and the order was made under

tions,[87] or for fraudulent consideration,[88] or for illegal considera-

duress, under the statute. Harlan v. Gladding, McBean & Co., 7 Cal. App. 49, 93 Pac. 400. Under statutes essentially modifying the strictly defined doctrine of duress at common law, it was held that a plea presented a good plea of duress when it alleged in substance that the makers, the year before the note was given, had placed the payee in control of their business in North Carolina; that he had a thorough knowledge and control of such business; that he had entered into numerous contracts involving large sums of money; that he had collected and had in possession money belonging to the makers; that he had control of contracts and other property relating to their business; that no one but the payee could carry on the business without financial loss, that payee was insolvent; and that payee threatened to leave the employ of makers and take with him their money, contracts and other property, unless they gave him the notes. Whitt v. Blount, 124 Ga. 671, 53 S. E. 205. This would seem to be an extreme ruling on what constitutes duress. In the following cases it was held that the circumstances did not amount to duress: Bond v. Kidd, 122 Ga. 812, 50 S. E. 934 (threat to institute a civil action); Jones v. Peterson, 117 Ga. 58, 43 S. E. 417 (given while maker was under arrest under a warrant charging him with being the father of a bastard child); Barger v. Farnham, 130 Mich. 487, 90 N. W. 281 (threat to maker while in jail to furnish damaging information to prosecuting officer, occurring two weeks before executing note); Slade v. Montgomery, 65 N. Y. S. 709, 53 App. Div. 343; Fred Rueping Leather Co. v. Watke, 135 Wis. 616, 116 N. W. 174 (maker knew that his partner had purchased property from thief); Bennett v. Luby, 112 Wis. 118, 88 N. W. 37 (made in settlement two weeks after maker had been told by his partner that he had enough evidence to send the maker to the State's prison); Barrett v. Mahnken, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 953 (threat to kill a third person who at the time was in a distant State). A threat of arrest, imprisonment, and prosecution does not constitute duress, unless the person so threatened is charged with having committed an act or acts constituting a crime or misdemeanor. Bond v. Kidd, 1 Ga. App. 798, 57 S. E. 944. A threatened lawful arrest or prosecution, which does not imply harsh or unusual use of criminal process, and where no warrant has been issued, and there is no danger of the threat being immediately carried out, does not constitute duress. Wolff v. Bluhn, 95 Wis. 257, 70 N. W. 73, 60 Am. St. Rep. 115. The fact that the president of a corporation told the manager that for a shortage a recovery would be had on his bond was not a threat of arrest invalidating notes given for such shortage, though the manager believed that his failure to pay might result through the bonding company in a prosecution for embezzlement. Murray Show Case & Fixture Co. v. Sullivan, 15 Cal. App. 475, 115 Pac. 259. Where a contract is procured by duress, it is not void but voidable, and if the party elects to repudiate, he must do so within a reasonable time after the duress has been removed; if the maker makes partial payments on a note for years, he cannot defend on the ground that it was obtained by duress. Bushnell v. Loomis, 137 S. W. 257, 234 Mo. 371, 36 L. R. A. (N. S.) 1029. The burden is upon the defendant to prove that the note was obtained from him by duress. Nebraska Mut. Bond Ass'n v. Klee, 70 Nebr. 383, 97 N. W. 476.

87. Hass v. Hall & Farley, 111 Ala. 442, 20 So. 78; Case of Cunyus v. Guenther,

88. Rogers v. Morton, 12 Wend. 484; Leavitt v. Taylor, 163 Mo. 158. Persons

tion,[89] or has been fraudulently obtained from an intermediate holder,[90] or been in any way the subject of fraud or felony,[91] or has

96 Ala. 564, 11 So. 869; House v. Martin, 125 Ga. 642, 54 S. E. 735; Farkas v. Monk, 119 Ga. 515, 46 S. E. 670; Turner v. Ware, 2 Ga. App. 57, 58 S. E. 310; Tucker v. Roach, 139 Ind. 275, 38 N. E. 822; Union Central Life Ins. Co. v. Huyck, 5 Ind. App. 474, 32 N. E. 580; Hutchinson v. Bogg, 28 Pa. St. 294; American Nat. Bank v. Cruger *et al.*, 91 Tex. 446, 44 S. W. 278; City Nat. Bank of Columbus, Ohio, v. Jordan, 139 Ia. 499, 117 N. W. 758; Ditto v. Slaughter (Ky.), 92 S. W. 2; Merchants' & Farmers' Bank v. Cleland (Ky.), 77 S. W. 176, 719; McNeill v. Bay Springs Bank (Miss.), 55 So. 333; Phœnix Ins. Co. v. Owens, 81 Mo. App. 201; Mueller v. Buch, 71 N. J. L. 486, 58 Atl. 1092; Bank of Commerce v. Broyles, 16 N. M. 414, 120 Pac. 670; Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068; Mayes v. McElroy (Tex. Civ. App.), 81 S. W. 344; Vathir v. Zane, 6 Gratt. 246; Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811. See also *post*, under § 193. But not the fraudulent misrepresentations of a co-obligor. Vass v. Riddick, 89 N. C. 6. Fraudulent conduct of a person other than the payee or some person in privity with him, is no defense. Roth v. Donnelly Grocery Co., 70 S. E. 140, 8 Ga. App. 851. The fraudulent representations must have been the moving cause. Southard v. Arkansas Valley, etc., R. Co., 24 Okl. 408, 103 Pac. 750. So long as the drawer of a check remains undischarged, a defense that the check was obtained under false pretenses is open both to him and to the bank. Times Square Automobile Co. v. Rutherford Nat. Bank, 77 N. J. L. 649, 73 Atl. 479. Where a note is given in purchase of a business, assertions that the business would make a bushel of money a day, and similar prophecies and puffs are not such false representations as will avoid the note. Black v. Epstein, 93 Mo. App. 459, 67 S. W. 736. A debtor who gives his note to a creditor for a valid subsisting debt, induced to do so by certain statements of the creditor, cannot set up as a defense to said note that such statements were false and fraudulent, without also alleging and proving injury and damage. Bowen v. E. A. Waxelbaum & Bro., 2 Ga. App. 521, 58 S. E. 784. In an action by the payee of a note against an indorser, wherein the indorser alleges that he was induced to become an indorser through false and fraudulent representations made to him by the payee, it is not necessary to offer to rescind the maker's contract or to restore that which the maker may have received as consideration for the note, as the contract of the indorser is separate and distinct from the maker's contract as maker. Roessle v. Lancaster, 104 N. Y. S. 217, 119 App. Div. 368, 114 N. Y. S. 387, 130 App. Div. 1.

who have signed a note knowing that the conditions to the purchase of the property for which the note was given have not been carried out, waived any fraud. Hakes v. Thayer, 131 N. W. 174, 165 Mich. 476.

89. Edmonds v. Groves, 2 M. & W. 642; Bingham v. Stanley, 2 Q. B. 117; Shirley v. Howard, 53 Ill. 455; Holden v. Cosgrove, 12 Gray, 216.

90. 1 Parsons on Notes and Bills, 188. An agreement by the makers of a note for its transfer from the payee to another, and recognizing its validity, does not preclude the defense that its execution was fraudulently procured and that it was without consideration, where the makers were not aware of the fraud nor want of consideration when the agreement was made, and where the indorsee and holder was acquainted with these facts. Murchison v. Nies (Kan.), 123 P. 750.

91. Holden v. Cosgrove, 12 Gray, 216; Western Bank v. Mills, 7 Cush. 546;

been misappropriated and diverted,[92] or that it was given as collateral security,[93] or for a loss for which party was not liable, or that otherwise it was without valuable consideration,[94] is a good defense as between the parties privy to it. And in some cases that it was given by mistake for too great a sum, or when no sum was due, the evidence showing fraud or a total or partial want of consideration.[95]

Gibson v. Feeney, 66 Wash. 531, 120 Pac. 97. Where the defense of fraud in the medical treatment of defendant was set up in an action on a note, and it was admitted that the note was given in place of a previous note given for medical treatment of defendant's wife, evidence of the fraud alleged was properly rejected. Hoag v. Nanstad, 139 Wis. 455, 121 N. W. 125. The presumption that the maker of a note, who signed it with his mark, was acquainted with the contents of the note, cannot be overcome without evidence that imposition or fraud was practiced upon him to procure his signature to the note. Dawson v. Wombles, 123 Mo. App. 340, 100 S. W. 547.

92. Merchants' Nat. Bank v. Comstock, 55 N. Y. 24.

93. Leighton v. Bowen, 75 Me. 504.

94. Dexter Sav. Bank v. Copeland, 77 Me. 269. See State v. Hardware Co., 147 Mo. 366, 48 S. W. 927. Where a new note was given in renewal of the maker's joint obligation on another note under representations that the payee of the other note had instructed an attorney to collect the amount due thereon, when in fact the original note had been satisfied by one of the other parties to it and an assignment of it taken by him, the new note was without consideration. Gillespie v. Salmon, 2 Cal. App. 501, 84 Pac. 310.

95. Forman v. Wright, 11 C. B. 481. A case where payee induced maker to give note for too great a sum, through mistake; Southall v. Rigg, 11 C. B. 481. In this case nothing was due payee, and there was deception. Held, that as in Forman v. Wright, consideration was wanting in part, here it was wanting *in toto*. See *post*, § 201; Earle v. Robinson, 91 Hun, 363, 36 N. Y. Supp. 178; Aultman, Miller & Co. v. Seichting, 126 Ind. 137, 25 N. E. 894; Fellers v. Penrod, 57 Nebr. 463, 77 N. W. 1085; Hardison v. Davis, 131 Cal. 635, 63 Pac. 1905. That a note is given in settlement of a balance mistakenly supposed to exist in favor of the payee, when, in truth, nothing is due, is always a defense in an action brought by the original payee of the promise, or by an indorsee with notice of the alleged affirmity. Widlerman v. Donnelly, 86 Minn. 184, 90 N. W. 366. The right to resist a recovery of the whole amount for which a check was given on account of a mistake of fact cannot be defeated because the maker of the check was careless in thinking that he owed the amount stated. Thompson v. National Bank of Commerce, 132 Mo. App. 225, 110 S. W. 681. Where a maker admits the execution of the note, but alleges a mistake of the draftsman in writing the notes for a certain sum more than was right, a judgment for the uncontroverted part of the note was proper. Bitzer v. Utica Lime Co. (Ky.), 76 S. W. 20. In the case of Bergmann v. Salmon, 79 Hun, 456, 29 N. Y. Supp. 968, it was decided that where a note and collateral security thereto were given under a mistake of the maker as to the personality of the party receiving them, and were accepted by such person, with knowledge of the maker's mistake, and of the rights of the other party thereto, such note was void in its inception for fraud.

The same defense which the defendant might make to an action by an indorsee of the note given by him, and the same requirement of proof may be made by him in an action on a renewal of a former note, both notes being regarded as given upon the same consideration.[96]

§ 178. Consideration of bills purchased for remission of money.— The writers upon foreign bills contemplate four parties to the transaction. 1. The giver of value or purchaser of the bill which is drawn for remittance—such purchaser desiring the draft for money on a foreign place being called the remitter. 2. The drawer of the bill. 3. The drawee abroad. 4. The payee. The ordinary course of dealing with reference to such foreign bills begins by the sale of the bill by the drawer to some person other than the payee; and it does not contemplate, therefore, that the consideration for the bill should necessarily move from the payee to the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the payee.[97] In such case there would be no privity between the

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96. First Nat. Bank of Dalton v. Black, 108 Ga. 538, 34 S. E. 143; Pearson v. Brown, 105 Ga. 802, 31 S. E. 746; McDonald v. Aufdengarten, 41 Nebr. 41, 59 N. W. 762. See §§ 179, 205.

97. Munroe v. Bordier, 8 C. B. 862 (65 Eng. C. L.). In this case it was held that where the purchaser or remitter in London of a foreign bill gets from the drawer, according to the usage in London, credit until the next foreign post-day for the amount, and delivers the bill to the payee, who receives it *bona fide* and for value, the drawer is liable for the amount to the payee, although, in consequence of the purchaser's or remitter's failure before the next foreign post-day, the drawer never receives value for it. The declaration stated that A. (the defendant) made a bill of exchange, and directed it to B., a merchant in France, requiring him to pay the amount to the order of C. (the plaintiff); that A. delivered the bill to D., who delivered it to C.; and that B. refused payment, etc. A. pleaded that he made and delivered the bill to D. for the use of C., on the faith and terms of being paid the price and value thereof according to the usage of merchants in that behalf; that is to say, on the next foreign post-day; that neither C. nor any other person, then or at any time before or since, paid him the said price or value of the bill, or any part thereof; that he never had any value or consideration for the making or delivery of the bill; and that C. always held and still held the same without any value or consideration whatever to him (A.) for the same. Replication that, after the making of the bill and before it became due, D., who appeared to be, and whom C. believed to be, the lawful holder, delivered the bill to him for a good and valuable consideration, and without notice of the premises in the plea mentioned. Held, that the plea was no answer to the action; and that even if it were sufficient to call upon C. to show *bona fides*, he did so by his replication. In Kyd on Bills it is said the parties to bills of exchange are generally four, two at the place where the bill is drawn and two at the place

drawer and payee, and the former could not plead against the latter for the want or failure of consideration.

If the bill be delivered by the drawer to the remitter upon a promise to pay the price next day, and the remitter, without paying, transmit the bill to the payee, the drawer might plead no consideration to the suit of the latter, provided the remitter were his agent.[98] But if the remitter purchase the bill on credit for himself, and sell it in good faith to the payee, the drawer could not resist the payee's suit for want of consideration if the remitter failed to pay the purchase money.[99] Thus, if Duncan, Sherman & Co., of New York, being indebted to Gilliatt & Sons, of London, procure Fisk & Hatch, New York, to draw a bill on London, in favor of Gilliatt & Sons, and remit it to the latter in payment of the debt, the liability of Fisk & Hatch to Gilliatt & Sons will be absolute, whether any consideration for the drawing of the bill has been paid by Duncan, Sherman & Co. or not. But if Duncan, Sherman & Co. were agents of Gilliatt & Sons in purchasing the bill, there would then be a privity between Gilliatt & Sons and Fisk & Hatch, and want of consideration could be pleaded.

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of payment; as where A., a merchant at Amsterdam, owes money to B., a merchant in London, instead of sending the money in specie to B., he applies to C., another merchant in Amsterdam, to whom D., a fourth person, residing in London, is indebted to an equal amount. A. pays to C. the money in question, and receives from him a bill directed to D. to pay the amount to B., or to any one appointed by him, who sends it to his correspondent B., with an order that the money be paid to him by D. Kyd on Bills, 3.

98. Puget de Bras v. Forbes, 1 Esp. 117. The plaintiff resided in Holland, and having money in England, employed Agassiz, Rengement & Co., as his agents, to sell it out and to remit it to him in bills on Holland. The agents bought of the defendants bills on Holland in favor of the plaintiff; and it was proved to be the custom of London, for persons in the habit of remitting foreign bills, to give the bills on one day, but not to receive the money for them until the next post-day. The bills were bought on February 17th, and the next post-day was Tuesday, February 21st. On Monday, the 20th, Agassiz, Rengement & Co. stopped payment, so that the defendants, in fact, never received any value for the bills which they had so drawn on Holland in favor of the plaintiff; and they having ordered their correspondent abroad not to pay the bills, an action was brought against them by the plaintiffs, as drawers. It was held that they were not bound.

99. Munroe v. Bordier, 8 C. B. 872 (65 Eng. C. L.); 2 Rob. Pr. (new ed.) 145.

SECTION IV

WHAT ARE SUFFICIENT AND LEGAL CONSIDERATIONS

§ 179. Valuable and gratuitous considerations.—When it has been determined that the relations of the parties are such as to admit an inquiry into the consideration, it becomes then important to ascertain what is such a consideration as will support an action upon a negotiable instrument. A valuable consideration is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable instruments when the consideration is open to inquiry.[1] Therefore, a consideration founded on mere love and affection, or gratitude, is not sufficient to sustain a suit on a bill or note; as, for instance, when a bill or note is accepted or made by a parent in favor of a child, or *vice versa*, it could not be enforced between the original parties, the engagement being gratuitous upon what is called a good, in contradistinction to a valuable, consideration.[2]

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1. Maynard v. Maynard, 105 Me. 567, 75 Atl. 299, quoting text. Where one executed and delivered a note to another in furtherance of a common venture, the fact that there is a partnership, or that the affairs of the partnership are still unsettled, constitutes no defense note; it might furnish good ground for transferring the action to the equity calendar. Vapereau v. Holcombe, 122 Iowa, 406, 98 N. W. 279. A consideration moving to one of several joint makers of a promissory note is good as to all. First Nat. Bank of Scribner v. Golder, 89 Nebr. 377, 131 N. W. 600. A contract giving an interest in land to the maker of a note is sufficient consideration for the note. Latzke v. Albrecht, 113 Minn. 322, 129 N. W. 508 (1911).

2. Story on Bills (Bennett's ed.), 181; 1 Parsons on Notes and Bills, 178; Chitty on Bills (13th Am. ed.), 89; Holliday v. Atkinson, 5 B. & C. 501; Easton v. Prachett, 1 Cromp., M. & R. 798, 2 Cromp., M. & R. 542; Sullivan v. Sullivan, 122 Ky. 707, 92 S. W. 966, 7 L. R. A. (N. S.) 156, quoting text; Maynard v. Maynard, 105 Me. 567, 75 Atl. 299, quoting text; Fuller v. Lambert, 78 Me. 325; Hill v. Buckminster, 5 Pick. 391, overruling Bowers v. Hurd, 10 Mass. 427; Brooks v. Owen, 112 Mo. 251, 19 S. W. 723, 20 S. W. 792, citing text; Pennington v. Gittings, 2 Gill. & J. 208; Fink v. Cox, 18 Johns. 145; Pearson v. Pearson, 7 Johns. 26; Shugart v. Shugart, 111 Tenn. 179, 76 S. W. 821, 102 Am. St. Rep. 777, citing text; Smith v. Kittridge, 21 Vt. 238; Parker v. Carter, 4 Munf. 273. A promissory note given by a son to his widowed mother for money paid by her for his board while at college and his college education, after such expenditure, without promise or expectation of repayment on the fact of either, at the time of such expenditure, wants legal consideration, and is not enforceable. Gooch v. Gooch, 70 W. Va. 38, 73 S. E. 56.

And if a note is executed and delivered with the intention of presenting it as a gift, and is afterward taken up and a new note given in its stead, the renewed note is without valuable consideration.[3] And, of course, a note given by a parent to his child during his lifetime could not be enforced after his death against his estate.[4]

Under Negotiable Instrument statute.—The statute defines "value" as any consideration sufficient to support a simple contract,[5] and it has been said thereunder that where the consideration for a promise is in part an act done by the promisee at the request of the promisor by which the former sustains any loss, trouble, or inconvenience and of a benefit to him who makes the promise, courts of law or of equity will not in the absence of fraud interfere with the valuation which the parties themselves placed upon the considerations that induced the contract.[6]

§ 180. Gift of note, bill, or check.—It seems now to be settled, that a bill, note, or check, delivered by the maker or drawer to the payee as a gift, and without any adequate consideration, but in-

3. Copp v. Sawyer, 6 N. H. 386; Hill v. Buckminster, 5 Pick. 391. See § 205. But if one, being an accommodation indorser, upon the original note, thereafterward indorses a renewal of the same, the obligation created thereby is founded upon a sufficient consideration. See Cutler v. Parsons, 13 App. Div. 377, 43 N. Y. Supp. 187; First Nat. Bank of Dalton v. Black, 108 Ga. 538, 34 S. E. 143; Pearson v. Brown, 105 Ga. 802, 31 S. E. 746.

4. Callender v. Callender (Ky.), 70 S. W. 844; Phelps v. Phelps, 28 Barb. 121. But it has been held in Massachusetts that a promissory note given by one to the parents of a child with the proviso that said child, then new-born, be named for the maker and giver of the note was a valid consideration, for the court declared that the child was affected more than any one else by this name being given him, inasmuch as it deprived him of the advantage of receiving any other name, and subjected him to the possibility of detriment because he bore the name imposed. Further than this, the court held that, "Assuming that the privilege belonged to the parents, if they waive the right in favor of another, we think the child has an interest in the name which it shall bear analogous to the interest which the child has in its own services, which belong to the father, but which, if the father waives his right, furnish a good consideration for a promissory note given to the child by a person to whom they have been rendered. Nightingale v. Withington, 15 Mass. 272. See Eaton v. Libbey, 165 Mass. 218, 42 N. E. 1127, 52 Am. St. Rep. 511, for above opinion; Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608.

5. Appendix, sec. 25. Where the holder of a note for $2,000, upon which $500 had been paid, surrendered the note for another note for $1,500, the holder parted with value. Van Norden Trust Co. v. Rosenberg, 114 N. Y. S. 1025, 62 Misc. 285.

6. Russell Electric Co. v. Bassett, 79 Conn. 709, 66 Atl. 531.

tended by him to be paid, cannot be enforced as against the donor or his personal representative.[7] But a note given "for value received and his kindness to me," would be good, the first part of the sentence denoting an adequate consideration.[8] The indorsee could not enforce against his indorser a note indorsed to him as a gift.[9]

Where a note without consideration was delivered to the payee

7. Holliday v. Atkinson, 5 B. & C. 501, 8 Dowl. & R. 163; Cloyes v. Cloyes, 43 Sup. Ct. Rep. 145; Simpson College v. Tuttle, 71 Iowa, 596; Loudermilk v. Loudermilk, 93 Ga. 443, 21 S. E. 77; Mader v. Cool, 14 Ind. App. 299, 42 N. E. 945, 56 Am. St. Rep. 304. See authorities cited in notes to §§ 24 and 24a. A gift of money by check is not consummated until there has been a payment of the check, and where the check has not been paid during the lifetime of the maker, the gift is not complete. Pullen v. Placer County Bank, 138 Cal. 169, 71 Pac. 83, 66 Pac. 740, 94 Am. St. Rep. 19. See also Cox v. Walker, 140 Ky. 172, 130 S. W. 984, and Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308, holding further that where a check has been accepted upon condition that it was not payable until the death of the maker, it was not good as a gift *inter vivos*. The intention to make a gift and payment of the check are sufficient. Pickslay v. Starr, 149 N. Y. 432, 44 N. E. 163, 52 Am. St. Rep. 740. A note given merely as evidence of an advancement paid by a parent, and on which the maker may be required to pay interest during the life of such parent, is without consideration. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108; Nowack v. Lehmann, 139 Mich. 474, 102 N. W. 992; Graham v. Alexander, 123 Mich. 168, 81 N. W. 1084. A note given by a son to his father was without consideration when the father intended to give his son the money when he paid it. Boblett v. Barlow (Ky.), 83 S. W. 145. The delivery of a bank book and an order for less than the amount of deposit is sufficient to constitute a gift. Wetherow v. Lord, 58 N. Y. S. 778, 41 App. Div. 413. But the mere possession of a bank book and check signed more than a month before the death of the maker of the check is not sufficient evidence of a gift *inter vivos* of the moneys deposited in the bank. Dinlay v. McCullagh, 36 N. Y. S. 1007, 92 Hun, 454. Where the delivery of a bank check as a gift is coupled with an intention to transfer a present interest in the money represented by the check and no revocation is attempted, the intent of the donor should be given effect and the transaction be held to transfer a present interest and a right to the payment of the check after the default of the drawer, as well as before. See May v. Jones, 87 Iowa, 189, 54 N. W. 231; Richardson v. Richardson, 148 Ill. 563, 36 N. E. 608; Beatty v. Western College, 177 Ill. 281, 52 N. E. 432, 69 Am. St. Rep. 242. Where a husband made notes payable to his wife and deposited them in a bank to her credit, and the money when collected was deposited to her credit, this constituted a gift to the wife. Flanner v. Butler, 131 N. C. 151, 42 S. E. 557, 92 Am. St. Rep. 773. And when the maker directed the payee of the note to sell the same in his lifetime and to retain the proceeds of such sale, the gift is extended by the negotiation of the note. Armstrong v. Armstrong, 142 Ill. App. 507.

8. Woodbridge v. Spooner, 3 B. & Ald. 235; Cotton v. Graham, 84 Ky. 675; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170.

9. Easton v. Pratchett, 1 Cromp., M. & R. 798.

in a sealed envelope, on the condition that the seal should not be broken in the maker's lifetime, and the maker dying, the envelope was opened, it was held that the payee could recover, although he did not know the contents of the envelope until it was opened.[10]

A request written by the maker below a promissory note that the payee will accept the note from his true friend the writer, is not conclusive as matter of law that the note was without consideration, although the note was delivered in a sealed envelope, whereon was indorsed a request not to open it till after the writer's death.[11]

Evidence of a party's pecuniary circumstances is not competent to show want of consideration.[12] In general the mere inadequacy of consideration, except as a circumstance bearing upon the question of fraud or undue influence, is not a defense to a promissory note. If no part of the consideration was wanting at the time, and no part of it subsequently failed, although inadequate in amount, the note is a valid obligation, while a want or failure of consideration, in whole or in part, is a good defense to the whole note, or to the extent of such failure.[13]

§ 181. A gift of a negotiable instrument of a third party *inter vivos* may be evidenced by the circumstances which usually attend gifts of personal property, as that it must be voluntary and absolute, and take effect at once, and must be accompanied by a delivery to the donee or to someone for his use and benefit.[14] Such a gift, however,

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10. Worth v. Case, 42 N. Y. 362.

11. Dean v. Carruth, 108 Mass. 242; Gammon Theological Seminary v. Robbins, 128 Ind. 85, 27 N. E. 341.

12. Hartman v. Shaffer, 71 Pa. St. 312.

13. Earl v. Peck, 64 N. Y. 598; Worth v. Case, 42 N. Y. 362; Cowee v. Cornell, 75 N. Y. 91; Farber v. National Forge & Iron Co., 140 Ind. 54, 39 N. E. 249, citing the text; Hertfelder & Cochran v. Clark (Ga. App.), 73 S. E. 608. A distinction is to be observed between want or failure of consideration, which is a defense or defense *pro tanto* to an action between the parties, and inadequacy of consideration, which does not, in law, constitute a defense. Furber v. Fogler, 97 Me. 585, 55 Atl. 514. See § 201. Where the maker of the note recognized the right of the payee to rent he agreed to pay, the fact that he stipulated to pay more than the payee's interest in the property was actually worth, affords no sufficient reason for relieving him of the effect of the contract fairly entered into by himself. Smith v. McLennan, 101 Ill. App. 196.

14. Malone v. Lebus, 116 Ky. 975, 77 S. W. 180; Burchett v. Fink, 139 Mo. App. 381, 123 S. W. 74; Blazo v. Cochrane, 71 N. H. 585, 53 Atl. 1026; Clark v. Gurley (Tex. Civ. App.), 106 S. W. 394. See also Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168, holding further that the delivery of a promissory note by the holder to the maker, with the intention of transferring to him the title to the note, is an

is not such a negotiation of it in the usual course of business as to give the donee the full protection which is extended a *bona fide* holder for value. And if the donee afterward transfer it for less than its value, or for a wholly inadequate consideration, his indorsee can recover from a prior party having a defense against the donor only what he himself paid for it.[15] But as to all prior parties having no defense against the donor, the donee can himself recover the whole amount,[16] and *a fortiori*, an indorsee who has paid only a partial consideration may recover the whole amount against all prior parties who have no defense against his immediate indorser.[17]

§ 182. **A mere moral obligation not sufficient.**—A mere moral obligation, although coupled with an express promise, will not constitute a valuable consideration, and it is only where there is a precedent duty which would create a sufficient legal or equitable right if there had been an express promise at the time, or where there is a precedent consideration, that an express promise will create or revive a cause of action.[18]

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extinguishment of the note, and a discharge of the obligation to pay it. When a note was delivered to a third person as the agent of the donor and not as trustee for the donee, the gift failed for want of a complete delivery to the donee. Bickford v. Mattocks, 95 Me. 547, 50 Atl. 894; Clapper v. Frederick, 199 Pa. St. 609, 49 Atl. 218; Jarrell v. Crow, 30 Tex. Civ. App. 629, 71 S. W. 397. A delivery of promissory notes of another by the donor to a trustee, with direction to collect, and, when collected, distribute the proceeds among named *cestuis que trustent*, is a good gift *inter vivos*. Calvin v. Free, 66 Kan. 466, 71 Pac. 823. The indorsement and delivery by the donor of a check payable to order constitutes a valid donation of the fund represented by such check. Succession of Desina, 123 La. 468, 49 So. 23.

15. Byles on Bills (Sharswood's ed.), 227; Nash v. Brown, Chitty on Bills (13th Am. ed.), 89; Brown v. Mott, 7 Johns. 361; Holeman v. Hobson, 8 Humphr. 127; Bethune v. McCrary, 8 Ga. 114; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40; Youngs v. Lee, 18 Barb. 187. See *ante*, chap. 1, § 24; Commonwealth v. Donovan, 170 Mass. 228, 49 N. E. 104; First Nat. Bank v. Wood, 128 N. Y. 35, 27 N. E. 1020; McCrady v. Jones, 44 S. C. 407, 22 S. E. 414.

16. Milnes v. Dawson, 5 Exch. 948.

17. Moore v. Candell, 11 Mo. 614; Turner v. Brown, 3 Smedes & M. 425; Farbell v. Sturtevant, 26 Vt. 513; Reid v. Furnival, 5 C. & P. 499; Callahan v. Crow, 91 Hun, 346, 36 N. Y. Supp. 225; Meyer v. Koehring, 129 Mo. 15, 31 S. W. 449.

18. Services rendered by a daughter to her mother are such as she is morally bound to render without compensation, and do not constitute valuable consideration for a note subsequently given to her by her father, as no compensation can be recovered in the absence of an express promise. Shugart v. Shugart, 111 Tenn. 179, 76 S. W. 821, 102 Am. St. Rep. 777, citing text. See also Harper v. Davis, 115 Md. 349, 80 Atl. 1012. See, however, notes under § 188. But in Henton v.

Thus, a promissory note made after full age for necessaries furnished to the promisor during infancy; [19] or a note executed for the payment of a debt discharged in bankruptcy,[20] or barred by the statute of limitations,[21] or voluntarily released,[22] or for the reimbursement of a person who has voluntarily paid a debt of the promisor,[23] would be valid, as upon any other valuable consideration. And in any case where the contract was merely voidable, but otherwise founded on a valuable consideration, a bill or note given to discharge it will be valid—but otherwise if the contract were void.[24]

But it has been held in England by the Court of Exchequer, that

Henton, 143 Ill. App. 53, it was held that a moral obligation to compensate a person for personal services already rendered and to be rendered, constitutes a sufficient consideration for the transfer of notes.

19. Hawkes v. Saunders, Cowp. 289; Eastwood v. Kenyon, 11 Ad. & El. 438 (39 Eng. C. L.); Chitty on Bills (13th Am. ed.), 87.

20. Wislizenus v. O'Fallon, 91 Mo. 184. By statute in a number of the States, part payment alone constitutes a new promise. See Park v. Brooks, 38 S. C. 300, 17 S. E. 22; Succession of F. Andrieu, 44 La. Ann. 103, 10 So. 388. A note executed by a married woman has no consideration to support it, when the creditor had at the time an unsecured, unenforcible debt, against the husband, which had been discharged in insolvency, and was worthless, except as it might furnish a consideration for a promise that would bind the husband if he should choose to waive the benefit of his discharge, and make an unequivocal new promise to pay the debt. Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436.

21. Eastwood v. Kenyon, 11 Ad. & El. 438 (39 Eng. C. L.); Trueman v. Fenton, Cowp. 544; McGrath v. Barnes, 13 S. C. 328 (note given by executor for debt barred after his qualification); Giddings v. Giddings, 51 Vt. 227; Glover v. Cheatham, 19 Mo. App. 661, citing the text.

22. Stafford v. Bacon, 25 Wend. 384; Valentine v. Foster, 1 Metc. (Mass.) 520; Snevely v. Read, 9 Watts, 396.

23. Hayes v. Warren, 2 Stra. 933; Stokes v. Lewis, 1 T. R. 20. Or renewal of note given when one was mentally incompetent—disability not existing when new note given. Bank v. Sneed, 97 Tenn. 120, 36 S. W. 716, 56 Am. St. Rep. 788.

24. Eastwood v. Kenyon, 11 Ad. & El. 438 (39 Eng. C. L.); Littlefield v. Shee, 2 B. & Ad. 811; Howell v. Wright, 41 Hun, 167, citing the text. In South Carolina it has been decided that a written promise to pay a debt is binding on the promisor if based upon a perfect moral obligation, even though such moral obligation did not arise from a once existing, but now extinguished legal obligation. See Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731, note. Though a lease of property of a minor is voidable because certain statutory conditions as to the making of such a lease were not complied with, an assignee of the lease who has enjoyed all the benefits of possession under the lease cannot set up invalidity of the lease as a defense in a suit upon a note given in consideration of the assignment of the lease. Norton v. Stroud State Bank, 17 Okl. 295, 87 Pac. 848. A verbal promise, to pay a note which is void under the statute, is void for want of consideration. Swinney v. Edwards, 8 Wyo. 54, 55 Pac. 306, 80 Am. St. Rep. 916.

a bill given since the repeal of the usury laws to pay a debt with usurious interest, contracted during the existence of the usury laws, was binding.[25] And a note given by the purchaser of an estate to the vendor for the purchase money, is made on sufficient consideration though the contract be void by the statute of frauds.[26] The indorsement of a note of a bankrupt by the payee gives it no effect as to the bankrupt; and it has been held that a new promise by the bankrupt after his discharge in bankruptcy, and after the indorsement, does not revive his liability; [27] but it has been held in Massachusetts that a promise by the maker of a note after his discharge in bankruptcy to pay it is a contract to pay it according to its tenor,[28] and we cannot see that there is any just reason to the contrary. If the bankrupt could bind himself by a renewal, why insist on that form of obligation when the same result is attainable by his recognition of his old one? It is, in effect, a renewal of its vitality without the circumvention of requiring a new execution of it.

§ 183. Not only will money paid, or advances made, or credit given, or work and labor done, constitute a sufficient consideration for a bill or note, but it will be equally sufficient to enforce the engagement that it was made in consideration of the discharge of the maker from liability as surety on a bond,[29] of the surrender of a guar-

25. Flight v. Reed, 22 L. J. Exch. 265, 1 H. & C. 708 (S. S.). And it has been held in Indiana that a note executed by husband and wife in renewal of a note for money loaned the wife and used by the husband, prior to the Act of 1881, is a valid and binding obligation of the husband, and said renewal note having been executed, subsequent to the passage of the said enabling statute, is not without consideration as to the wife, although the original note as to her was void. Lackey v. Boruff, 152 Ind. 371, 53 N. E. 412.

26. Cameron v. Tompkins, 72 Hun, 113, 25 N. Y. Supp. 305. *Contra*, Kraak v. Fries, 21 D. C. 100; Jones v. Jones, 6 M. & W. 84. While an oral promise to pay a commission to a broker for the sale of real estate is unenforceable because of the statute of 1897 (Laws 1897, p. 304, c. 57), so long as it rests in parol, it constitutes a sufficient consideration to support a promissory note given in payment of such commission. Mohr v. Rickgauer, 82 Nebr. 398, 117 N. W. 950 (1908).

27. Walbridge v. Harron, 18 Vt. 448; White v. Woodruff (Conn.), 1 Root, 309; Wheeler v. Simmons, 60 Hun, 404, 15 N. Y. Supp. 462.

28. Way v. Sperry, 6 Cush. 238.

29. Court Valhalla, No. 16, Foresters of America v. Olson, 14 Colo. App. 243, 59 Pac. 883. Where a note was given to a bank partly to secure future advances, and through mistake the bank extended certain additional credit, and the maker of the note overdrew his account to cover the amount thereof, this was an advance covered by the note. Haines v. Cadwell, 40 Or. 229, 66 Pac. 910. Where one who loaned his check at a sale by a trustee in bankruptcy as a payment of a percent-

anty;[30] or on a legal obligation to reimburse a purchaser of property surrendered because the sale was void;[31] as also that it was given in settlement of a dispute;[32] on an arbitration;[33] on compromise of a

age to assure a sale, on representations that a certain absent person had authorized the bidder to act for him, was misled as to the authority to bid for such person, and a conveyance was refused, the maker of the check is liable thereon, as the termination of the auction sale by the award of the premises was consideration for the check, and this though both the maker of the check and the trustee were ignorant of the nonauthority of the bidder to act for the absent person. Levy v. Huwer, 81 N. Y. S. 191, 80 App. Div. 499, affirmed 176 N. Y. 612, 68 N. E. 1119.

30. Fitch v. Fraser, 82 N. Y. S. 138, 84 App. Div. 119.

31. Hobson v. Marsh, (Wash.) 124 P. 912.

32. Williams v. First Nat. Bank, 216 U. S. 582, 54 L. Ed. 625, 30 S. Ct. 441, affirming 20 Okl. 274, 95 Pac. 457; Baldwin v. Hart, 136 Cal. 222, 68 Pac. 698; Root v. New Haven Trust Co., 82 Conn. 600, 74 Atl. 950; Johnson v. Redwine, 98 Ga. 112, 25 S. E. 924; Robinson v. Robinson, 147 Ia. 615, 125 N. W. 216; First State Bank of Corwith v. Williams, 143 Ia. 177, 121 N. W. 702, 23 L. R. A. (N. S.) 1234, 136 Am. St. Rep. 759; Barger v. Farnham, 130 Mich. 487, 90 N. W. 281; Northern Pac. R. Co. v. Holmes, 88 Minn. 389, 93 N. W. 606; Lane v. Pollard, 88 Mo. App. 326; Bullard v. Smith, 28 Mont. 387, 72 Pac. 761; Fourth Nat. Bank of Cadiz v. Craig, 1 Nebr. (Unof.) 849, 96 N. W. 185; Armijo v. Henry, 14 N. Mex. 181, 89 Pac. 305; Warshawsky v. Grand Theatre Co., 94 N. Y. S. 522, 47 Misc. Rep. 615; Brooks v. Wage, 85 Wis. 12, 54 N. W. 997. The existence of a claim founded upon an equitable duty such as would be enforced by a court of chancery, is a sufficient consideration for a promise to pay it and such promise may be enforced in a court of law. Henton v. Henton, 143 Ill. App. 53. A note given to a bank as compensation for the bank's injury through a clerk's embezzlement and in discharge of the clerk's civil liability, is enforcible. Lomax v. Colorado Nat. Bank, 46 Colo. 230, 104 Pac. 85. The compromise of a disputed claim is a sufficient consideration to support an express promise, although there may have been no merit or foundation for such claim. Fender v. Helterbrandt (Ark.), 142 S. W. 184. But to sustain a compromise and settlement it must appear that the claim or controversy settled, though perhaps not in fact valid in law, was presented and demanded in good faith and upon reasonable grounds for inducing the belief that it was enforcible. Montgomery v. Grenier, (Minn.) 136 N. W. 9. In Andrews v. Schmidt, 10 N. D. 1, 84 N. W. 568, it was held that where a note was given on the supposition that the amount thereof had been received by the maker, and if it was found that he had not in fact received the amount the note was to be returned, it was without consideration when it was discovered that the amount had not been received. Where undue influence and moral coercion induced a clerk to make admissions to his employer of theft and embezzlement, and notes were made by the clerk to the amount stated to be misappropriated, in an action to cancel the notes, it was held that they were made without consideration when the charges were specifically denied, and the maker of the notes testified minutely to all the money he received during his employ-

33. Downing v. Lee, 98 Mo. App. 604, 73 S. W. 721.

suit;[34] on forbearance to sue,[35] or extension of time on past due debt or note;[36] on release of a lien;[37] the purchase of a promissory

ment and showed that the money he received from his employment and other legitimate sources was ample to meet all his expenditures. Peckham v. Van-Bergen, 10 N. D. 43, 84 N. W. 566. Where it appears that the only consideration for the note was the maker's liability on a bond which was never signed by him, nor by any of the obligors whose names were attached thereto, but their names were cut off another bond which had been signed by them, and pasted to the paper on which was written the body of the bond for which the note was given, without their knowledge or consent, the instrument on which the names were pasted was a forgery and could not form the consideration for the note. Terrill v. Tillison, 75 Vt. 193, 54 Atl. 187. A note given by an executor in settlement of a supposed claim of the payee as a legatee of the testator was without consideration, when the payee was not in fact one by the legatees. Russell v. Wright, 98 Ala. 652.

34. Sharp v. Bowie, 142 Cal. 462, 76 Pac. 62; Bank of Commerce v. Scofield, 126 Cal. 156, 58 Pac. 451; McClure v. McClure, 100 Cal. 339, 34 Pac. 822; Murray Show Case & Fixture Co. v. Sullivan, 15 Cal. App. 475, 115 Pac. 259; Court Harmony v. Court Lincoln, 70 Conn. 634; Humphereys v. Smith, 128 Ga. 596, 58 S. E. 26; Jones v. Peterson, 117 Ga. 58, 43 S. E. 417; Parker v. Enslow, 102 Ill. 276; Jones v. Rittenhouse, 87 Ind. 348; Power v. Hambrick (Ky.), 74 S. W. 660; Fay v. Hunt, 190 Mass. 378, 77 N. E. 502; Brown v. Ladd, 144 Mass. 310; Rogers v. Mercantile Adjuster Pub. Co., 118 Mo. App. 1, 93 S. W. 328; Chapman v. Ogden, 56 N. Y. S. 73, 37 App. Div. 355; General Electric Co. v. Nassau Electric R. Co., 55 N. Y. S. 858, 36 App. Div. 510, affirmed 161 N. Y. 656, 57 N. E. 1110; McGlynn v. Scott, 4 N. Dak. 18, 58 N. W. 460; Baines v. Coos Bay, etc., Railroad, etc., Co., 49 Ore. 192, 89 Pac. 371; Fred Rueping Leather Co. v. Watke, 135 Wis. 616, 116 N. W. 174. See *post*, § 196*b*. A promissory note executed and delivered by a married woman for the purpose of settling a pending action against her husband and herself, wherein the plaintiff alleged that both were liable, is binding upon her, although in point of fact the debt declared upon was exclusively that of the husband. The consideration of such a note is not the husband's debt, but the settlement of the litigation. Thornton v. Lemon, 114 Ga. 155, 39 S. E. 943. The rule that the compromise of an action is a sufficient consideration for a note, can have no application where the claim involved was wholly based upon an unlawful, as distinguished from a merely insufficient, consideration, and an attempted compromise of a claim based on a note given from money lost at gambling, whether before or after institution of action thereon, looking to the ratification of the illegal contract, cannot be enforced. Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164.

35. Meltzer v. Doll, 91 N. Y. 368; Chapman v. Ogden, 56 N. Y. S. 73, 37 App. Div. 355; Brandenstein v. Ebensberger, 71 Tex. 268; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392. See *post*, § 196*b*.

36. Wesphal v. Nevills, 92 Cal. 545, 28 Pac. 676; Coffin v. Trustees, 92 Ind. 337; First State Bank of Corwith v. Williams, 143 Iowa, 177, 121 N. W. 702, 23 L. R. A. (N. S.) 1234, 136 Am. St. Rep. 759; Wormer & Sons v. Waterloo Agricultural Works, 50 Iowa, 262 (to uphold note obtained in fraud); Sanders v. Smith, (Miss.) 5 So. 514; Finch v. Skilton, 29 N. Y. S. 925, 79 Hun, 531.

37. Blythe v. Cordingly, 20 Colo. App. 508, 80 Pac. 495 (as to release of a valid

note;[38] the surrender of a prior note;[39] in compromise of a claim against a third person;[40] or in pursuance of an agreement made before delivery that another signature should be obtained as joint makers.[41] A note on condition that the payee abstain for a certain time from intoxicating drink would be valid.[42] A note to a railroad corporation, to be paid when the road is constructed, is upon sufficient consideration.[43] The "good will" of a business is a sufficient consideration, although the business subsequently proves unsuccessful.[44] And the execution and delivery of a policy by an insurance company is ample consideration for the indorsement and delivery of a note taken by an agent in payment for the premium.[45] So, also, a note in consideration of the release of an inchoate right of dower.[46]

Under Negotiable Instrument statute.—Under the definition that the value is any consideration sufficient to support a simple contract,[47] an agreement to advance money is a sufficient consideration for a note.[48] And under the provision that any negotiable instrument is

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and subsisting judgment); Hillenbrand v. Shippen (Ky.), 58 S. W. 525 (though the lien may not have been valid); Pranell v. Davenport, 36 Mont. 571, 93 Pac. 939; Scanlon v. Wallach, 102 N. Y. S. 1090, 53 Misc. 104; Creveling v. Saladino, 89 N. Y. S. 834, 97 App. Div. 202 (though there may have been differences between the parties as to the amount due). Releasing of property covered by chattel mortgages, is a sufficient consideration for a note made by a third person. Doxy v. Exchange Bank of Perry, 19 Okl. 183, 92 Pac. 150 (1907).

38. Crampton v. Newton, 132 Mich. 149, 93 N. W. 250 (1907).

39. Scribner v. Hanke, 116 Cal. 613, 48 Pac. 714 (executed by a different maker); Brewster v. Baker, 97 Ind. 260 (between the same parties for the same amount); Dykman v. Northbridge, 36 N. Y. S. 962, 1 App. Div. 26.

40. Root v. New Haven Trust Co., 82 Conn. 600, 74 Atl. 950; National Bank of Newbury v. Sayer, 73 N. H. 595, 64 Atl. 189, rehearing denied 65 Atl. 254; General Electric Co. v. Nassau Electric R. Co., 55 N. Y. S. 858, 36 App. Div. 510 affirmed 161 N. Y. 656, 57 N. E. 1110; Dooley v. Houston Land, etc., Co., 24 Tex. Civ. App. 275, 59 S. W. 619; Barrett v. Mahnen, 6 Wyo. 541, 48 Pac. 202, 71 Am. St. Rep. 953.

41. Winders v. Sperry, 96 Cal. 194, 31 Pac. 6.

42. Lindell v. Rokes, 60 Mo. 249.

43. Rose v. San Antonio R. Co., 31 Tex. 49. See also Cedar Rapids Bank v. Hendrie, 49 Iowa, 402, disapproving Holiday v. Patterson, 5 Oreg. 177.

44. Smock v. Pierson, 68 Ind. 405.

45. Muller v. Swanton, 140 Cal. 249, 73 Pac. 994.

46. Nichols v. Nichols, 136 Mass. 256; Aultman, Miller & Co. v. Seichting, 126 Ind. 137, 25 N. E. 894.

47. Appendix, sec. 25.

48. Marling v. Fitzgerald, 138 Wis. 93, 120 N. W. 388, 23 L. R. A. (N. S.) 177, 131 Am. St. Rep. 1003, the court saying that a note is not without considera-

deemed *prima facie* to have been issued for a valuable consideration,[49] it has been held that where a check was given on a contract for the purchase of property, this, under the statute, imports a consideration, and want of consideration cannot be maintained as a defense to a suit thereon upon a contention that the property was never accepted by the purchaser.[50]

§ 183a. Bankers receiving the bills or notes of their customers for collection are considered holders for sufficient consideration, not only to the extent of advances already made by them either specifically or upon account, but also for future responsibilities incurred upon the faith of them.[51] The balances upon an account are a shifting consideration for bills and notes deposited as security with the banker.[52] Thus, where one bank, which we may call A., sent an accommodation bill accepted by C., to another bank, which we may call B., to secure an indebtedness upon account; and when the bill became due, the latter bank had become indebted to the former, but the bill was not withdrawn, and subsequently the indebtedness shifted back, and the original debtor, bank A., became bankrupt, owing to the correspondent, B., a sum upon account, it was held that the latter could recover against C. upon the accommodation bill accepted by him.[53] Where a bank discounts a bill before maturity, paying part of the proceeds in money, and applies the residue in payment of a past-due note of the payee which is surrendered, it is a holder for valuable consideration.[54] Where a note was delivered by the maker to the payee to be discounted for the maker's benefit, and the payee left it at the bank with the understanding that he, the payee, might draw against it, it was held in a suit against the maker, of whose interest in the note the bank had no notice, that the maker was liable for the sums drawn against the note by the payee, the payment of

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tion to support it merely because the money called for thereby was not advanced at the time it was given, nor at all.

49. Appendix, sec. 24.

50. Hawkin v. Windhorst, 82 Kan. 522, 108 Pac. 805.

51. Byles on Bills (Sharswood's ed.), 230; Bosanquet v. Dudman, 1 Stark. 1; Percival v. Frampton, 2 Cromp., M. & R. 180.

52. Bank of Metropolis v. New England Bank, 1 How. 239, 17 Pet. 174; Swift v. Tyson, 16 Pet. 21.

53. Atwood v. Crowdie, 1 Stark. 483 (2 Eng. C. L.).

54. Mechanics, etc., Bank v. Crow, 60 N. Y. 85; Brown v. Leavitt, 31 N. Y. 113; Pratt v. Coman, 37 N. Y. 440; Bookheim v. Alexander, 64 Hun, 459, 19 N. Y. Supp. 776; Weems v. Shaughnessy, 70 Hun, 175, 24 N. Y. Supp. 271.

which sums was in effect a discount of the note to the amount so paid; also that the result would be the same if it should be considered that the note was simply pledged for the sums paid upon the draft.[55]

§ 184. As to pre-existing debts.—There is no doubt that a pre-existing debt of the drawer, maker, or acceptor is a valid consideration for his drawing or accepting a bill or executing a note, and indeed is as frequently the consideration of negotiable paper as a debt contracted at the time,[56] and it is equally as valid and sufficient consideration for the indorsement and transfer to the creditor of the bill or note of a third party which is in his hands. And the best-considered, as well as the most numerous, authorities regard the creditor who receives the bill or note of a third party from his debtor either in payment of,[57] or as collateral security for, his debt, as entitled to the full

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55. Platt v. Beebe, 57 N. Y. 339.

56. Scott v. Fairlamb, 35 L. J. R. 47; Swift v. Tyson, 16 Pet. 1; Townsley v. Sumrall, 2 Pet. 170; Levy & Cohn Mule Co. v. Kauffman, 114 Fed. 170; Gates v. Morton Hardware Co., 146 Ala. 692, 40 So. 509; Hamiter v. Brown, 88 Ark. 97, 113 S. W. 1014; Hart v. Church, 126 Cal. 471, 58 Pac. 910, 77 Am. St. Rep. 195; Merchants' Bank v. McClelland, 9 Colo. citing the text; McIntyre v. Yates, 104 Ill. 500; Barber v. Aetna Fuel Co., 92 Ill. App. 380; Henry v. State Bank of Laurens, 131 Ia. 97, 107 N. W. 1034; German Sav. Bank v. Geneser, 116 Ia. 119, 89 N. W. 201; Des Moines Nat. Bank v. Chisholm, 71 Iowa, 675; Lovelace v. Lovelace, 136 Ky. 452, 124 S. W. 400, 136 Am. St. Rep. 271; Cox v. Sloan, 158 Mo. 411, quoting text; Stitzer v. Whittaker, 3 Nebr.(Unof.) 414, 91 N. W. 713 (in settlement of a judgment); Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14, affirming 84 N. Y. S. 995, 87 App. Div. 522; Macaulay v. Holsten, 114 N. Y. S. 611; Le Tulle Mercantile Co. v. Rugeley (Tex. Civ. App.), 98 S. W. 438. Promissory notes executed for a pre-existing indebtedness, and involving new benefits to the maker and obligations by the payee, are based on a good consideration. Richardson v. Wren, 11 Ariz. 395, 95 Pac. 124, 16 L. R. A. (N. S.) 190 (1908). An agreement for an extension of time will be implied if the debt is then due, and the note is made payable at a future day. Zimbleman & Otis v. Finnegan, 141 Ia. 358, 118 N. W. 312 (1908). Where, in accommodating a customer of the bank, the cashier had committed a technical conversion of notes and an actual conversion of funds of the bank, a note given by the cashier to make the amount good was supported by a good consideration. Behrens v. Poetker, 175 Ind. 504, 92 N. E. 339. Where a note and mortgage were executed payable to a certain person, and such note and mortgage were given to secure an indebtedness then existing and evidenced by a separate note and also to cover future advances for which as made from time to time separate notes were to be given, the note and mortgage were simply duplicate evidence which was to be held until the debt was paid, and were without consideration as independent evidence of indebtedness. First Nat. Bank v. Henry, 156 Ind. 1, 58 N. E. 1057.

57. See chapter XXIV, on *Bona Fide* Holder; Byles [*121], 229; Marks v. First

protection of a *bona fide* holder for value, free from all equities which might have been pleaded between the original parties.[58] But there is much controversy on this subject, and it is hereinafter more fully treated.[59]

Under Negotiable Instrument statute.—By the express provisions of the statute, "an antecedent or pre-existing debt constitutes value";[60] under this statutory definition of value, the receipt of a note as security for a debt on forbearance to sue upon a present claim, is sufficient to enforce the maker's obligation,[61] and the rule has been applied to the case of a bank giving credit for a certificate of deposit issued by another and indorsed for collection.[62]

§ 185. As to debts of third persons.—A valuable consideration,

Nat. Bank, 79 Ala. 558; Swift v. Tyson, 16 Pet. 1; Southern Sand & Material Co. v. People's Savings Bank & Trust Co. (Ark.), 142 S. W. 178 (as to a check); Bank of St. Albans v. Gilliland, 23 Wend. 31; Bank of Sandusky v. Scoville, 24 Wend. 115; Youngs v. Lee, 18 Barb. 187; Bertrand v. Barkman, 8 Eng. 150; Henry v. Ritenour, 31 Ind. 136; Robinson v. Lair, 31 Iowa, 9; Smith v. Isaacs, 23 La. Ann. 454; Schepp v. Carpenter, 51 N. Y. 602 (1873). In this case, Carpenter made his note to and for accommodation of Church, without restriction, and Church, being indebted to plaintiff in a larger sum, transferred the note to him on account thereof, and was credited with the amount. Johnson, C., said: "The existence of the debt from Church to the plaintiff was a sufficient consideration between them to sustain a promise to pay it, or a transfer of property to secure its payment, and according to the doctrine which has prevailed in this State for many years, to sustain the transfer of a note made for the debtor's accommodation and general benefit." This question is more fully discussed, and the New York cases more fully cited in chapter XXV, §§ 826, 827, 831; Langford v. Varner, 65 Mo. App. 370.

58. See chapter XXV, section 1, § 832; Devendorf v. West Virginia, O. & O. L. Co., 17 W. Va. 176; Bank of Commerce v. Wright, 63 Ark. 604, 40 S. W. 81. *Contra*, Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Barker v. Lichtenberger, 41 Nebr. 751, 60 N. W. 79.

59. §§ 820, 826, 827, 831.

60. Appendix, sec. 25. Bigelow Co. v. Automatic Gas Producer Co., 107 N. Y. S. 894, 56 Misc. Rep. 389; Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885; Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522. Under sections 24 and 25, it has been held that when a note was given by one of two joint debtors in satisfaction of the debt, the indorsement of the note by the other was supported by a sufficient consideration, and it is immaterial whether he indorsed before or after the note had been delivered to the agent of the payee. Young v. Hayes (Mass.), 99 N. E. 327.

61. Zimbleman & Otis v. Finnegan, 141 Ia. 358, 118 N. W. 312; Mohlman v. McKane, 69 N. Y. S. 1046, 60 App. Div. 546.

62. Commercial Nat. Bank v. Citizens State Bank, 132 Iowa, 706, 109 N. W. 198.

moving from the maker to a third person will support the obligation in favor of the payee of a note.[63] Thus, if goods be furnished by A. to B. at the request of C., it is a good consideration for the note of C. to A.[64] There is no doubt that a debt due from a third person, as from A. to B., is a good consideration for a note as from D. to B., provided there were an express agreement for delay,[65] or an implied

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63. Harrison v. State Bank of Monticello, 47 Ind. App. 568, 94 N. E. 1020, holding further that such third party need not know when the note is executed that it is payable to him, in order to enforce collection. The execution and delivery of a note and mortgage to secure the debt of another is sufficient compliance with the statute of frauds. McLanahan v. Chamberlain, 85 Nebr. 850, 124 N. W. 684. Where a party promises to pay the note of another to satisfy the importunity of the owner of the note, such promise, to be valid, must be in writing, unless there be a novation by the substitution of a new debtor and a release of the old one. Hanson v. Nelson, 82 Minn. 220, 84 N. W. 742. A contract to indorse a note of one, provided another will discount it, is a promise to answer for the debt of another, and therefore within the provisions of the statute of frauds; such a promise is not an original one, but collateral. Greenwich Bank v. Oppenheim, 118 N. Y. S. 297, 133 App. Div. 586.

64. Lipsmeier v. Vehlsage, 29 Fed. 175; Atherton v. Marcy, 59 Iowa, 651. It seems to be well established by the authorities that when the consideration be a benefit bestowed or a detriment suffered by the payee, or at his instance—in other words, both the maker of the obligation and the payee thereof must be connected with the consideration. The decisions of the Indiana courts seemingly do not make this distinction. See Moore v. Hubbard, 15 Ind. App. 85, 42 N. E. 962, and other cases therein cited; Harris v. Harris, 180 Ill. 157, 54 N. E. 180; Elmer v. Loper, 66 N. J. L. 50, 48 Atl. 550; Smith v. Hightower, 3 Ga. App. 197, 59 S. E. 593. Where the amount named in a note was received by the maker through another person and used by such other person for the maker's benefit, this was a sufficient consideration, though the money was furnished by a third person for the payee of the note. Hale v. Harris (Ky.), 91 S. W. 660, 5 L. R. A. (N. S.) 295. The borrowing of money by a mother to set her sons up in business is sufficient consideration for a note signed by the mother; when, in such a case, the maker of the note directs the money to be paid into the hands of another, he thereby constitutes such person his agent for the purpose of receiving it from the lender, and the act of delivery in this manner transfers the title to him. Vandeventer v. Davis, 92 Ark. 604, 123 S. W. 766. Where a sum of money was furnished by the payee of a note for the use of a company in which the makers of the note were interested, the makers of the note cannot be heard to complain on the ground of inadequacy or want of consideration. Helvie v. McKain, 32 Ind. App. 507, 70 N. E. 178.

65. Beebe v. Wells, 153 Fed. 133 (as to notes signed by a new corporation to settle claims against an insolvent corporation which had transferred its property to the maker); Guy v. Bibend, 41 Cal. 324; Davis v. Meisner, 127 Ind. 343, 26 N. E. 829; Lambert v. Clewley, 80 Me. 480; Mansfield v. Corbin, 2 Cush. 151; Fuch v. Yawger, 47 N. J. L. 157; Goll v. Fehr, 131 Wis. 141, 111 N. W. 235 (as to a note executed by a married woman to secure an extension on a note made by her

agreement which would arise if the debt were then due, and the note were made payable at a future day.[66] So the surrender up of an obligation of a third person is a sufficient consideration.[67] If the

husband). On a defense of want of consideration for a note given to secure the debt of another, there must be an agreement, express or implied that the plaintiff would forbear to sue; but while forbearance to sue is evidence from which an agreement to forbear may be inferred, it is not conclusive. Saunders v. Bank of Mecklenburg (Va.), 71 S. E. 714. A promise to forbear where there is no present liability and the promise is indefinite, does not present a sufficient consideration. Funk v. Hossack, 129 Ill. App. 421. Where the forbearance is no more than that of any creditor who risks a delay in bringing a suit, the debtor remaining under the same liability and the creditor retaining the same right, there is no new consideration. Bedford's Ex'r v. Chandler, 81 Vt. 270, 69 Atl. 874, 17 L. R. A. (N. S.) 1239, 130 Am. St. Rep. 1057.

66. 1 Parsons on Notes and Bills, 195; Balfour v. Sea Fire & Life Ins. Co., 3 C. B. (N. S.) 300 (91 Eng. C. L.); Thompson v. Gray, 63 Me. 228; York v. Pearson, 63 Me. 587; Yeatman v. Mattison, 59 Ala. 382; Fulton v. Loughlin, 118 Ind. 288, citing the text; Remington v. Dental Mfg. Co., 101 Wis. 307, 77 N. W. 178, citing the text; Murphy v. Illinois Trust & Sav. Bank, 57 Nebr. 519, 77 N. W. 1102; Zimbleman & Otis v. Finnegan, 141 Iowa, 358, 118 N. W. 312; Pitt v. Little, 58 Wash. 355, 108 Pac. 941, citing text. A promissory note given by the drawee of a draft on presentment of the draft for payment, is founded on a valid consideration. Torpey v. Tebo, 184 Mass. 307, 68 N. E. 223. Where notes were overdue, an arrangement whereby the obligee should receive drafts accepted by a third party and not press for payment of the notes until the drafts should mature, there was a sufficient consideration for the drafts. *In re* Stevens, 74 Vt. 408, 52 Atl. 1034. No specific time of forbearance was mentioned, but it became the duty of the obligee to wait a reasonable time before seeking enforcement of the original indebtedness. Any time, however short, was a sufficient consideration for the note. Emerson v. Sheffer, 98 N. Y. S. 1057, 113 App. Div. 19.

67. Hobson v. Hassit, 76 Cal. 203; W. S. Broom & Co. v. Harrah, 143 Ill. App. 476; Brewster v. Baker, 97 Ind. 250; Henry v. Ritenour, 31 Ind. 136; Wm. Deering Co. v. Veal (Ky.), 78 S. W. 886 (as to a note executed by a wife in settlement of outstanding notes of the husband); Iberia Cypress Co. v. Christen, 112 La. 448, 36 So. 490; Crombie v. McGrath, 139 Mass. 550; State Bank of Moore v. Forsyth, 41 Mont. 249, 108 Pac. 914, 28 L. R. A. (N. S.), 501; Osborne v. Doherty, 38 Minn. 430; Holm v. Sundberg, 32 Minn. 427; Flour City Nat. Bank v. Shire, 84 N. Y. S. 810, 88 App. Div. 401; affirmed 179 N. Y. 587, 72 N. E. 1141; Bacon v. Montauk Brewing Co., 115 N. Y. S. 617, 130 App. Div. 737; Doxy v. Exchange Bank of Perry, 19 Okl. 183, 92 Pac. 150; Bromley v. Hawley (Vt.), 12 Atl. 222. A wife's note, given to a third person in payment of her husband's debt, is for a valuable consideration; but a note given as security for such a debt, previously existing, is not; to make a note of the latter kind valid, there must be a new consideration. Widger v. Baxter, 190 Mass. 130, 76 N. E. 509, 3 L. R. A. (N. S.) 436. A note given to a bank by the brother of an embezzler from the bank, accompanied by a memorandum that the note was in "settlement of the indebtedness" of his brother to the bank, is supported by a consideration; the word "settlement" as used meant payment of an ascertained debt or liability.

original debt from the third person were payable simultaneously with the note, there might be a want of consideration unless credit for the original debt had been given upon a promise of the note, which would be sufficient.[68] Whenever one person signs a note to induce another to take it, the consideration is sufficient.[69] A note given for the payee's assumption of the debt of the maker evidenced by another note is upon sufficient consideration.[70] So a note given by a father for the benefit of his son to be applied by the latter in part payment of a defalcation.[71] So any other thing done at his request by the promisee for a third person will, in general, be a sufficient consideration—such as forbearing to sue on a debt due by such person, or guaranteeing his debt, or becoming liable for his acts or defaults.[72] But the mere naked debt of another without some cir-

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Lomax v. Colorado Nat. Bank, 46 Colo. 230, 104 Pac. 85. Where one of two sureties, equally bound on a note, has paid his part of the note, and, the principal being insolvent, executes another note by mistake for his co-surety's part of the indebtedness, such further note was executed without consideration. Allnutt v. Allnutt's Executrix (Ky.), 127 S. W. 986. Where a note was given in by several joint makers in renewal of outstanding notes of part of the makers, due and payable, this is a sufficient consideration as against all the makers of the new note. *In re* Kemp's Estate, 100 N. Y. S. 221, 49 Misc. Rep. 396. A promise to pay a certain person a debt due him from a third person on or before a day named, is not a promissory note importing a consideration. Bradt v. Krank, 164 N. Y. 515, 58 N. E. 657, 79 Am. St. Rep. 662, reversing 54 N. Y. S. 1096. Where the drawer of an order was not indebted to his agent, in whose favor the order was drawn, but such agent was indebted, as shown by notes, to the drawee, there was no consideration to support the order notwithstanding the drawee credited the agent on the notes with the amount of the order. Smith v. Southern, Eap. Co., 139 Ala. 519, 36 So. 621.

68. Crofts v. Beale, 11 C. B. 172 (73 Eng. C. L.); 1 Parsons on Notes and Bills, 195; Carter *et al.* v. Odom, 121 Ala. 162, 25 So. 774.

69. Robbins v. Brooks, 42 Mich. 62; Savage v. Fox, 60 N. H. 17; Ballard v. Barton, 64 Vt. 387, 24 Atl. 769. See Winders v. Sperry, 96 Cal. 194, 31 Pac. 6.

70. Turner v. Rogers, 121 Mass. 12. But see Studenmire v. Ware, 48 Ala. 589; McCormal v. Redden, 46 Nebr. 776, 65 N. W. 881.

71. Papple v. Day, 123 Mass. 521.

72. Story on Bills, § 183; Howe v. Taggart, 133 Mass. 284; Judd v. Martin, 97 Ind. 175; Parsons v. Frost, 55 Mich. 232; Crears v. Hunter, 19 L. R., Q. B. Div. 341; Mascolo v. Montesanto, 61 Conn. 50, 23 Atl. 714, 29 Am. St. Rep. 170; Ditmar, Guardian of West v. West, 7 Ind. App. 637, held in this case that where a guarantor of a promissory note, after the same was due, went to the payee and offered to pay him the full amount due on the note, and have the note delivered to him for collection, but the payee refused to accept the amount and deliver the note, and promised to release the guarantor upon his forbearance to sue, the surrender of the right to sue by the guarantor was sufficient to sustain the contract of release. Ballard v. Barton, 64 Vt. 387, 24 Atl. 769; Murphey v. Illinois Trust

cumstance of advantage to the debtor, or disadvantage to the creditor, would not be a consideration; and the maker of a note for such a debt might defend against the payee on that ground.[73]

§ 186. Discharge of debt of another.—As a general rule, the discharge of a debt of a third person will be a valid consideration for a bill or note.[74] So, the note of a husband given in settlement of

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& Sav. Bank, 57 Nebr. 519, 77 N. W. 1102; Janis v. Roentgen, 59 Mo. App. 75; Burrus v. Davis, 67 Mo. App. 210.

73. Ryan v. McKerral, 15 Ont. 464; Wright v. Byrne, 129 Cal. 614, 62 Pac. 176; Leverone v. Hildreth, 80 Cal. 139; Currier v. Clark, 15 Colo. App. 6, 60 Pac. 958; Saul v. Southern Seating, etc., Co., 6 Ga. App. 843, 65 S. E. 1065; Wilson v. Tricker, 64 Ind. 41; West Coast Co. v. Bradley, 111 Minn. 343, 127 N. W. 6; Security Bank v. Bell, 32 Minn. 409; Produce Bank v. Bache, 31 Hun, 351, distinguished from Grocers' Bank v. Penfield, 69 N. Y. 502; Tyler v. Jaeger, 93 N. Y. S. 558, 47 Misc. Rep. 84. A note given by a mother for a debt of a minor son, not dated and therefore due on demand, was held not to be enforcible, when there was no credit given to the maker as a part of the bargain between the payee and the son, no discharge or extinguishment of the minor's indebtedness, no forbearance to sue nor an agreement therefor, nor any new consideration. Gilbert v. Wilbur, 105 Me. 74, 72 Atl. 868. Where a wife was disappointed as to the financial condition of her husband and urged a settlement upon her, as had been promised before marriage, a note procured by the husband from his brother, and delivered by the husband to his wife, which was not given for any debt or legal obligation as between the husband and his brother, was without consideration, and the wife cannot recover from the maker thereon. Kramer v. Kramer, 181 N. Y. 477, 74 N. E. 474, reversing 86 N. Y. S. 129, 90 App. Div. 176.

74. Brainard v. Capella, 31 Mo. 428; Arnold v. Sprague, 34 Vt. 402; Thatcher v. Dinsmore, 5 Mass. 299; Byles on Bills (Sharswood's ed.) [*123], 233; Poplewell v. Wilson, 1 Stra. 264; Railroad v. Chamberlain, 44 N. H. 497; *ante*, § 184; McCormal v. Redden, 46 Nebr. 776, 65 N. W. 881. Where, by mutual agreement, a note was given by J. to A., the latter having accepted the former as a substitute for his original debtor, W., this was a novation, and the debt from W. to A. was abrogated. Dillard v. Dillard, 118 Ga. 97, 44 S. E. 885. To create a novation by the making of a note by a third person, there must be the consent of all parties to be substitution resulting in the extinction of the old obligation. Held v. Caldwell-Easton Co., 89 N. Y. S. 954, 97 App. Div. 301; Mount v. Dehaven, 29 Ind. App. 127, 63 N. E. 330. The mere taking of a note from a third person is not a novation. In order to make a case of that kind there must be a mutual agreement among the parties, the creditor, his immediate debtor and the new debtor, for the substitution of the new debt in the place and stead of the original debt; if the draft or note be taken contemporaneously with the creation of the debt, the presumption would prevail that it was taken in payment of the debt, but if a note or draft is taken for a precedent debt the presumption is that it was not taken as payment and the burden of removing that presumption would rest on the party asserting it. Gimbell & Sons v. King, 43 Tex. Civ. App. 188, 95 S. W. 7. A note for the debt of another must show the consideration on its face, other-

a claim against his deceased wife's estate is valid.[75] And a note given by a widow to a creditor of her deceased husband is made upon a sufficient consideration, when the estate is solvent and she is interested therein,[76] but such a note is void for want of consideration if the husband has left no estate or assets.[77] And a promissory note given by

wise it is not binding under the statute of frauds. Stanford v. Horwitz, 49 Md. 525. In Maryland it was held a note given by a vestryman of a church to pay a debt of the church was without consideration, and void; and the fact that it was payable at a future day to raise no presumption of forbearance to sue, it appearing that it was made for the purpose of closing an account. Rogers v. Waters, 2 Gill & J. 84. Before the enabling act, a married woman's note given for a claim against her husband was held void, there being no other consideration. Linderman v. Farquharson, 101 N. Y. 434.

75. Nye v. Chace, 139 Mass. 379; Union & Planters' Bank of Memphis v. Jefferson, 101 Wis. 452, 77 N. W. 889.

76. Carpenter v. Page, 144 Mass. 316. In California, where the widow was executrix and the estate community property, so that she had an interest in it, her note to a creditor of her husband was enforced, though the debt was outlawed and she thought otherwise. Mull v. Van Trees, 50 Cal. 547. In Indiana, where she elected to take under the husband's will, instead of under the statute of distributions, she was held bound upon a note given for his debt. Kayser v. Hodopp, 116 Ind. 428. A note made by a widow to a creditor of the deceased husband's estate, in which she promised to pay the creditor's debt, provided it was not paid by the estate, the consideration for the note being the withdrawal by the creditor of objections filed by him to the allowance of a year's support to her out of the estate, is in the absence of fraud, a valid contract. And, when the creditor to whom the note was made payable failed by reason of the insolvency of the estate to collect therefrom the amount of his debt, the contingency of the widow's liability on the note to such creditor was determined. Golding v. McCall, 5 Ga. App. 545, 63 S. E. 706. Where an executrix, who was also a legatee, executed a note in settlement of litigation against the estate, the facts that the matter was kept secret at her request and that the settlement was made without knowledge of or consultation with the attorneys, do not show fraud. Young v. Shepard's Estate, 124 Mich. 552, 83 N. W. 403. In Alabama, where the husband has assets, the widow, who gave a note for his debt, was held not bound, the payee having represented to her that she was liable to pay the debt, the court resting its decision partly on the view that there was no consideration, and partly on the view that the representation was fraudulent. Maull v. Vaughn, 45 Ala. 141. See also Watson v. Reynolds, 54 Ala. 192, where it is held that a widow's note for debt of deceased husband, not taken in payment, and where there was no suspension of the remedy, or receipted account, is without consideration. But in the same State a widow who gave her own notes in exchange for her late husband's, which were of value, and enforcible in her hands against his estate, and secured them by mortgage, and extended time of payment, was held bound. Hixon v. Hetherington, 57 Ala. 165, overruling 46 Ala. 29.

77. Williams v. Nichols, 10 Gray, 83, Dewey, J., saying: "The widow would derive no benefit from the discharge of a debt due by her deceased husband.

an heir in settlement of a debt due by the estate is founded upon a sufficient consideration.[78] It is clear that if a mere voluntary note is given it cannot be enforced as between immediate parties; but if an element of value to the promisor, or disadvantage to the promisee, enters into the transaction, without fraud or misrepresentation, it would violate first principles not to hold it valid.

Under Negotiable Instrument statute.—And under the statute, where the payee of a note paid off a debt of the maker, he is a holder for value.[79]

Nor do we perceive how any possible damage to such creditor could arise from having given a receipt to the widow purporting to discharge such a demand." It is said in England that it is a sufficient consideration for a note that it be given by a widow out of respect to the memory of her husband. Chitty on Bills (13th Am. ed.), 82. No such decision would, we think, be now rendered. Stockton Bros. v. Reed, 65 Mo. App. 605. Where a note had been executed by a husband and wife which was void as to her, the execution of her own note in lien thereof after the death of her husband, was without consideration, where no property subject to execution was received by her from the estate of her deceased husband. Gilbert v. Brown, 123 Ky. 973, 97 S. W. 40, 7 L. R. A. (N. S.) 1053 (1906). In York v. Pearson, 63 Me. 587, such a note was held valid though the husband's estate was insolvent.

78. McCormal v. Redden, 46 Nebr. 776, 65 N. W. 881. In Safe Deposit & Trust Co. v. Wright, 105 Fed. 155, with respect to a claim against an estate and a note given by the widow and heirs after the lien of the claim had been lost for failure to prosecute it against the estate within two years, Circuit Judge Gray said: "The debt was not, however, extinguished, and would have supported a suit against the administration of the intestate's estate. The giving of the note, with warrant to confess judgment, by the widow and heirs at law, was in effect a continuance of that lien against the same lands in their hands, and a recognition of a moral obligation to restore to the plaintiff the legal advantage of which it had been deprived by operation of law. The notes thus given come clearly within the rule which sanctions a promise made in consideration of a pre-existing legal obligation, though at the time determined by a positive legal requirement. Such a moral obligation is now universally recognized in American and English jurisprudence as sufficient consideration to support a promise." The forbearance of a bank from prosecuting or pressing a valid claim against an estate is a valid consideration for a note made by a son of the deceased. Galena Nat. Bank v. Ripley, 55 Wash. 615, 104 Pac. 807. Where a note executed by husband and wife, was renewed after his death by the widow, and, upon maturity of the widow's note, a new note was signed by the widow and a daughter, to whom had been transferred all the property owned at the time of the husband's death, the new note being payable one day after date, there was a sufficient consideration for the daughter's signature. Whelan v. Swain, 132 Cal. 389, 64 Pac. 560. In Didlake v. Robb, 1 Woods, 680, it was held that a promissory note given by the heir, in renewal of one made by his ancestor, which was barred, by limitation at the time of the latter's death, was void for want of consideration.

79. Appendix, sec. 25. Hermans' Ex'r v. Gregory (Ky.), 115 S. W. 809.

§ 187. Cross-notes and acceptances and other instances.—If one gives his acceptance to another, that will be a good consideration for another bill or acceptance, although such first acceptance be unpaid.[80] "By the exchange of the obligation of one for that of another, a good consideration is raised for the undertaking of each." [81] A note given by a borrower for the amount of cash loaned, and including also a note given for the balance of the loan, is upon good consideration to the whole amount.[82] And cross-acceptances, or cross-notes, bills, or checks for the mutual accommodation of the parties, are respectively considerations for each other,[83] and a defense that the notes given on one side were subsequently worthless is unavailing.[84] And a contract between two accommodation indorsers

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80. Rose v. Sims, 1 B. & Ad. 521 (20 Eng. C. L.). The surrender of his note to the payee of a draft, is a sufficient consideration for the transfer of the draft. Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537.

81. Newman v. Frost, 52 N. Y. 424, Folger, J.; Union Trust Co. v. Rigdon, 93 Ill. 459, notes; Farber v. National Forge & Iron Co., 140 Ind. 54, 39 N. E. 249, citing the text.

82. Backus v. Spalding, 116 Mass. 418. Notes exchanged for mutual convenience are not accommodation paper, since each is a consideration for the other. State Bank of Fillmore v. Hayes, 16 S. D. 365, 92 N. W. 1068, holding that where a person owed another $300, and executed a note for $800, receiving in return a note for $500, the note for $800, was not an accommodation note.

83. Newman v. Frost, 52 N. Y. 427; Wooster v. Jenkins, 3 Den. 187; Mickles v. Colvin, 4 Barb. 304; Adams v. Soule, 33 Vt. 539; Stickney v. Mohler, 19 Md. 490; Whittier v. Eager, 1 Allen, 449; Shannon v. Langhorne, 9 La. Ann. 526; Eaton v. Carey, 10 Pick. 211; Bacon v. Holloway, 2 E. D. Smith, 159; Dowe v. Schutt, 2 Den. 621; Rankin v. Knight, 1 Cin. 515; Crescent Bank v. Hernandez, 25 La. Ann. 43; State Bank of Lock Haven v. Smith, 85 Hun, 200, 32 N. Y. Supp. 999; Lock Haven State Bank v. Smith, 155 N. Y. 185, 49 N. E. 1102; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46; Newmarket Sav. Bank v. Hanson, 67 N. H. 502, 32 Atl. 774; Kettner v. Shippy, 8 Cal. App. 342, 96 Pac. 912; Shannon v. Hawley, 66 N. Y. S. 471, 32 Misc. Rep. 623. The correspondence in date, amount, and term of the notes raises a presumption that there was such an exchange as to constitute a consideration each for the other, but it is a presumption that might be capable of refutation. Mutual Loan Ass'n v. Brandt, 71 N. Y. S. 770, 35 Misc. Rep. 270, reversed 69 N. Y. S. 652, 34 Misc. Rep. 400.

84. First Nat. Bank v. Engebretson, (S. D.) 132 N. W. 786. The fact that the maker of a note may be irresponsible does not change the rule that one buying a note buys property, and that the giving of a note therefor is given for good consideration. Crampton v. Newton's Estate, 132 Mich. 149, 93 N. W. 250. Where notes have been exchanged, payment on one of the notes may be enforced notwithstanding the payee of that note has defaulted in the payment of the note he made and gave at the same time pursuant to the agreement. Milius v. Kauffmann, 93 N. Y. S. 669, 104 App. Div. 442.

that they will share any loss equally between them, is upon sufficient consideration.[85]

Where one has given his own note in purchase of the note of another from the payee, notice to him by the maker not to pay his note given in purchase, and that the bought note originated in fraud, does not deprive him of the character of a *bona fide* holder for value, and he need pay no attention to such notice.[86] Where a note is given for a draft assigned by the payee to the maker, and an agreement was made at the same time that in the event the maker of the note could not collect or realize on the draft he was to be released from payment of the note, no recovery can be had on the note, if the maker has been unable to realize on the draft.[87]

Under Negotiable Instrument statute.—Under the statutory declaration that value is any consideration sufficient to support a simple contract,[88] where there is an exchange of commercial paper, each instrument forms a sufficient consideration for the other.[89]

§ **187a. Marriage and promise of marriage** are good legal considerations. Delay in fulfilling a promise to marry, and services rendered during the engagement, constitute a good consideration for a note;[90] and in Scotland it has been held that a bill granted to a woman as a security for a promised marriage is valid, and may be enforced against the man if he break his promise.[91] The meritorious

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85. Phillips v. Preston, 2 How. 278. Likewise held that "the makers of the note being stockholders in the company they cannot be held as accommodation makers merely, but the fact of their interest in the company and their ownership of its property constitutes a sufficient consideration for their contract, and makes them all liable as principal debtors." Reed v. First Nat. Bank, 23 Colo. 383, 48 Pac. 507.

86. Adams v. Soule, 33 Vt. 538; Rice v. Grange, 131 N. Y. 149, 30 N. E. 46.

87. Hall v. Henderson, 84 Ill. 611.

88. Appendix, sec. 25.

89. Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747 (as to checks). A note given in place of checks which had been dishonored by the bank on which they were drawn was based on a good consideration. Crawford County State Bank v. Stegemann, 137 La. 13, 114 N. W. 549.

90. Prescott v. Ward, 10 Allen, 203; Blanshan v. Russell, 32 App. Div. 103, 52 N. Y. Supp. 963, it is held that where a betrothal has existed for some time before the notes were given, and the notes were made and given not in consideration for the engagement, the mere existence of the engagement will not in itself support a contract to pay.

91. Thompson on Bills (Wilson's ed.), 72, citing Calder v. Provan (Scotch case). In Love v. Peers, 4 Burr. 2225, judgment was arrested on a bond which defendant had agreed to pay plaintiff if he married any one else but her. This

consideration arising out of the duty of a husband to support his wife, is not sufficient in equity to sustain a note, given by the husband to the wife, as against the husband's collateral heirs.[92]

§ 188. Services.—Professional services, whether of a physician, attorney, or other person, in the learned or skilled professions, constitute, in general, a sufficient consideration for a bill or note; and consideration that the plaintiff, an attorney, should prevent the approval of the commanding general to the sentence of a military court condemning a guerrilla to death, is valid.[93] Services of any business character are sufficient,[94] and the inadequacy of the services, or the extravagance of the compensation, are not material.[95] An

case is clearly distinguishable from the principle of the text of Thompson, though he seems to think it in conflict.

92. Whitaker v. Whitaker, 52 N. Y. 368.

93. Thompson v. Wharton, 7 Bush, 463. Attorney's fees are a sufficient consideration for a bill or note, even in those jurisdictions (*e. g.*, Ontario) where an action will not lie upon a *quantum meruit* for such services. Mowat v. Brown, 19 Fed. 87.

94. Foxworthy v. Adams, 136 Ky. 403, 124 S. W. 381, 27 L. R. A. (N. S.) 308; Velie v. Titus, 15 N. Y. S. 467, 60 Hun. 405 (for services rendered by a granddaughter to her grandfather); Price v. White, (Tex. Civ. App.) 117 S. W. 484 (securing a purchaser of property to sign a contract); Pierce v. Stolhand, 141 Wis. 286, 124 N. W. 259. Extra services to be performed are a sufficient consideration for a note. Dikson v. Fowler, 114 Md. 344, 79 Atl. 519. Where a father, after marriage to a second wife, executed two notes for $2,000 each, payable to a son who had remained working for him without wages for fifteen years after he became of age, and to a daughter who had performed without help all the household duties and had nursed her invalid sister and mother through years of illness, until their death, and both had done all they could to save their father's heavily incumbered property, this was a sufficient consideration and the notes were enforcible against the father's estate. *In re* Sutch's Estate, 201 Pa. 305, 50 Atl. 943. Where a decedent, just prior to his death, had given to his housekeeper a check for $500, and the deceased left directions with the person who had charge of his estate stating that what he was leaving to the housekeeper was his own voluntary act and that he was more dependent upon her than any other person, the check was based on a valid and sufficient consideration. Clay v. Layton, 134 Mich. 317, 96 N. W. 458. Where a note was executed for services, although it was not an extinguishment of the debt, the payee is not entitled to recover without producing the note. Dawdy v. Dawdy's Estate, 118 Mo. App. 336, 94 S. W. 767.

95. Barthe v. Lacroix, 29 La. Ann. 326; Farnsworth v. Fraser, 137 Mich. 296, 100 N. W. 400; Thomas v. Miller, (Minn.), 40 N. W. 358; Cowee v. Cornell, 75 N. Y. 91; *In re* Bradburg, 93 N. Y. S. 418, 105 App. Div. 250. A promissory note given to a near relative, by a person in declining years, by way of compensation or reward for services rendered and to be rendered, is so much in the nature of

agreement to perform services is a sufficient consideration for a note,[96] and if services, received and accepted, were for the benefit of the person to whom they were rendered, this is sufficient without any express request therefor or promise to pay for the same.[97] Services rendered in procuring a pardon for an offense have also been respected;[98] though it has been said by some of the authorities that this would contravene public policy unless done by leave of the court.[99] This is, we think, too severe. Services exerted in procuring the passage of an act through a legislative body are not recognized as the legitimate exercise of the legal profession; and compensation for them cannot be recovered.[1] If contingent upon the passage of a bill, it would be obvious that they were illegitimate.[2]

§ **188a. Subscriptions.**—A subscription to a fund, either for business or charitable purposes, founded upon a sufficient consideration, constitutes, therefore, a binding obligation, provided said subscription induced others to subscribe to the same purpose.[3] In a case in In-

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a testamentary disposition of property that ordinarily the maker's estimate of the value of the services will not be disturbed on the ground of disparity between the actual value thereof and the amount of the note. Bade v. Feay, 63 W. Va. 166, 61 S. E. 348. See also *In re* Simmons Estate, 96 N. Y. S. 1103, 48 Misc. Rep. 484.

96. Morrison v. Hart, 122 Ga. 660, 50 S. E. 471; Pierce v. Stolhand, 141 Wis. 286, 124 N. W. 259.

97. Yarwood v. Trusts & Guarantee Co., 87 N. Y. S. 947, 94 App. Div. 47. When services have been rendered gratuitously, they are not a sufficient consideration to sustain an executory promise. Strevell v. Jones, 94 N. Y. S. 627, 106 App. Div. 334, affirming 92 N. Y. S. 719; Blanshan v. Russell, 52 N. Y. S. 963, 32 App. Div. 103. But where the services rendered constitute a legal and valid consideration for the obligation, this would not be destroyed or impaired by the fact that the obligor declared a sense of gratitude. Yarwood v. Trust & Guarantee Co., 87 N. Y. S. 947, 94 App. Div. 47.

98. Meadow v. Bird, 22 Ga. 246.

99. Chitty on Bills (13th Am. ed.), 100; Thompson on Bills (Wilson's ed.), 70, citing Stewart v. Earl of Galloway (Scotch case); Norman v. Cole, 3 Esp. 253.

1. Marshall v. Balt. & O. R. Co., 16 How. 334; Clippinger v. Hepbaugh, 5 Watts & S. 315. See Sharswood's Legal Ethics (2d ed.), 99.

2. Mills v. Mills, 40 N. Y. 543.

3. Subscriptions to stock in a proposed corporation may lawfully be evidenced by promissory notes given for the price thereof and made payable to some person in the nature of a trustee who holds them for the purposes of the proposed corporation. The payee may upon the charter being obtained sue upon the notes for the use of the corporation. Bing v. Bank of Kingston, 5 Ga. App. 578, 63 S. E. 652. A note given for the price of shares of stock which the payee had pre-

diana, it was held that a promissory note given for a certain specified sum, expressing a desire therein, "to advance the cause of missions and to induce others to contribute to that purpose," is a valid obligation and may be enforced by suit. And in New York, the same doctrine has been upheld. In the New York case referred to, the defendant made a subscription of $500 toward the founding of Keuka College, and gave his promissory note to the treasurer of that institution, providing in the note that the sum named, was given for the purpose of contributing to the endowment of said college, and it was further stipulated in the note, "and in case I shall die previous to that date, then this note shall become due and payable in one year from my decease." The subscription referred to was one of the causes that induced others to subscribe the balance of the fund wanted. It was held that the note was based upon sufficient consideration and enforceable.[4]

§ 189. Accommodation bills and notes.—The mercantile credit of parties is frequently loaned to others by the signature of their names as drawer, acceptor, maker, or indorser of a bill or note, used to raise money upon, or otherwise for their benefit. Such instruments are termed accommodation paper. An accommodation bill or note, then, is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some

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viously owned and which were deposited with the payee as collateral security, so that the maker was the owner of the equitable interest in the stock, was supported by a good consideration. Linnell v. Leon, 206 Mass. 71, 91 N. E. 895. A check given on a subscription for stock in a corporation not yet in existence has no valid consideration to support it, but the delivery of scrip of shares of stock in a company incorporated, for which subscription had been made, is a sufficient consideration for a check. Avon Springs Sanitarium Co. v. Kellogg, 109 N. Y. S. 153, 125 App. Div. 51, affirmed 194 N. Y. 567, 88 N. E. 1132. A note given by a candidate as a contribution to a fund intended to be and in fact used to pay expenses of a contest, was supported by a consideration. Day v. Long (Ky.), 80 S. W. 774.

4. Garrigus, Admr. v. Home Frontier and Foreign Missionary Soc., 3 Ind. App. 91, 28 N. E. 1009, 50 Am. St. Rep. 262; Keuka College v. Ray, 41 App. Div. 200, 58 N. Y. Supp. 745. A contribution to a church debt in consideration of obtaining pledges to pay the balance, is sufficient to support a promissory note. Roberts v. Cobb, 103 N. Y. 600. See also Irwin v. Lombard University, 56 Ohio St. 9, as to a note executed to an incorporated college, to which others has been induced to contribute, and on account of which the college had incurred obligations, and Beatty v. Western College, 177 Ill. 281, 52 N. E. 432, 69 Am. St. Rep. 242.

other party who is to use it and is expected to pay it.[5] Credit given to the accommodation party is sufficient consideration to bind the accommodation maker or indorser.[6] Between the accommodating and accommodated parties the consideration may be shown to be

5. Byles on Bills (Sharswood's ed.) [*125], 237; Citizens' Bank v. Frederickson, 83 Nebr. 755, 120 N. W. 462; Peoria Mfg. Co. v. Huff, 45 Nebr. 7, 63 N. W. 121; Brown Carriage Co. v. Dowd, 155 N. C. 307, 71 S. E. 721; Allen v. Chambers, 13 Wash. 327, 43 Pac. 57; Fant v. Miller, 17 Gratt. 47; Robertson v. Williams, 5 Munf. 381; De Land v. Dixon Bank, 14 Ill. App. 219. In this case the note was for the accommodation of a person not a party thereto. Jefferson County v. Railroad Co., 66 Iowa, 389, citing the text, and applying the definition given in ascertaining the character of certain municipal bonds issued in aid of a railroad. For illustration of what constitutes, see Beacon Trust Co. v. Robbins, 173 Mass. 261, 53 N. E. 868. Held, in North Carolina, that if one indorses at the request of a member of the firm for the purpose of obtaining money for the use of the firm and the proceeds were so used, the indorser, upon payment of the note, can recover therefor against the firm, though no member of the firm signed the note. Springs v. McCoy, 122 N. C. 629, 29 S. E. 903. Where sureties were liable on a contract and borrowed money to satisfy the liability, a person who was induced to sign a note with them for the borrowed money was an accommodation maker for the sureties' benefit. Lamberson v. Love, 165 Mich. 460, 130 N. W. 1126. A note which was not intended or given as an accommodation note is not made accommodation paper by a subsequent instrument signed by the makers authorizing the holder to use the note as security for a loan, as to persons who were never deceived by the subsequent instrument and unaware of its existence. Bouton v. Cameron, 205 Ill. 50, 68 N. E. 800, affirming 99 Ill. App. 600. Where a payee of a note indorsed the same in blank for the accommodation of the maker, and accompanied it with a letter to the bank in which it was deposited stating that it was deposited "as security for any obligation that may be due or that may hereafter become due" by the maker, and the note was largely in excess of the then indebtedness, and the indorser and the maker both testified that it was deposited for the purpose of securing future credit, the letter must be interpreted as showing an intention to secure future advances. Banker's Iowa State Bank v. Mason Hand Lathe Co., 121 Iowa, 570, 97 N. W. 70, 90 N. W. 612.

6. Bank of Morgan City v. Herwig, 121 La. 513, 46 So. 611. First Nat. Bank of St. Cloud v. Lang, 94 Minn. 261, 102 N. W. 700. Hill v. Coombs, 93 Mo. App. 264. Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. Where the indorsee of a note made payable to the order of the maker refused to accept the note and advance money thereon unless it was indorsed by someone in addition to the maker, this was sufficient consideration for such additional indorsement. Blatchford v. Harris, 115 Ill. App. 160. Where a bank required notes in addition to those already held, and received them with the understanding that there should be no extension of time on the notes previously held and that the makers of those notes would still be held responsible, and that the new notes should be accepted and carried by the bank as live paper, the new notes were supported by a consideration when all were given as security for a debt of another person to the bank. Meigs v. Bromley, 131 Mich. 408, 91 N. W. 627.

wanting,[7] but when the instrument has passed into the hands of a third party for value, and in the usual course of business, it cannot be,[8] for as between remote parties, as we have already seen, the con-

7. Bank of British North America v. Ellis, 6 Sawy. 98, citing the text; Boqua v. Brady, 90 Ark. 512, 119 S. W. 677, quoting text; Keenan v. Blue, 240 Ill. 177, 88 N. E. 553, affirming 130 Ill. App. 312; Marsh v. Chown, 104 Iowa, 556, 73 N. W. 1046; Nesson v. Millen, 205 Mass. 515, 91 N. E. 995; Brown v. Smedley, 136 Mich. 65, 98 N. W. 856; National Citizens' Bank of Mankato v. Bowen, 109 Minn. 473, 124 N. W. 241; Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214, 482; Evansville Nat. Bank v. Kaufman, 93 N. Y. 273, 45 Am. Rep. 204, citing the text; Higgins v. Ridgway, 90 Hun, 398, 35 N. Y. Supp. 944; Breitengross v. Farr, 100 Wis. 215, 75 N. W. 893. The mere fact that one not a party to the note, requests another to sign for accommodation of the maker, will not open the paper to the defense of accommodation uses should he afterward acquire it. Lockwood v. Twitchell (Mass.), 16 N. E. 731. The fact that an indorser before delivery, for the payee, subsequently paid interest on the notes when not obliged to does not estop or prevent him from setting up want of consideration in an action against him in which the payee seeks to recover on the indorsements. Nesson v. Millen, 205 Mass. 515, 92 N. E. 995. Where a note was made by a husband, it is a sufficient defense that the note was executed and delivered to a bank of which the defendant is the receiver as an accommodation to the bank, and was not executed for the benefit of the community existing between the defendants as husband and wife or on behalf of the community, it not appearing that the husband and wife, or either of them, were interested in the bank at or prior to that time. Shuly v. Holmes, 20 Wash. 13, 54 Pac. 540. A note given to a bank to cover the amount of unsubscribed stock, merely for accommodation and to enable the bank officials to deceive the comptroller, on which the maker paid no interest, the bank applying the dividends on the shares of its own stock it held to such interest payment, could not be sued on by the bank, and where the bank is in the hands of a receiver liability on the note will not be adjudged when, in the absence of proof on the subject, it may be assumed that the fruit of a judgment would not be used for the payment of creditors, but in relief of stockholders from an assessment by the comptroller. Lyons v. Westwater, 173 Fed. 111. Where the note was executed, and indorsed by the payee in order to obtain money with which to carry out a contract entered into between the maker and the payee, the payee is not an accommodation indorser, but is liable as an indorser of the note and as having been benefited by it. Vitkovitch v. Kleinecke, 33 Tex. Civ. App. 20, 75 S. W. 544.

8. Violett v. Patton, 5 Cranch (S. C.), 142; Yeaton v. Bank of Alexandria, 5 Cranch (S. C.), 49; French v. Bank of Columbia, 4 Cranch (S. C.), 59, 141; Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland, 161 Cal. 397, 119 P. 506; Bankers' Iowa State Bank v. Mason Hand Lathe Co., 121 Iowa, 570, 90 N. W. 612, 97 N. W. 70; Bank of Morgan City v. Herwig, 121 La. 513, 46 So. 611; Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Mehlinger v. Harriman, 185 Mass. 245; 70 N. E. 51; Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214, 482; Proctor v. Blanchard, 75 N. H. 186, 72 Atl. 210; Polhemus v. Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303; Walde Asphalt Paving Co. v. National Trading Co., 120 N. Y. S. 11, 135 App. Div. 391; Willoughby v. Ball, 18 Okl. 535, 90 Pac. 1017; Stephens v. Monongahela Nat. Bank, 88 Pa. St.

sideration which the plaintiff gave for his title, as well as that for which the defendant contracted the liability, must be impeached in order to defeat a recovery.[9] The circumstance that the accommodation maker was assured that the payee would protect it being known to the holder, does not weaken in any degree his title to recover,[10] and in an action against an indorser of a note for the accommodation of the maker, a defense personal to the maker of the note cannot be set up by the accommodation indorser.[11]

Under Negotiable Instrument statute.—Under sundry provisions of the statute,[12] it has been held, as between the immediate parties, it may be shown that it was given or indorsed by one party for the accommodation of the other party,[13] but that there was a lack of consideration to the accommodation party cannot be set up against a holder for value.[14] When the indorsement of a note was a requisite to its acceptance, this furnished a sufficient consideration,[15] and it has been held that a person who introduces the payee of a check to a bank, which has been raised by the payee, and who is informed by

157; Fant v. Miller, 17 Gratt. 47; Robertson v. Williams, 5 Munf. 381; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392; Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. One of two joint makers of a note cannot defend on the ground that he signed it as an accommodation to his brother, with the understanding that the signing of his name was a mere matter of form to comply with the provisions of the national banking laws, and that he would not subject himself to any liability by signing it, and that the cashier of the bank had made these representations to the brother at the time the loan was made and afterwards said the same thing to the defendant. Lebanon Nat. Bank v. Long, 220 Pa. 556, 69 Atl. 1033.

9. *Ante*, chapter VII, section III, § 174.

10. Thatcher v. West River Nat. Bank, 19 Mich. 196.

11. Fleitmann v. Ashley, 69 N. Y. S. 1099, 60 App. Div. 201, affirmed 172 N. Y. 628, 65 N. E. 1116.

12. Appendix, secs. 28, 29, 196.

13. People's Nat. Bank v. Schepflin, 73 N. J. L. 29, 62 Atl. 333; Morgan v. Thompson, 72 N. J. L. 244, 62 Atl. 410; Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136. Where the maker and payee of notes agreed that each was to receive ½ of the proceeds of the notes when discounted, the paper thus issued was not accommodation paper, and could not give to the maker the character or rights of an accommodation maker. Reyburn v. Queen City Sav. Bank & Trust Co., 171 Fed. 609. Reading section 115 with section 29, it means that the indorser for whose accommodation the instrument was made or accepted is one who receives value therefor, and not one who signs it simply for the purpose of lending his name to some other person. First Nat. Bank v. Bickel, 137 S. W. 790, 143 Ky. 754.

14. Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1.

15. Bank of Monticello v. Dooly, 113 Wis. 590, 89 N. W. 490.

the bank that the check is good, and indorses the same for accommodation, is liable on the check.[16]

§ 190. An accommodation indorser, who has paid the amount of the note to a subsequent indorsee, may recover of the maker without being subject to an offset of the maker against the payee, although he knew when he indorsed it that the maker was a creditor of the payee for an amount greater than the amount of the note.[17] And the payee may recover against the acceptor, although he knew when he took the bill that the acceptance was for accommodation of another party.[18] And it has been held that the accommodation payee and indorser may recover the full amount of the note, although he took it up by paying only a part.[19] But this is, we think, erroneous.[20] If one member of a firm obtains an accommodation note payable to himself, and afterward indorses it to a third person, who reindorses it to the same firm, before maturity, and for good consideration, such firm cannot recover against the maker, both parties being affected with the notice of a want of consideration.[21]

§ 191. An accommodation bill or note is not considered a real security, but a mere blank, until it has been negotiated, and it then becomes binding upon all the accommodation indorsers, in like manner and to the like effect as if they were successive indorsers; [22] but until it has been negotiated any party may withdraw his indorsement, acceptance, or other liability upon it, and rescind his engagement; [23] and that right is not impaired by the circumstance that he may be indemnified by an assignment or other security.[24]

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16. Smith v. State Bank, 104 N. Y. S. 750, 54 Misc. 550.

17. Barker v. Barker, 10 Gray, 339.

18. Spurgeon v. McPheeters, 42 Ind. 527; Milino Nat. Bank v. Cobbs (Tex. Civ. App.) 128 S. W. 151, citing text.

19. See chapter XLI, on Principal and Surety, § 1353, note.

20. This section is cited in Berkely v. Tinsley, 88 Va. 1005, 14 S. E. 842, by Lacy, J.

21. Quinn v. Tuller, 7 Cush. 244.

22. Whitworth v. Adams, 5 Rand. 342; Taylor v. Bruce, Gilmer, 42; May v. Boisseau, 8 Leigh, 164; Downes v. Richardson, 5 B. & Ald. 674; Macaulay v. Holsten, 114 N. Y. S. 611.

23. Second Nat. Bank v. Howe, 40 Minn. 390, citing the text.

24. May v. Boisseau, 8 Leigh, 164; Patterson v. Bank, 26 Oreg. 509, 38 Pac. 818, citing the text. In this case a number of persons, among them the plaintiff, T. Patterson, gave their promissory notes for the accommodation of the payee, to enable it to obtain advances from a bank. Said notes passed into the hands of

§ **192.** A person who indorses a note as an accommodation indorser for the payee, such note having been made by an accommodation maker, is subject to all the obligations and acquires all the rights of a party to negotiable paper.

If obliged to take up such note, the accommodation maker cannot set up fraud on the part of the payee, in the inception of the note, as a defense to his suit.[25]

§ **193. Fraudulent considerations.**—"Fraud cuts down everything" is the sharp phrase of the Lord Chief Baron Pollock in an English case.[26] And between immediate parties it at once destroys the validity of a bill or note into the consideration of which it enters.[27]

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the bank as a pledge as collateral security for future advances to the extent of $100,000. The bank had notice at the time that the notes were all executed solely for the accommodation of the Smelting Company, and for a specified purpose, that of securing the bank for future advances to the company. Judge Wolverton, in delivering his opinion, thought that all the note-makers, acting in unison in giving notice, and demanding a cessation of credit, could oblige the bank to deal with the Smelting Company upon its own credit, assimilating the makers to that of guarantors under a continuing guaranty which would be revocable at any time by notice, but in so far as the guaranty had been acted upon, the notice was without effect. These note-makers are all principals upon the face of the notes, their engagements, several, not joint, nor joint and several; but as between themselves, they are sureties by virtue of their collateral written contract. The plaintiff, T. Patterson, a single one of these note-makers, if allowed to fix his liability to and stay the credit, created by his note, would violate the spirit of the agreement, and it would be inequitable and unjust to permit the correlative relationship and liability of the parties thereto to be thus changed or severed; and that other note-makers were at least entitled to notice of plaintiff's intention to terminate his liability for further advances by the bank.

25. Laubach v. Pursell, 35 N. J. L. 434; Rossi v. National Bank, 71 Mo. App. 150.

26. Rogers v. Hadley, 32 L. J. Exch. (N. S.) 248 (1863).

27. Grinnell v. Hill, 1 Cal. App. 492, 82 Pac. 445; Clayton v. Cavender, 1 Maw. (Del.) 191, 40 Atl. 956; Barco v. Taylor, 5 Ga. App. 372, 63 S. E. 224; Crooker v. Hamilton, 3 Ga. App. 190, 59 S. E. 722; Cox v. Clime, 147 Ia. 353, 126 N. W. 330; Roberts v. Sholes, 144 Mich. 215, 107 N. W. 904; Hightower v. Mobile & R. Co., 83 Miss. 708, 36 So. 82, 102 Am. St. Rep. 476; Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 S. W. 1050; Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109; Anderson v. Stapel, 80 Mo. App. 115; Douglass v. Richards, 101 N. Y. S. 299, 116 App. Div. 27; Benson v. Keller, 37 Oreg. 120, 60 Pac. 918; Wisegarver v. Yinger (Tex. Civ. App.), 128 S. W. 1190, 122 S. W. 925; Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762; Webb v. Moseley, 30 Tex. Civ. App. 311, 70 S. W. 349; Cunningham v. Morris, 56 Wash. 341, 105 Pac. 839; Hynes v. Plastino, 45 Wash. 190, 87 Pac.

We have seen that if a horse or other personal chattel is warranted, and a bill, note, or check given for the price, the breach of the war-

1127; Du Clos v. Batcheller, 17 Wash. 389, 49 Pac. 488; Prewett v. Citizens Nat. Bank, 66 W. Va. 184, 66 S. E. 231; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192. As to fraud going on the character of the paper, see Gillespie v. Hester, 160 Ala. 444, 49 So. 580; Peoples State Bank v. Ruxer, 31 Ind. App. 245, 67 N. E. 542; Biddeford Nat. Bank v. Hill, 102 Me. 346, 66 Atl. 721, 120 Am. St. Rep. 499; Minneapolis Brewing Co. v. Grathen, 111 Minn. 265, 126 N. W. 827; Ribner v. Kleinberg, 122 N. Y. S. 239. That a mere expression of an opinion does not constitute fraud, see Consumers' Brewing Co. v. Tobin, 19 App. Cas. (D. C.) 353; Court Valhalla, No. 16, Foresters of America v. Olson, 14 Colo. App. 243, 59 Pac. 883; State Bank of Indiana v. Mentzer, 125 Ia. 101, 100 N. W. 69; State Bank of Indiana v. Gates, 114 Ia. 323, 86 N. W. 311. Where statements were made as to the capacity machine, based upon the payee's own observation and knowledge, this was a representation of a fact which was exclusively within the knowledge of the payee, and was not the expression of a mere opinion, and tends to show fraud in procuring a note given for the purchase of the machine. Merillat v. Plummer, 111 Ia. 643, 82 N. W. 1020. Mere puffing of property sold does not show fraud. Harrison v. Walden, 89 Mo. App. 164. As to the necessity to use diligence to guard against fraud and imposition, see Clodfelter v. Hulett, 72 Ind. 137; Smith v. McDonald, 139 Mich. 225, 102 N. W. 738; Hall v. Grayson County Nat. Bank, 36 Tex. Civ. App. 317, 81 S. W. 762. As to the duty of the maker to read the note, see Bank of Morgan City v. Herwig, 158 Fed. 744; Barco v. Taylor, 5 Ga. App. 372, 63 S. E. 224; Branan v. Warfield & Lee, 3 Ga. App. 586, 60 S. E. 325; Bank of Morgan City v. Herwig, 121 La. 513, 46 So. 611; Graham v. Mercantile Town Mut. Ins. Co., 110 Mo. App. 95, 84 S. W. 93; Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109; Guthrie & W. R. Co. v. Rhodes, 19 Okl. 21, 91 Pac. 1119. If the printed matter was unintentionally obscured from the defendant's view, and he carelessly signed the paper without ascertaining its contents, there is no reason for relieving him from the obligation assumed. On the other hand, if the printed matter was canceled by the agent of the payee with the design of obtaining some advantage over defendant, that is, if it was fraudulently done, the defendant is not bound. Palo Alto Stock Farm v. Brooker, 131 Ia. 229, 108 N. W. 307. Where the maker of a note is an ignorant man, unskilled in the use or understanding of technical or legal language, and the contents of a long printed mortgage note were deliberately misrepresented to him, he was not negligent in not stopping to read all its terms. Wickerman v. Evans, 133 Ia. 552, 110 N. W. 1046. On ignorance of the payee of the fraud practiced on the maker by another, the maker is bound. McCrea v. Murphy, 90 Ill. App. 434; Lovelace v. Lovelace, 136 Ky. 452, 124 S. W. 400, 136 Am. St. Rep. 271; Hays v. Bostick, 96 Miss. 794, 51 So. 462. Where one enters into a binding contract to give certain promissory notes for named amounts, and subsequently gives them, fraud in procuring him to sign the notes, or drunkenness at the time of their execution, is no defense, when the notes amount to no more than a compliance with his previous valid contract. Strickland v. Parlin & Orendorf Co., 118 Ga. 213, 44 S. E. 997. The indorser of a note before delivery cannot avail himself of a defense of fraud evidenced by a contract under seal between other parties than those who executed the note. Elliott v. Brady, 192 N. Y. 221, 85 N. E. 69. Concurring in the opinion,

ranty is no defense to the action on the bill, note, or check (unless authorized by statute); but if it appear that the seller knew that there was unsoundness in the horse or other chattel, the element of fraud enters into the transaction. There was, in fact, no contract, and proof of the fraud at once defeats the action on the bill, note, or check.[28]

Cullen, C. J., added: "It would be a good defense to the appellants' liability as indorsers of the note in suit to show that such indorsement was obtained by fraud, and I concede the claim that the fraud practiced on the vendee in the contract of sale might be the same fraud which induced the indorsement of the obligation of the vendee for the purchase money. In pleading such a fraud the indorsers would be availing themselves neither of the vendee's right to rescind the contract nor of the latter's cause of action for damages. But the difficulty in this case is that the indorsement of the appellants on the note sued upon was made after their knowledge of the fraud practiced on the vendee and was given with such knowledge to secure a renewal of the original note for which the note in suit was substituted. Therefore the appellants' relief if any, must be had in an equitable action." Where notes were given for stock in a business, representations as to the manner in which the payee of the notes could or would conduct the business and of his intentions in regard to it, do not constitute fraud in law. Lowry Nat. Bank v. Hazard, 223 Pa. 520, 72 Atl. 889 (1909). Where notes were executed and delivered in payment of the premium on a life insurance policy, the fact that the agent made a verbal agreement that the company should loan the money does not show that there was any fraud, trick or device in obtaining the execution of the notes. Poindexter v. McDowell, 110 Mo. App. 233, 84 S. W. 1133. Where notes were given in subscription for stock, the fact that the promoters had a secret agreement with one whose name appeared on the list of subscribers under which stock was transferred to him at a lower rate than that at which stock was sold to the maker of the note does not charge such fraud as would relieve the maker of the note from liability. State Bank of Indiana v. Gates, 114 Ia. 323, 86 N. W. 311. Where parties have signed notes for the purchase of property and have alleged fraud in the transaction, to avail themselves of the fraud mentioned as a complete defense, the contract must have been rescinded. Cox v. Cline, 147 Ia. 353, 126 N. W. 330 (1910). Where a note was given for the purchase of timber on land under a contract in writing for the purchase, the defendant, after having enjoyed parts of the fruits of the contract, cannot defend an action on the note on a defense depending upon a parol contract anterior to the date of the writing, by virtue of which a part of the land was alleged to have been omitted from the written contract because of fraud of the maker or mistake on his part, without first praying for a reformation of the contract. Harris v. P. H. & W. D. Brandon, 135 Ga. 131, 68 S. E. 1040.

28. Lewis v. Cosgrove, 2 Taunt. 2; Waterbury v. Andrews, 67 Mich. 281; Wickham v. Grant, 28 Kan. 521; Snyder v. Hargus, 26 Kan. 416; Wenzel v. Schultz, 20 Pac. 404, citing the text. It has been held that equity has jurisdiction to compel cancellation and delivery of negotiable instruments apparently valid, but in fact invalid, in the hands of holders, with notice before maturity. Scott v. Town of Menasha, 84 Wis. 73, 54 N. W. 263; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632; Selby v. Case, 87 Md. 459, 39 Atl. 1041.

While inadequacy of consideration in the origin, or transfer of a negotiable instrument, is not, in itself, a defense to a suit upon it, yet it is oftentimes a circumstance strongly tending to show a fraud in the contract in which it was given or transferred. Evidence, therefore, in a suit on a note for certain pictures, is not admissible for the purpose of reducing the damages by proving that they were of inferior value; but it would be good to show that they were fraudulently palmed off on the defendant.[29] A note is not vitiated by representations of what others say as to the value of property sold, unless the payee making them knew they were false.[30]

If the defendant repudiate the contract on the ground of fraud, he must return the consideration—otherwise the plaintiff may recover on the bill or note.[31]

Under Negotiable Instrument statute.—Under the statute,[32] it is competent to show, under a plea of partial or total failure of consideration, that the purchaser was induced to execute the instrument sued on by the false and fraudulent representations of the seller as to the quality, quantity, value, or character of the property which formed the consideration that moved the contract, as that is one mode of showing a failure of consideration,[33] and the title of a person who negotiates commercial paper is defective when he has obtained any signature thereto by fraud, and if the party so defrauded be relieved from liability thereon it has been held that such fraud makes such paper voidable by all the other persons who signed it, though

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29. Solomon v. Turner, 1 Stark. 51 (2 Eng. C. L.). See also Rudderow v. Huntington, 3 Sandf. 252, where goods were sold by an auctioneer with warranty or misrepresentation, and turned out to be spurious. Held no defense, it not appearing that the auctioneer knew the fact. Hodges v. Traux *et al.*, 19 Ind. App. 651, 49 N. E. 1079; Brook v. Teague, 52 Kan. 119, 34 Pac. 347. A statement by the payee which amounted to nothing more than a promise does not constitute fraud, as that, on making notes for the purchase of lots, the maker would not have to use any money, and the obligation would only be to sell the lots and turn the proceeds over to the payee until payment was made; but such a statement may be considered on the issue of fraud. State Bank of Iowa Falls v. Brown, 142 Ia. 190, 119 N. W. 81, 134 Am. St. Rep. 412.

30. Davidson v. Jordan, 47 Cal. 351.

31. Archer v. Bamford, 3 Stark. 175; Macaltimer v. Croasdale, 3 Houst. 365; Sternbury v. Bowman, 103 Mass. 326; Heaton v. Knowlton, 53 Ind. 357. *Contra*, Bell v. Sheridan, 21 D. C. 370; Regensburg v. Notestine, 2 Ind. App. 97, 27 N. E. 108; Starke v. Dicks, 2 Ind. App. 125, 28 N. E. 214.

32. Appendix, secs, 9, 10.

33. Taft v. Myerscongh, 197 Ill. 600, 64 N. E. 711, reversing 92 Ill. App. 560.

they did not participate in and were ignorant of such fraudulent conduct at the time they signed it.[34]

§ 194. Fraud on third persons vitiates consideration.—Fraud upon third persons vitiates a bill or note given in furtherance of it as between the parties; and the most frequent instance in which fraud of this kind appears is in undue advantage claimed by one or more creditors when the debtor enters into a composition in which all appear to stand on the same footing.[35] If the creditor refuses to enter into the agreement of composition until he receives a note for the residue of his debt,[36] or receives a note as inducement to his consent,[37] such note will be fraudulent and void; and the transaction is none the less fraudulent, and the note none the less void, because it is given after the composition was entered into, having been agreed on before,[38] and the fraud extends to the composition notes given to such creditor, and vitiates them also.[39] If the note for the residue be given by a third person who is indemnified by the debtor, it will be void.[40] In these cases the creditor and insolvent are "*particeps criminis*," but not "*in pari delicto*." It can never be *par delictum* when one holds the rod and the other bows to it.[41] If a third person pay money for the debtor, in fraud of the composition, the debtor's note to such person for the amount is void.[42] When a note given by the debtor in composition in fraud of creditors is paid, the debtor cannot recover back the amount.[43]

Where a statute provides that fraudulent conveyances, bonds, notes, etc., shall be void "as against the parties whose right or debt is attempted to be avoided," it has been held a note given with such fraudulent intent will be valid as between maker and payee.[44] But

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34. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192, under section 55 of the statute.

35. O'Shea v. Collier W. L. Co., 42 Mo. 397; Bastian v. Dreyer, 7 Mo. App. 332.

36. Cockshott v. Bennett, 2 T. R. 763; Knight v. Hunt, 5 Bing. 432 (15 Eng. C. L.); Rice v. Maxwell, 13 Smedes & M. 289.

37. Winn v. Thomas, 55 N. H. 294; Huckins v. Hunt, 138 Mass. 366.

38. Howe v. Litchfield, 3 Allen, 444; Took v. Tuck, 4 Bing. 224; Fay v. Fay, 121 Mass. 561; Tinker v. Hurst, 70 Mich. 160.

39. Dougherty v. Savage, 28 Conn. 146.

40. Bryant v. Christie, 1 Stark. 329.

41. Smith v. Cuff, 6 Maule & S. 160.

42. Bryant v. Christie, 1 Stark. 329.

43. Solinger v. Earle, 82 N. Y. 393; Wilson v. Ray, 10 Ad. & El. (37 Eng. C. L.), 82, 2 Per. & Dav. 253; s. c., overruling Turner v. Hoole, 1 D. & R. 27.

44. Carpenter v. McClure, 39 Vt. 13; Davis v. Sittig, 65 Tex. 500.

it has been held that the maker of such notes, the contract being unexecuted, may make the defense that they were given in fraud of others, though the rule would not extend so as to admit of his pleading against executed contracts.[45]

SECTION V

WHAT ARE ILLEGAL CONSIDERATIONS

§ **195. (1) As to illegal considerations by the common law.**—A bill or note which is founded upon an illegal consideration, in whole or in part,[46] is void; for the law will not aid one who seeks, or has consented to, its violation. Sometimes the consideration is illegal, because opposed to the general principles of the common law; and sometimes because it is specially interdicted by statute. The considerations which are illegal at common law are: 1. Such as violate the rules of religion, moral or public decency; and, 2. Such as contravene public policy.

A bond given in consideration of future illicit cohabitation would be void; but not so if given for past cohabitation;[47] nor is it void if given to support a putative child;[48] but a bill or note as between immediate parties would not be enforced if given for past cohabitation, because not founded upon a consideration.[49]

§ **195a. Wagers—Futures.**—As a general rule, wagers were not illegal by the common law.[50] But wagers upon the sex of a person;[51] that an unmarried female would bear a child;[52] upon the result of a prize fight;[53] or the result of a criminal trial;[54] or the result of an

45. Hamilton v. Scull's Admr., 25 Mo. 166; Brown v. Finley, 18 Mo. 375. See McCausland v. Rulston, 12 Nev. 195; Bank v. Keith, 85 Mo. App. 409.

46. Frick v. Moore, 82 Ga. 163; *post*, § 204; Swing v. Cider and Vinegar Co., 77 Mo. App. 391; Ball v. Putman, 123 Cal. 134, 55 Pac. 773.

47. Beaumont v. Reeve, 8 Q. B. 483; Friend v. Harrison, 2 C. & P. 584; Brown v. Kinsey, 81 N. C. 245; People v. Hayes, 70 Hun, 111, 24 N. Y. St. Rep. 194.

48. Hook v. Pratt, 78 N. Y. 371; Marshall v. Bell, 1 Ind. App. 506, 27 N. E. 988.

49. 1 Parsons on Notes and Bills, 214; Byles (Sharswood's ed.) [*132], 246.

50. De Costa v. Jones, Cowp. 729.

51. Good v. Elliott, 3 T. R. 693.

52. Ditchburn v. Goldsmith, 4 Campb. 152.

53. Hunt v. Bell, 1 Bing. 1, 7 Moore, 212.

54. Allen v. Hearn, 1 T. R. 57; Rust v. Gott, 9 Cow. 169.

election;[55] or upon the question of war or peace,[56] would be illegal as opposing public policy and sound morals. And, as a general rule, in the United States all manner of wagers are declared illegal by statutory enactments; and even where not prohibited by statute, they are regarded as opposed to public policy and sound morality.[57] Putting up margins in stock speculations is regarded as a species of gambling, and notes given for such margins are void as upon illegal consideration.[58] In Massachusetts one who pays a gambling debt for another cannot recover the amount.[59] And also, as a general rule, in the United States, contracts for the sale or purchase of commodities,

55. Lockhart v. Hullinger, 2 Ill. App. 465; Atwood v. Weeden, 12 R. I. 293; Thompson v. Harrison, S. C., Texas, Dallam's Decisions, 466.

56. Ibid.; Woolfolk v. Duncan, 80 Mo. App. 421.

57. Eldred v. Malloy, 2 Colo. 320; Boughner v. Mayer, 5 Colo. 75; Spies v. Rosenstock, 87 Md. 14, 39 Atl. 268; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Payne v. Raubinek, 82 Iowa, 588, 48 N. E. 995. In this case held that "what are familiarly known as 'Bohemian oats' contracts are void as being against public policy, and a promissory note given in pursuance of such contract is void in the hands of a purchaser thereof with notice of the character of the transaction." Morris v. White, 83 Mo. App. 194. A note given for money lost at a gambling game is given for an unlawful consideration, and the payee cannot recover thereon. Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164. See also Vennum v. Carr, 130 Ill. App. 309. Where a note is given to a third person for money to be used by the maker in paying a gambling debt, the payee not having been informed of the fact that it was for a gambling debt, the lender may recover on the note. Cooley v. Allen, (Ky.), 90 S. W. 1048. A note given in consideration of money borrowed to enable the borrower to engage in a gambling game is not on the same footing as a note given in settlement of a gambling debt, and an innocent purchaser of such a note for value may recover from the maker thereof. Higginbotham v. McGready, 183 Mo. 96, 81 S. W. 883, 105 Am. St. Rep. 461. A check issued for money advanced for the purpose of gambling, where the payee wins the money, is void between the parties, when it was for money advanced before it had been lost as well for money after it has been won, under a statute which must be reasonably construed to include both conditions, and not only the latter. Ash v. Clark, 32 Wash. 390, 73 Pac. 351. Where a person received a check knowing that it was for a gambling debt, and the check had been drawn by a husband on funds of his wife deposited in his name, the wife may recover the amount from the drawee of the check. Murray v. Aull, 47 Colo. 572, 107 Pac. 1068, 1120.

58. Fareira v. Gabell, 89 Pa. St. 89. A check given in consideration of money won from the maker at a game of chance is utterly void. See Cunningham v. Gans, 79 Hun, 434, 29 N. Y. Supp. 979; Benson v. Dublin Warehouse Co., 99 Ga. 303; Kain v. Bare, 4 Ind. App. 441, 31 N. E. 205. People's Sav. Bank v. Gifford, 108 Iowa, 277, 79 N. W. 63; Bank v. Arnold, 187 Pa. St. 356, 40 Atl. 794, *contra*.

59. Scolluns v. Flyn, 120 Mass. 271. See also Little v. Stokely, 99 Ga. 306, 25 S. E. 650.

such as cotton or grain, when no actual delivery of the same is contemplated or intended, such transactions being commonly known as "futures," are held contrary to public policy and void. A *bona fide* contract for the future delivery of any article is valid, but if the contract amount to a mere staking of margins to cover the difference between the price of the article at the time of purchase and the time of delivery, it is void.[60]

§ 196. As to considerations which oppose public policy.—Considerations which oppose public policy are never respected by the

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60. Such contracts have been held illegal in the following cases: Irvin v. Villiar, 110 U. S. 499; Root v. Merriam, 27 Fed. 909; Lee v. Boyd, 86 Ala. 283; Hawley v. Bibb, 69 Ala. 52; Cunningham v. Bank, 71 Ga. 400; Davis v. Davis, 119 Ind. 511; Hare v. Robinson, 37 La. Ann. 814; Gregory v. Wendell, 30 Mich. 337; Stewart v. Hutchinson, 120 Mo. App. 32, 96 S. W. 253; Zeller v. Leiter, 189 N. Y. 361, 82 N. E. 158; Bigelow v. Benedict, 70 N. Y. 202; Nichols v. Lumpkin, 51 N. Y. Supp. Ct. 88; Yerker v. Salomon, 18 N. Y. Sup. Ct. 473; Kahn v. Walton, 46 Ohio St. 197; Kirkpatrick v. Bonsall, 72 Pa. St. 89; Waugh v. Beck, 114 Pa. St. 422; Seeligson v. Lewis, 65 Tex. 215; Barnard v. Backhaus, 53 Wis. 599; Crawford v. Spencer, 4 S. W. 713; Beadler v. McElrath, 3 S. W. 152; Grizewood v. Blain, 11 C. B. 526. See also Bishop on Contracts, § 534. And such a note based upon such consideration is void even as against a *bona fide* purchaser of the note without notice. See Lulley v. Morgan, 21 D. C. 88, approving Justh v. Holliday, 2 Mack. 346. Where a payee of a note in good faith advanced money to another person for the purchase of stock, and to enable the maker of the note to complete the purchase of stock originally purchased on margin, recovery upon the note cannot be defeated on the ground of want of good consideration by reason of the payee's general knowledge of the marginal character of the contract as between the maker of the note and the broker. Foster v. Beau de Zart, 13 Cal. App. 52, 108 Pac. 875 (1910). Such transactions have been sustained under various circumstances in the following cases: Sondheim v. Gilbert, 117 Ind. 76; Third Nat. Bank v. Tinsley, 11 Mo. App. 498; Shaw v. Clark, 49 Mich. 384; Hentz v. Jewell, 20 Fed. 592; St. Louis Bank v. Harrison, 3 McCrary, etc., 316; Jackson v. City Nat. Bank, 125 Ind. 347, 25 N. E. 430; Morris v. Norton, 21 C. C. A. 553, 75 Fed. 912. When a wagering contract has been executed, and its fruits paid to the agent of the winner, the agent cannot hold it against the winner, and a draft made by cotton dealers for money collected for the payee of the draft on a cotton future sale, is valid. Russell v. Kidd, 37 Tex. Civ. App. 411, 84 S. W. 273. Where a note was given for cotton purchased under the New York Cotton Exchange rules, by which delivery of the cotton is required, and the holder of the note knew nothing of any intention of the maker not to receive the cotton bought for him under his contracts upon his orders, the note is valid. Springs & Co. v. Carpenter, 154 Fed. Rep. 487. The mere negotiation of the note by payments thereon and a promise to pay the balance, would not relieve it from its illegality, or estop the maker from urging that as a defense. Treat v. Suydecker, Tyffe & Co., 92 Ill. App. 458.

law; and contracts founded upon them are universally condemned.[61] Contracts in general restraint of trade;[62] or restraining or prevent-

61. Barnhart v. Goldstein, 27 Ind. App. 101, 59 N. E. 1067 (note given for machine which was made and could not be used for a lawful purpose); Hubbard v. Freiburger, 133 Mich. 139, 94 N. W. 727; Dickson v. Baker, 75 Minn. 168, 77 N. W. 820, 74 Am. St. Rep. 447 (note to a trustee to secure the election of another to the office of trustee, as constituting a breach of trust); Bank of Ozark v. Hanks, 142 Mo. App. 110, 125 S. W. 221; Cobb v. Wm. Kenefick Co., 23 Okl. 440, 110 Pac. 545 (note given to a construction company to induce it to construct the railroad off the survey and to a certain town); McGuffin v. Coyle & Guss, 16 Okl. 648, 85 Pac. 954, 6 L. R. A. (N. S.) 524 (note payable personally to an officer of a railroad company on condition that a railroad is built to a certain point by a certain time). A note given for liquors unlawfully sold or with knowledge that they were to be unlawfully sold, is without consideration in law. Levy & Son v. Stegman (Iowa), 104 N. W. 372; Jones v. Yokum, 24 S. D. 176, 123 N. W. 272; *In re* Lemerise, 73 Vt. 304, 50 Atl. 1062. In the Union Cent. Life Ins. Co. v. Champlin, 11 Okl. 184, 65 Pac. 836, 55 L. R. A. 109, it was held that a stipulation in a note that the right of the maker to make payment at any time is waived, providing the money tendered is borrowed in whole or in part elsewhere, is contrary to public policy, and is therefore void, as the stipulation forbids the maker from discharging his obligation by tendering to the payee money which was not borrowed, in whole or in part, elsewhere. To the contrary, see Lasher v. Union Cent. Life Ins. Co., 115 Ia. 231, 88 N. W. 375. Under a statute providing that no recovery shall be had to recover the purchase price of any sale on credit of any liquor, to be drunk on the premises where the same shall be sold, and that all securities given for such debt shall be void, a promissory note is a security within the meaning of the statute and a note given for the price of liquor thus sold is not enforceable. Wagner v. Scherer, 85 N. Y. S. 894, 89 App. Div. 202. A note given in consideration of the written consent of the payee, as adjacent property owner, to the maintenance of a saloon by the maker upon certain premises, was given for an illegal consideration. O'Connor v. Klennan, 143 Ia. 435, 121 N. W. 1088 (1909). A license fee, the payment of which is a condition precedent to issuing the license, is in no sense a debt owing the municipality, and the fact that a person had been selling liquor for some months without a license did not make him indebted to the town for the license fee; he simply violated the ordinance, and a note given for a license under such circumstances is without consideration, as a

62. Chitty on Bills (13th Am. ed.) [*83], 99. But contracts in partial restraint of trade, on fair and beneficial terms, are supported. Bunn v. Gray, 4 East, 190; Jenkins v. Temples, 39 Ga. 655, when the contract was not to trade in the same place; Nobles v. Bates, 7 Cow. 307; Perkins v. Lyman, 9 Mass. 522. A note given for manufactured goods purchased is enforceable though the payee may be a trust or combination organized for the purpose of carrying out restrictions in trade contrary to the common law or to the Federal and State anti-trust acts; this is not a contract which is itself in restraint of trade, but is based on a transaction in itself legal. Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 L. ed. 679.

ing marriage even for a time;[63] or to assist another in furthering a marriage where the promisor has no right to interfere;[64] champertous contracts between attorney and client[65] to procure or sell a public office,[66] or votes; or to induce a candidate to withdraw;[67] to suppress evidence or interfere with the course of justice by dropping a criminal prosecution;[68] and contracts to indemnify a person in doing an act of known illegality, as inducement thereto;[69] or to do anything reprehensible for its injurious effects upon the feelings of third persons; or in fraud of the rights and interests of

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license issued without payment of the license fee is void. Ristine v. Clements, 31 Ind. App. 338, 66 N. E. 924. A note taken from one confined in jail, at the expiration of his term, for the amount of costs in his case, is void when the statutes have not provided for that mode of release. Horner v. Simpson, 10 Kan. App. 582, 63 Pac. 604. A promise in writing to pay a certain sum "on the day after my nomination for county clerk in the year 1900, for value received," while not a valid negotiable promissory note, is valid as a promise to pay money, unless evidence aliunde be adduced from which illegality in the inception of the contract may reasonably be inferred. Harris v. Firth (N. J.), 68 Atl. 1064 (1908). A promissory note or obligation, payable to a railroad company in aid of the construction of its line between two given points through a certain point, is not void as against public policy. Southard v. Arkansas Valley, etc., R. Co., 24 Okl. 408, 103 Pac. 750 (1909). And in Sparks v. Oklahoma Const. Co., 19 Okl. 55, 91 Pac. 839, it was held that a petition, praying for judgment upon a promissory note, containing a provision showing that it was executed in consideration of the benefits arising to the maker by reason of the construction of a railroad from a given place to another place named, by a time stated, and which is made payable to a construction company, without naming the railroad to be built, or any railroad company as an interested party, does not present such a question of public policy as to make such petition demurrable upon the ground.

63. Hartley v. Rice, 10 East, 22; Lowe v. Peers, 4 Burr. 2225.

64. Roberts v. Roberts, 3 P. Wms. 66; 1 Parsons on Contracts, 555, 556.

65. Million v. Ohmsberg, 10 Mo. App. 432.

66. Richardson v. Mellish, 2 Bing. 229 (9 Eng. C. L.); Martin v. Wade, 37 Cal. 168.

67. Ham v. Smith, 87 Pa. St. 63.

68. Edgecombe v. Rodd, 5 East, 294; Fallows v. Taylor, 7 T. R. 475; Porter v. Havers, 37 Barb. 343; Gardner v. Maxey, 9 B. Mon. 90; Commonwealth v. Johnson, 3 Cush. 454; Soule v. Bonney, 37 Me. 128; Clark v. Ricker, 14 N. H. 44; Hinesburgh v. Sumner, 9 Vt. 23; Ozanne v. Haber, 30 La. Ann., part II, 1384; Merrill v. Carr, 60 N. H. 114; Rosenbaum Bros. v. Levitt, 109 Iowa, 292; Kirkland v. Benjamin, 67 Ark. 480, 55 S. W. 840; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; Case v. Smith, 107 Mich. 215, 65 N. W. 279.

69. Chitty on Bills (13th Am. ed.) [*85], 102; Edwards on Bills, 340; Goodale v. Holdridge, 2 Johns. 193; Welborn v. Norwood, 1 Tex. Civ. App. 164, S. 20 W. 1129.

third persons [70] are instances of the kind of contracts which the law will not recognize.

Of the like kind are contracts founded on consideration to resign a public office; [71] to induce the withdrawal of a bid for a government contract; [72] to withdraw the papers in defense in a divorce suit; [73] to get possession of goods wrongfully held; [74] for the sale of libelous or immoral works; [75] or for the supply of drinks to influence votes for a public office; [76] or to influence a public officer in the discharge of his duty; [77] or to procure the appointment of a party as administrator of an estate; [78] or to prevent competition in bidding at an administrator's sale; [79] or to prevent examination of the public records.[80]

§ 196a. Compounding felonies and misdemeanors.—Abandonment of the prosecution of an offense against the public, of which the law requires prosecution, is, as we have seen, not a good consideration. It is a high requirement of public policy that felonies should be investigated and punished, and compounding a felony, as such a compromise is called, is frowned upon by the courts, and is never permitted to be enforced.[81] It is not necessary to stamp the transac-

70. Ibid. When a note is made in fraud of creditors, none but a creditor can assail it. Sullivan v. Bonesteel, 79 N. Y. 631; Ward v. Doane (Mich.), 43 N. W. 980; Goodrich v. McDonald (Mich.), 43 N. W. 1019; Milwaukee Masons & Builders' Assn. v. Niezerowski, 95 Wis. 129, 70 N. W. 166, 60 Am. St. Rep. 97. Or an agreement by a notary to charge bank by which he is employed, one-half the usual and legal fees. See Ohio Nat. Bank v. Hopkins, 8 App. D. C. 146.

71. Meachum v. Dow, 32 Vt. 721.

72. Kennedy v. Murdick, 5 Harr. (Del.) 458.

73. Stoutenburg v. Lybrand, 13 Ohio (N. S.), 228; Merrill v. Peaslee, 146 Mass. 462. But see Adams v. Adams, 91 N. Y. 383.

74. White v. Heylman, 10 Casey, 142.

75. Fores v. Johnes, 4 Esp. 97; Turk v. Richmond, 13 Barb. 533.

76. Jackson v. Walker, 5 Hill, 27, 7 Hill, 387.

77. Cook v. Shipman, 52 Ill. 316; Boyd v. Cochrane, 18 Wash. 281, 51 Pac. 383; Douai v. Lutjens, 21 App. Div. 254, 47 N. Y. Supp. 659. So a note given without consideration, and under a threat of the payee that he will influence the city counsel not to pay a claim by the maker, is void. French v. Talbot Paving Co., 100 Mich. 443, 59 N. W. 166.

78. Porter v. Jones, 52 Mo. 399.

79. Goldman v. Oppenheim, 118 Ind. 96. In Nebraska it is held that a note given to prevent bidding at a chattel sale is against public policy and void. McClellan v. Citizens' Nat. Bank, 60 Nebr. 90, 82 N. W. 319; Atlas Nat. Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489.

80. Parsons v. Randolph (Mo.), 4 West. 864; Montjoy v. Delta Bank, 76 Miss. 402, 24 So. 870.

81. Bishop v. Matney (Ky.), 78 S. W. 856; Corbett v. Clute, 137 N. C. 546,

tion with illegality that a felony should have been committed. It is sufficient if it be charged, for the investigation of the charge is the policy of law which is sought to be protected.[82]

But compounding a private misdeameanor, such as a suit for slander,[83] or bastardy proceedings,[84] or other civil action, is a good con-

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50 S. E. 216; Henderson v. Palmer, 71 Ill. 579; Commonwealth v. Pease, 16 Mass. 91; Wallace v. Hardacre, 1 Campb. 45; Collins v. Blantern, 2 Wils. 347; Pierce v. Kibbe, 51 Vt. 559; National Bank v. Kirk, 90 Pa. St. 49; Armstrong v. Southern Express Co., 4 Baxt. 376; Ozanne v. Huber, 30 La. Ann. 1384; Johnston v. Allen, 22 Fla. 224 (see Geier v. Shade, 109 Pa. St. 180, as to legality of settlement after institution of criminal proceedings); Haynes v. Rudd, 102 N. Y. 372; Williams v. Walker, 18 S. C. 577; Frick v. Moore, 82 Ga. 160; Crowder v. Reed, 80 Ind. 1; Ricketts v. Harvey, 106 Ind. 565. And the objection prevails although there be other and valid considerations. Fernekes v. Bergenthal, 69 Wis. 466; Bell v. Riddell, 2 Ont. 25; Graham v. Keyes, 137 Mass. 583. See Sumner v. Summers, 54 Mo. 340, where it is held that a note given under an agreement to secure dismissal of a prosecution for felony is void. Groesbeck v. Marshall, 44 S. C. 538, 22 S. E. 743; Bleckley v. Goodwin, 51 S. C. 362, 29 S. E. 3; Rosenbaum Bros. v. Levitt, 109 Iowa, 292; Friend v. Miller, 52 Kan. 139, 34 Pac. 397, 39 Am. St. Rep. 340; Welborn v. Norwood, 1 Tex. Civ. App. 164, 20 S. W. 1129. See *ante*, under § 196. A claim that notes were given to avoid prosecution, and hence were illegal and void, cannot be sustained when there is neither allegation nor proof of an agreement not to prosecute the maker for any offense. Fred Rueping Leather Co. v. Walke, 135 Wis. 616, 116 N. W. 174 (1908). A promissory note given to secure the payment of a debt contracted by the debtor, under circumstances which subjected him to criminal prosecution, is not rendered invalid by reason of the fact that it was made under pressure of a threat by the creditor that he would procure the indictment of the debtor, unless the debt was paid. Mullin v. Leamy, 80 N. J. L. 484, 79 Atl. 257. If the consideration of a note is partly illegal, the whole note is void; and, where the note is given in settlement of preexisting debts, in addition to certain sums of money advanced to one of the makers at the time of signing the same, and also for the agreed purpose of discontinuing a pending prosecution against one of the makers thereof for a crime, such note, being entire and indivisible, is void, and there can be no recovery thereon. Standard v. Sampson, 23 Okl. 13, 99 Pac. 796, citing text (1909).

82. Rogers v. Blythe, 51 Ark. 523, citing the text; Chandler v. Johnson, 39 Ga. 85; Lucas v. Castelow, 8 Ga. App. 812, 70 S. E. 184; Joyce Co. v. Rohan, 134 Iowa, 12, 111 N. W. 319, 120 Am. St. Rep. 410; Smith Premier Typewriter Co. v. Mayhew, 65 Nebr. 65, 90 N. W. 939; Cass County Bank v. Bricker, 34 Nebr. 516, 52 N. W. 575, 33 Am. St. Rep. 649.

83. Walbridge v. Arnold, 21 Conn. 424; Clark v. Reker, 14 N. H. 44; Drage v. Ibberson, 2 Esp. 643; Gardner v. Maxey, 9 B. Mon. 90.

84. Merrill v. Fleming, 42 Ala. 234; Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812. It is no defense to such note that the mother and guardian of such infant made an unlawful agreement not to prosecute the putative father for statutory rape, unless such infant knowingly participated in such unlawful agreement. Griffin v. Chriswisser, 84 Neb. 196, 120 N. W. 909.

sideration for a note;[85] and a good bill substituted for a forged one without any agreement to stifle the prosecution, is valid.[86] So is a note given to the prosecutor after the trial and conviction for expenses of the prosecution.[87] So, also, a note given for a fine imposed upon conviction of a misdemeanor;[88] and, also, a note for expenses incurred in defending a person charged with crime.[89] Embezzled money is a good consideration,[90] and it has been held in Alabama that a note given for embezzled funds would not be invalidated by an accompanying agreement not to prosecute for a felony.[91] The true question, however, in such a case seems to be, was the note given for the money, or to settle the prosecution? and in the first event it would be valid, in the latter illegal and void.[92]

Under Negotiable Instrument statute.—Under the several provisions of the statute with respect to consideration,[93] it has been held that parties to a note which was given to take up a forged note, which one of the parties had indorsed, are liable thereon whether or not they knew that the note was forged, when it was not given to compound the felony.[94]

§ 196b. Forbearance and compromise.—Forbearance to prose-

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85. Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677, holding that a note given in settlement of the civil liability resulting from the commission of a crime, is enforceable. Where a check was given for the return of property believed to have been stolen and the amount of the check was used to obtain and return it, and it was not part of the agreement to interfere with the apprehension of the criminal, and payment of the check was stopped, a recovery could be had thereon. Schirm v. Wieman, 103 Md. 541, 63 Atl. 1056, 7 L. R. A. (N. S.) 175, 115 Am. St. Rep. 373.

86. Wallace v. Hardacre, 1 Campb. 45.

87. Kirk v. Strickwood, 4 B & Ad. 421 (24 Eng. C. L.).

88. Blain v. Hitch, 70 Ga. 276; County v. McWilliams, 69 Ga. 840.

89. Hutchinson v. Dornin, 23 Mo. App. 575.

90. Thorn v. Pinkham, 84 Me. 101, 24 Atl. 718, 30 Am. St. Rep. 335; Armstrong v. Southern Express Co., 4 Baxt. 376. A note given to settle the embezzlement of an agent is valid if there is no agreement to stifle a prosecution. Wolf v. Troxell Estate, 94 Mich. 215, 54 N. W. 383. A note given by the sureties on a postmaster's official bond, as an extension of time granted by a postoffice inspector to pay an amount embezzled by the postmaster, was held to be invalid, as the act of the inspector was unauthorized. United States v. Kanhoe, 147 Fed. 185.

91. Bibbs v. Hitchcock, 49 Ala. 468.

92. Godwin v. Crowell, 56 Ga. 566; Welborn v. Norwood, 1 Tex. Civ. App. 164, 20 S. W. 1129; First Nat. Bank v. Gregg, 74 Mo. App. 639.

93. Appendix, secs. 24, 25, 26.

94. Jennings v. Law, 199 Mass, 124, 85 N. E. 157.

cute a claim, or the compromise of a doubtful one, is a good consideration for a note or bill.[95] But the compromise of one clearly illegal is not,[96] and if there be no ground for assertion of liability, it seems that forbearance to sue will not supply a consideration.[97] Resignation

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95. Keefe v. Volge, 36 Iowa, 87; Muirhead v. Kirkpatrick, 21 Pa. St. 237; Stewart v. Ahrenfeldt, 4 Den. 189; Phelps v. Younger, 4 Ind. 450; Anstell v. Rice, 5 Ga. 472; Stephens v. Spiers, 25 Mo. 386; Wyatt v. Evins, 52 Ala. 285; Bozeman v. Rushing, 51 Ala. 529; Heaps v. Dunham, 95 Ill. 583; Boone v. Boone, 58 Miss. 820; Lipsmeier v. Vehlsage, 29 Fed. 175; Tyson v. Woodruff, 108 Ga. 368, 33 S. E. 981; Morey v. Laird, 108 Iowa, 670, 77 N. W. 835; French v. French, 84 Iowa, 655, 51 N. W. 145. To equalize shares on partition of land. Badger v. Stephens, 61 Mo. App. 387. Withdrawing a contest over a will, which had been begun in good faith, is a sufficient consideration for a note given to the contestant by one of the beneficiaries under the will. Wright v. Bayless (Ky.), 118 S. W. 918. A note executed by a widow in settlement of an apparent shortage in the accounts of her deceased husband as executor of an estate, and for the dismissal of a suit which had been brought against a surviving executor, was given for a good consideration. Rohrbacher v. Aitken, 145 Cal. 485, 78 Pac. 1054. A note given for the dismissal of a proceeding to remove executors, and respecting the payment of attorneys' fees, commissions and other expenses, is not based on a good consideration, as the suit does not involve a dispute as to property rights between the parties, and the expenses of administration are matters to be determined by the court. Currier v. Clark, 15 Colo. App. 6, 60 Pac. 958.

96. Sullivan v. Collins, 18 Iowa, 228. See Tucker v. Ronk, 43 Iowa, 80. The discontinuance of a suit brought upon an illegal demand (void note) is not a sufficient consideration to support a new note when the illegal element which avoided the first note enters into the new note. Kennedy v. Welch, 196 Mass. 592, 83 N. E. 11 (1907). Where an order was given in an original transaction tainted with fraud, and, on threats being made that the order would be sued, a note was given in compromise, the original fraud is carried forward into the note and there cannot be a recovery thereon. Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856. See also Ormsbee v. Howe, 54 Vt. 182, 41 Am. Rep. 841. But see to the contrary Packham v. Hendren, 76 Ind. 47.

97. Tucker v. Roach, 139 Ind. 275, 38 N. E. 822. In Foster v. Mills, 55 Miss. 80, a mail contractor gave his note for money stolen by his agent from the mail, and it was held that there was no consideration, as he was under no liability, and although payee agreed not to sue him. In order that forbearance to sue may constitute a valid consideration for a contract, the party forbearing must have, as against the party to whom the favor is granted a *bona fide* claim which might give rise to an action to enforce it. Bank of Ontario v. Hoskins, 33 Mont. 306, 83 Pac. 493, holding that where a person signed a note in terms due 30 days after date, under an agreement to postpone the bringing of any action on the note against the maker until the happening of certain contingencies, only upon the happening of which the maker would be liable, this was not a forbearance of any legal right. A note executed by a husband and the wife is supported by consideration as against both when the amount was due by the husband on a lease, and the payee, by taking it, extended the time of payment, waived the forfeiture

of an office in a corporation is a good consideration:[98] so, also, the surrender of a certificate of entry on public lands.[99]

§ 197. (2) As to considerations illegal by statute.—It is an invariable rule that when a note has been given for a consideration which is illegal by statute, it is not enforceable between the parties.[1] It has been so held as to a note given for a transfer of a liquor license, such a transfer being prohibited by statute;[2] for the services of one practicing medicine without a license duly issued;[3] for the balance of a premium on a contract of insurance in the case of a rebate of part of the premium;[4] to an employment agency for an amount greatly in excess of the fees provided for by statute,[5] or in settlement of a bucket shop transaction.[6]

The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect.[7] There is, however, one exception to this rule: that when a

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of the lease, and allowed the makers to remain in possession. Emery v. Lowe, 140 Cal. 379, 73 Pac. 981.

98. Peck v. Regua, 13 Gray, 407.

99. Thompson v. Hanson, 28 Minn. 484.

1. A note given for a stallion, which does not have the words on its face required by statute, written or printed thereon that the note is "for the sale of a stallion or interest therein," is void, because the giving of it is an illegal act. Quiggle v. Herman, 131 Wis. 379, 111 N. W. 479. A promissory note given for a deed of land from the payee to the payor, in possession of the payee, and held by him in violation of Act Cong. July 1, 1902, c. 1362, 32 Stat. 641, the transaction being in violation of Rev. St. U. S., § 2118, was given for an illegal consideration. McLaughlin v. Ardmore Loan, etc., Co., 21 Okl. 173, 95 Pac. 779. See Combs v. Miller, 24 Okl. 576, 103 Pac. 580 (1908).

2. Kennedy v. Welch, 196 Mass. 592, 83 N. E. 11 (1907).

3. Hill v. Ward, 45 Ind. App. 458, 91 N. E. 38 (1910).

4. Heffron v. Daly, 133 Mich. 613, 95 N. W. 714.

5. Hapgoods v. Barrett, 106 N. Y. S. 189.

6. Wilson v. National Fowler Bank, 47 Ind. App. 689, 95 N. E. 269.

7. Thompson on Bills (Wilson's ed.), 68; Grimes v. Hillenbrand, 4 Hun, 354; Town of Eagle v. Kohn, 84 Ill. 292; Smith v. Columbia State Bank, 9 Nebr. 34; New v. Walker, 108 Ind. 365, citing the text; Thompson v. Samuels (Tex.), 14

statute, expressly or by necessary implication, declares the instrument absolutely void, it gathers no vitality by its circulation in respect to the parties executing it;[8] though even upon such instruments an indorser may, as we shall hereafter see, be held liable to a *bona fide* holder without notice.[9]

There are a very few cases in which the statute renders such instruments absolutely void; and the most important are the statutes against usury and gaming.[10]

S. W. 143, citing the text; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Hart *et al.* v. Livermore Foundry & Machine Co., 72 Miss. 809, 17 So. 769; Campbell v. Jones, 2 Tex. Civ. App. 263, 21 S. W. 723, citing text; Atlas Nat. Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489; Press Co. v. City Bank, 7 C. C. A. 248, 58 Fed. 321, citing text; Union Nat. Bank v. Brown, 101 Ky. 354, 41 S. W. 273, 72 Am. St. Rep. 420, 38 L. R. A. 503. See further, *post*, § 198. A *bona fide* holder of a note made by a foreign corporation which had not complied with the laws of the State authorizing it to do business therein, may maintain an action thereon. State Bank of Chicago v. Holland (Tex.), 126 S. W. 564, citing text (1910). Commercial paper is valid in the hands of an innocent holder, even though the consideration for the note arises out of some contract or transaction prohibited by law, unless the law in express terms declares the instrument void. Gray v. Boyle, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042, citing text. See also Wilson v. National Fowler Bank, 47 Ind. App. 689, 95 N. E. 269, as to a bucket shop transaction.

8. See also chapter XXIV, on *Bona Fide* Holder, § 807 *et seq*:. Bayley v. Taber, 5 Mass. 286. In Vallett v. Parker, 6 Wend. 615, Savage, C. J., said: "Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure of or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of, the consideration." German Bank v. De Shon, 41 Ark. 340, citing the text; Hanover Nat. Bank v. Johnson (Ala.), 8 So. 42, citing the text; Glen v. Farmers' Bank, 70 N. C. 191; Town of Eagle v. Kohn, 84 Ill. 292; Hatch v. Burroughs, 1 Woods, 439; Woods v. Armstrong, 54 Ala. 150; Bacon v. Lee, 4 Clarke (Iowa), 49; Smith v. Columbus S. B., 9 Nebr. 34; Robertson v. Cooper, 1 Ind. App. 78, 27 N. E. 104; Bohons, Assignee, v. Brown, etc., 101 Ky. 354, 41 S. W. 273, 72 Am. St. Rep. 420; Furman Farm Improvement Co. v. Long, 117 Ala. 581, 23 So. 527; Rodecker v. Littauer, 8 C. C. A. 320, 59 Fed. 857; Pope v. Hanke, 155 Ill. 617, 40 N. E. 839, citing text.

9. See chapter XXI, section I, § 673 *et seq.*

10. 3 Kent Com. 44; Story on Bills (Bennett's ed.), § 189; *post*, § 807; Sondheim v. Gilbert, 117 Ind. 76, citing the text; Traders' Bank v. Alsop, 64 Iowa, 98; Hollingsworth v. Moulton, 53 Hun, 91; Savings Bank v. National Bank of Commerce, 38 Fed. 800; Union Nat. Bank v. Fraser, 63 Miss. 231; Angier *et al.* v. Smith, 101 Ga. 844, 28 S. E. 167; Fidelity Loan & Guarantee Co. v. Baker, 54 Mo. App. 79. Under a statute making all usurious contracts absolutely void usury may be pleaded as against an innocent holder, but when the usurious contract is void or voidable, at the instance of the debtor, only as to the usury, an

In England, the policy of declaring the instrument a nullity in the hands of a *bona fide* holder no longer prevails, the statute of 8 & 9 Victoria, c. 109, having relaxed the ancient rule on the subject; [11] and in some of the States similar statutes have been enacted.[12] But the change has not become general, and in the States where contracts founded on gaming or usurious considerations are declared void, bills and notes given to secure them are held void in the hands of every holder.

Prior to the act of March 24, 1874, all contracts and assurances for the loan or forbearance of money founded on usurious consideration, were void by statute; but since then, they are illegal only, and hence a negotiable instrument originating on such consideration would be valid in the hands of a *bona fide* holder, who gave value without notice.[13]

Under Negotiable Instrument statute.—Under the statute,[14] it has been held that the title is defective, within the meaning of the statute, when the only consideration for the note was interest which had accrued on a previous note which called for a higher than the legal rate of interest.[15]

§ 198. How bona fide holder affected.—When the statute merely declares expressly, or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration will be valid in the hands of a *bona fide* holder without notice; [16] but

innocent purchaser is not affected thereby. Bradshaw v. Van Valkenburg, 97 Tenn. 316, 37 S. W. 88. In Reed v. Bank of Ukiah, 148 Cal. 96, 82 Pac. 845, it was held, where a substantial part of the amount included in the notes was made up of items of interest at 10 per cent. per annum, compounded monthly, upon sums due on open account, and there had not been any written agreement to pay the excess over 7 per cent., except that contained in the notes sued on, which were made after the excess had accrued, that as to this excess, the notes were without consideration.

11. See Parsons v. Alexander, 5 El. & Bl. 263, 30 Eng. L. & Eq. 299.

12. Vallett v. Parker, 6 Wend. 615; Kendall v. Roberston, 12 Cush. 156; Wortendyke v. Mechan, 9 Nebr. 221; Savings Bank v. Scott, 10 Nebr. 83.

13. Lynchburg Nat. Bank v. Scott, 91 Va. 654, 22 S. E. 487, 50 Am. St. Rep. 860; Woolf v. Hamilton, 2 Q. B. 337 (1898).

14. Appendix, sec. 55.

15. Keene v. Behan, 40 Wash. 505, 82 Pac. 884.

16. Wyatt v. Bulmer, 2 Esp. 538; Rhodes v. Beall, 73 Ga. 643; State Bank of Greentown v. Lawrence (Ind.), 96 N. E. 947; Henry v. State Bank of Lawrens, 131 Iowa, 97, 107 N. W. 1034; Sistermans v. Field, 9 Gray, 331; Paton v. Coit, 5 Mich. 505; Citizens' State Bank v. Nore, 67 Nebr. 69, 93 N. W. 160, 60 L. R. A. 737 (as to a note given for medical services by an unlicensed practitioner, not-

the burden of proof will be upon the plaintiff, when the illegal consideration appears, to show that he is a *bona fide* holder without notice.[17] And if the statute in terms only forbids suit to be brought upon bills and notes founded on certain considerations, "except by a *bona fide* holder who has received the same upon a valuable and fair consideration, without notice or knowledge, etc.," they will be good in the hands of such holder; but the burden of proof will be devolved upon him in like manner, if it appear that the instrument originated in such a consideration.[18] But want or failure of consideration do not require such proof of the holder.[19]

Where a statute provided that wherever, in an action brought on a contract for the payment of money, it shall appear that unlawful interest has been taken, the plaintiff shall forfeit threefold the amount of the unlawful interest so taken, etc., it was held to apply to the innocent indorsee of a note who received it in due course of trade;[20] and as a general rule all contracts founded on considerations which embrace an act which the law prohibits under a penalty, are void.[21]

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withstanding the statute declared such practice a crime); Savings Bank v. Scott, 10 Nebr. 83; Wortendyke v. Mechan, 9 Nebr. 221; Bank v. Arnold, 187 Pa. St. 356, 40 Atl. 794; Campbell v. Jones, 2 Tex. Civ. App. 263, 21 S. W. 723, citing text; Lynchburg Nat. Bank v. Scott, 91 Va. 654, 22 S. E. 487; Gray v. Boyle, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042 (as to a note given in part payment of the premium on a policy of insurance on which a rebate was allowed in violation of an anti-rebate law). See also, *ante*, § 197.

17. *Ibid.;* New v. Walker, 108 Ind. 365, citing the text. And it follows that if the usurious character of the contract appears on its face, the indorsee acquires no rights to recover on the instrument or to recover of the maker on the original consideration for which the note was given. Bank v. Mann, 94 Tenn. 17, 27 S. W. 1015; Wing v. Ford, 89 Me. 140, 35 Atl. 1023.

18. Paton v. Coit, 5 Mich. 505; Johnson v. Meeker, 1 Wis. 436; Doe v. Burnham, 11 Fost. 426; Story on Bills, § 193; Bottomley v. Goldsmith, 36 Mich. 29.

19. Ross v. Bedell, 5 Duer, 462; Wilson v. Lazier, 11 Gratt. 478.

20. In Kendall v. Robertson, 12 Cush. 156, Shaw, C. J., said: "The former law extended the entire forfeiture to any holder of the note, though an innocent indorsee; the natural conclusion is, in the absence of express words changing the operation of the law, that it was the intention of the legislature to extend such partial forfeiture in like manner, and attach it as before to the note, although held by an innocent indorsee without notice. In both cases the intention of the legislature appears to have been the same, to suppress a mode of lending regarded as dangerous and injurious to society, by attainting the contract, and attaching the penal consequences to the contract itself, whenever set up as a proof of a debt." As to rule in Nebraska, see Wortendyke v. Mechan, 9 Nebr. 221, 2 N. W. 339; Savings Bank v. Scott, 10 Nebr. 83, 4 N. W. 314.

21. Woods v. Armstrong, 54 Ala. 150. Compare Kreibohm v. Yancay, 154 Mo. 69, 55 S. W. 260; Ward v. Sugg, 113 N. C. 492, 18 S. E. 17, citing text.

§ 199. Where a statute declared that all payments made for spirituous liquors sold contrary to law "should be held and considered to have been received in violation of law, without consideration, and against law, equity, and good conscience," it was held that a bill given for liquors so sold was valid in the hands of a *bona fide* holder without notice.[22] A bill accepted to secure payment of money taken in at an unlicensed theater is void in the hands of all knowing the consideration for which it was given.[23]

If the paper be susceptible of a legal and an illegal construction, the courts will enforce it according to the most favorable construction, *ut res magis valeat quam pereat.* Thus, where a due-bill was made payable in Confederate bonds, or Tennessee money, the first-named medium was deemed illegal, but payment in Tennessee money was enforced.[24]

Under Negotiable Instruments statute.—Under the provision declaring that the title of a person who negotiates an instrument is defective when he obtained the instrument for an illegal consideration,[25] and the further provision declaring that a holder in due course holds the instrument free from any defect of title of prior parties,[26] it has been held that the rule that a note executed on a consideration declared absolutely void by statute can be successfully defended though it is owned and held by an innocent purchaser for value without notice of the infirmity or illegal consideration of the note, has not been changed,[27] though the contrary has also been held.[28] In a Dis-

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22. Cazet v. Field, 9 Gray, 329. But such bill is void as between the original parties. Weil v. Golden (Mass.), 2 New Eng. Rep. 235; Campbell v. Jones, 2 Tex. Civ. App. 263, 21 S. W. 723, citing text; Press Co. v. City Bank, 7 C. C. A. 248, 58 Fed. 321.

23. De Bignis v. Armistead, 10 Bing. 107 (25 Eng. C. L.).

24. Hanauer v. Gray, 25 Ark. 350.

25. Appendix, sec. 55.

26. Appendix, sec. 57.

27. Lawson v. First Nat. Bank of Fulton (Ky.), 102 S. W. 324 (as to a peddler's not indorsed "Peddler's note"); Alexander & Co. v. Hazelrigg, 123 Ky. 677, 97 S. W. 353 (under a statute declaring all gaming contracts void). In the Lawson v. Bank case, the court discusses the effect of the Negotiable Instrument law, does not favor implied repeal, says that the law goes into the minutest detail, applies only to paper that might have been obligatory between the parties, and declares that the prevention of crime is of more importance than the fostering of commerce.

28. Wirt v. Stubblefield, 17 App. D. C. 283; Samson v. Ward, 147 Wis. 48, 132 N. W. 629 (as to a note for a part of the price of a stallion, and not showing such consideration on its face as required by statute); Arnd v. Sjoblom, 131 Wis. 642,

trict of Columbia case, it was held that a promissory note, although made upon a gambling consideration, is good in the District of Columbia in the hands of a *bona fide* purchaser for value without notice under the act of Congress of January 12, 1899, known as the Negotiable Instrument Law, though before the enactment of that statute, under the law in force in the District of Columbia, the defense of gaming consideration for the note might have been set up in an action by such holder. The court said: "It is difficult to conceive, if we bear in mind the object and policy intended to be promoted by, as well as the entire scope and express provisions of the 'Negotiable Instrument Law,' that the framers of that act ever intended to save and preserve unrepealed, as part of the law governing negotiable instruments, the old English statutes of 16 Car. 2, and 9 Anne, against gaming. On the contrary, it was most clearly among the objects and purposes of that act, to get rid of all such impediments and hindrances to the circulation of negotiable instruments as had been created by those old statutes, and to embody the entire law upon the subject, as far as practicable, into one well digested and consistent act. * * * This construction of the latter act is strongly fortified by the general provision of that act which declares that 'In any case not provided for in this act the rules of the law merchant shall govern.' [29] We know that no such prohibition or nullity as that declared in the old statutes against gaming has any recognition in the law merchant." [30]

§ 199a. Statement of consideration in note.—The statement of consideration in a bill or note may be explained or contradicted in any case in which the consideration may be disputed between the parties; and it may be shown either that the consideration was different from that stated, or that there was none at all.[31] In some of the States, notes given in purchase of patent rights are required by statute to have the fact written or printed on the face, under heavy penalties, the frauds arising out of such transactions being very frequent, and

111 N. W. 666, 10 L. R. A. (N. S.) 847 (as to a note given in payment for lightning rods and not containing the words of consideration as required by the statute).

29. Appendix, sec. 196.

30. See also Schlesinger v. Gilhooly, 189 N. Y. 1, 81 N. E. 619 (as to a defense of usury); and Schlesinger v. Kelly, 99 N. Y. S. 1083, 114 App. Div. 546.

31. Abbott v. Hendricks, 1 M. & G. 791; Foster v. Jolly, 1 Cromp., M. & R. 703; Smith v. Brooks, 18 Ga. 440; Litchfield v. Falconer, 2 Ala. 280; Matlock v. Livingstone, 9 Smedes & M. 489; Barker v. Prentiss, 6 Mass. 430.

the legislatures seeking to suppress them, and such notes are open to the same defenses in the hands of a *bona fide* holder as when held by the payee.[32] But under such a statute, if the patent right consideration were not expressed in the note, a *bona fide* holder would be protected according to the general principles of the law merchant.[33] In those States where no statute upon the subject exists, the purchaser is not put upon inquiry by his knowledge of the fact that the note was given for a patent right.[34]

§ 200. Effect of knowledge of illegal use of article sold.—It is stated as a general principle, by some of the text writers, that if goods be sold by a trader with mere knowledge that the purchaser intends an illegal use of them, but without lending any aid to his unlawful purpose, he may sustain an action on the contract; and a number of cases would seem to support such a declaration;[35] especially as applicable to the sale of articles innocent in themselves.[36]

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32. Questions arising out of these statutes are so peculiarly local that we deem their detailed discussion beyond the scope of this treatise. For a number of cases construing such statutes, see Ozan Lumber Company v. Union County Nat. Bank, 207 U. S. 251, 28 S. Ct. 89, 52 L. Ed. 195; Woods & Son v. Carl, 203 U. S. 358, 27 S. Ct. 99, 51 L. Ed. 219; Brown v. Pergain, 125 Fed. 577; Hogg v. Thurman, 90 Ark. 93, 117 S. W. 1070; Columbia County Bank v. Emerson, 86 Ark. 155, 110 S. W. 214; Wyatt v. Wallace, 67 Ark. 574, 55 S. W. 1105; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240; Lee v. Hightower, 3 Ga. App. 226, 59 S. E. 597; First Nat. Bank of Petersburg v. Beach, 34 Ind. App. 80, 72 N. E. 287; State Nat. Bank v. Bennett, 8 Ind. App. 769, 36 N. E. 551; Bolte v. Sparks, 85 Kan. 13, 116 Pac. 224; Tredick v. Walters, 81 Kan. 828, 106 Pac. 1067; Nyhart v. Kubach, 76 Kan. 154, 90 Pac. 796; Pinney v. First Nat. Bank of Concordia, 70 Kan. 879, 78 Pac. 151; Pinney v. First Nat. Bank of Concordia, 68 Kan. 223, 75 Pac. 119; Hays v. Walker (Ky.), 76 S. W. 1099; Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; Haskell v. Jones, 86 Pa. St. 175; State v. Cook, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174; Twentieth Century Co. v. Quilling, 130 Wis. 318, 110 N. W. 174; J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. Notes which were given in payment for stock of a corporation to which patents had been assigned, were not given for a patent right within the contemplation of such a statute. Showell v. Barr, 228 Pa. 42, 76 Atl. 718.

33. Palmer v. Minor, 8 Hun, 342 (1876); Bohons, Assignee, v. Brown, etc., 101 Ky. 354, 41 S. W. 273, 72 Am. St. Rep. 420.

34. Gerrish v. Bragg, 55 Vt. 330.

35. Byles on Bills (Sharswood's ed.) [*132], 247; 1 Parsons on Notes and Bills, 215; Gardner v. Maxey, 9 B. Mon. 90; Clark v. Recker, 14 N. H. 44; McGavock v. Puryear, 6 Coldw. 34; Puryear v. McGavock, 9 Heisk. 461; Coppock v. Bower, 4 M. & W. 361; Jackson v. City Nat. Bank, 125 Ind. 347, 25 N. E. 430.

36. Henderson v. Waggoner, 2 Lea, 133; Benjamin on Sales, § 506; Treacy & Wilson v. Chinn, 79 Mo. App. 648.

But the proposition is certainly of limited application, and the courts are careful not to extend it. If the articles be sold with distinct knowledge that they are to be used for any illegal purpose, it is doubtful if the courts should allow a recovery of the purchase money: for public morality and good government must condemn the furnishing of means to violate the law; and when the use contemplated involves a heinous crime, as when one sells arsenic with knowledge that the purchaser intends to poison his wife with it,[37] or sells noxious drugs, knowing that the brewer who buys them intends to use them in his manufacture,[38] it is clear that the recovery should not be allowed. And it has been held, both in England and in this country, that money lent to a man to enable him to settle his losses on an illegal stock-jobbing transaction cannot be recovered back.[39] No man ought to furnish another with the means of transgressing the law, knowing that he intended that use of them." [40]

Following the principle of the text (but applying it to political circumstances which it is now needless to discuss), the United States Supreme Court has held that a due-bill for goods, sold to be used by the Confederate States in prosecuting the war against the United States, was void as upon an illegal consideration, and that an action could not be maintained by the seller or by any holder of the bill who was cognizant of the purpose for which the goods were purchased.[41] And in Massachusetts it has been held that there can be no recovery upon a note by the plaintiff against a defendant who executed it to him for liquors, the defendant well knowing that they were to be

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37. Lightfoot v. Tenant, 1 Bos. & P. 551.

38. Langton v. Hughes, 1 Maule & S. 593.

39. Canaan v. Bryce, 3 B. & Ald. 179, Abbott, C. J., saying: "If it be unlawful in one man to pay, how can it be lawful for another man to furnish him the means of payment?"

40. De Groot v. Van Duzer, 20 Wend. 390; Tompkins v. Compton, 93 Ga. 520, 21 S. E. 79.

41. Hanauer v. Doane, 12 Wall. 342, Bradley, J.: "With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it without turpitude when he knows, or has every reason to believe, that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. * * * There are cases to the contrary; but they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum*, or of inferior criminality, or cases in which the unlawful act was already committed, and the loan was an independent contract, made not to enable the borrower to commit the act, but to pay obligations which he had already incurred in commiting it."

resold in violation of law, and co-operating to that end.[42] And in Arkansas, where the payee sold guns to be used in the war against the United States, he was not permitted to recover.[43] Like decisions have been rendered where the party selling a horse knew he was to be used in the Confederate States cavalry service; [44] and where the lender of money knew that iron was to be bought with it for military uses against the United States.[45]

Money lent for the purpose of being used in gaming cannot be recovered back by the lender; and a bill or note given for such purpose is, as between the parties, void.[46] But where it was not used for the purpose for which it was lent—it was held that it might be recovered.[47] It is fully settled that the repayment of money lent for the express purpose of accomplishing an illegal object cannot be enforced.[48] But knowledge that the money was to be so used must be distinctly proved and the mere fact that the borrower was a gambler, and that any one might expect him to game with the money, would not suffice, of course, to show it.[49] When illegal transactions have been concluded, and a settlement between the partners in them has been made, a note given by one of the partners to another for profits which arose out of them, is deemed by many and weighty authorities to be valid and enforceable—public policy not being regarded as requiring more than the avoidance of contracts made with a view to its breach.[50] And this doctrine obtains in the United States Supreme Court, as seen by the cases cited. But in a number of cases it is doubted or denied.[51]

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42. Hubbell v. Flint, 13 Gray, 277.

43. Tatum v. Kelly, 25 Ark. 209. See also Oxford Iron Co. v. Spradley, 51 Ala. 171.

44. Booker v. Robbins, 26 Ark. 660. *Contra*, Thetford v. McClintock, 47 Ala. 650; though otherwise if he intended such use. To same effect, see Henderson v. Waggoner, 2 Lea, 133; Murphy v. Weems, 69 Ga. 687.

45. Oxford Iron Co. v. Spradley, 46 Ala. 98; Logan v. Plummer, 70 N. C. 388.

46. M'Kinnel v. Robinson, 3 M. & W. 434; Cutler v. Welsh, 43 N. H. 497; Mordecai v. Dawkins, 9 Rich. 262.

47. Corbin v. Wachorst, 73 Cal. 411.

48. M'Kinnel v. Robinson, 3 M. & W. 434; Lee v. Boyd, 86 Ala. 288, citing the text.

49. 1 Parsons on Notes and Bills, 214.

50. De Leon v. Trevino, 49 Tex. 88. See in accord, Brooks v. Martin, 2 Wall. 70; Planters' Bank v. Union Bank, 16 Wall. 483; Sharp v. Taylor, 2 Phillips' Ch. 801; Finkney v. Reynous, 4 Burr. 2069; Petrie v. Hannay, 3 T. R. 418; Boggess v. Lilly, 18 Tex. 200; Armstrong v. Toler, 11 Wheat. 258; McBlair v. Gibbes, 17 How. 236; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 55 Fed. 223.

51. See Aubert v. Maze, 2 Bos. & P. 373; Mitchell v. Cockburne, 2 H. Bl. 379;

SECTION VI

PARTIAL WANT, FAILURE, AND ILLEGALITY OF CONSIDERATION

§ 201. **(1) As to partial want of consideration.**—Whenever the defendant is entitled to go into the question of consideration, he may set up the partial as well as the total want of consideration.[52] Thus, where the drawer of a bill for £19 5s., payable to his own order, sued the acceptor, and it appeared that the bill was accepted for value as to £10, and as an accommodation to the plaintiff as to the residue, it was held, that although with respect to third persons the amount

Canaan v. Bryce, 3 B. & Ald. 183; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Woodworth v. Burnett, 34 N. Y. 273, and notes of editor, 30 Am. Rep. 106, 112. The execution of a note in settlement of an illegal contract does not purge the new promise from the illegal consideration. Mackin v. Shannon, 165 Fed. Rep. 98, holding that where an agreement of the partnership was illegal on account of the consideration moving between the parties, or the character of the business to be transacted, the court would not, after the business had been transacted, aid either of the parties to recover from another who showed that a note had been executed in settlement thereof, no other valid or adequate consideration intervening, and a settlement and execution of a note would not take the case out of the rule.

52. Thompson on Bills (Wilson's ed.), 64; Byles on Bills (Sharswood's ed.), 239; McGregor v. Bishop, 14 Ont. 10, citing the text. But alleging total failure which cannot show partial failure. Stocks v. Scott, 188 Ill. 267, 58 N. E. 990. A defense of want of consideration is personal to the maker of the note and cannot be set up by an accommodation indorser. Fleitmann v. Ashley, 69 N. Y. S. 1099, 60 App. Div. 201, affirmed 172 N. Y. 628, 65 N. E. 1116. To support a defense of want of consideration for notes, it is competent to prove the alleged purpose for which they were given and that the purpose has been carried out. Independent Brewing Ass'n v. Klett, 114 Ill. App. 1. See also *ante,* § 81*b*. When a note is given for a certain sum, a part of which is for a good consideration and the balance is without consideration, and afterwards the amount that is for a legal consideration is paid and indorsed on the note, the note then being without consideration as to the unpaid balance, no recovery can be had upon it. Littlefield v. Perkins, 100 Me. 96, 60 Atl. 707. Where a note was made for the full amount of the purchase price of property when in fact only part of the purchase price remained unpaid, and the agent of the payees stated that when the note reached the office of the payee the amount paid would be credited on it, the note was obtained without consideration. Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548 (1910). Where a guarantor gave a note to a bank upon representations that the amount of the note embraced the unpaid parts of loans covered by the guaranty whereas the amount included loans not covered by the guaranty, the note was without consideration as to the excess. National Bank of Commerce v. Rockefeller, 174 Fed. 22.

of the bill might be £19 5*s*., yet as between these parties it was an acceptance to the amount of £10 only.[53] So where a note was given by A. to B., for the sum of £32 6*s*. 10*d*, upon B.'s representation and assurance that that amount was due, whereas A. owed B. £10 14*s*. 11*d*, and no more, the note was held good only for the amount that was actually due.[54] So, where a father gives his son a note partly for services, and partly as a gratuity, the partial want of consideration might be pleaded as to such portion of the amount as was gratuitous; and it would be no objection that no distinct amount was fixed upon as compensation for the services, but it would be for the jury to settle what amount was founded on the one consideration, and what on the other.[55] If a note be given by mistake on settlement of accounts for an amount greater than that actually due, there is want of consideration as to the excess, and between the parties it may be pleaded.[56]

§ 202. Where an article sold is received upon delivery, but does not answer the description given of its quality or value, the party who has given his bill or note in payment, cannot make the breach of warranty a defense in England and in many of the States—it being necessary that he should resort to his cross-action for damages for breach of contract,[57] unless indeed the article be of no value, in which case the consideration would be regarded as having entirely failed,[58] others holding that it may be set up as a defense.[59] There

53. Darnell v. Williams, 2 Stark. 166 (3 Eng. C. L.); Barber v. Backhouse, Peake, 61; Clarke v. Lazarus, 2 M. & G. 167.

54. Forman v. Wright, 11 C. B. 481. The words of the plea "fraudulently and deceitfully," were rejected as surplusage.

55. Parish v. Stone, 14 Pick. 198. See Guild v. Belcher, 119 Mass. 257; Lanning, Antrim & Co. v. Burns, 36 Nebr. 236, 54 N. W. 427, quoting text.

56. Seeley v. Engell, 13 N. Y. 542; Claxon v. Demaree, 14 Bush, 173. In Buck v. Steffey, 65 Ind. 58, it is held that mistake must be mutual. See *ante*, §§ 81, 177. But a defense of mistake or fraud will not avail against the holder for value. See Lanier v. Union Mortgage Co., 64 Ark. 39, 40 S. W. 466.

57. Washburn v. Picot, 3 Dev. 390; Warwick v. Nairn, 10 Exch. 726; Elminger v. Drew, 4 McLean, 388. But see Peden v. Moore, 1 Stew. & P. 71; Spalding v. Vandercook, 2 Wend. 431; Harrington v. Stratton, 22 Pick. 510; McNeel v. Smith, 106 Ga. 214, 32 S. E. 119; Choate v. Kimball, 56 Ark. 55, 19 S. W. 108; Rublee v. Davis, 33 Nebr. 779, 51 N. W. 135, 29 Am. St. Rep. 509.

58. Shepherd v. Temple, 3 N. H. 455; Danforth v. Crookshanks, 68 Mo. App. 311. The payment of interest coupons does not estop the maker of the note, given for the purchase of machinery, from offering as a defense such breach of warranty of sale as enables him to deny the consideration of the note in suit. Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414.

59. Cornish v. Friedman, 94 Ark. 282, 126 S. W. 1079 (1910). Tygart v.

should be an offer in such a case to return the property and rescind the contract, according to some cases,[60] but according to others this is unnecessary.[61]

If the article be of any value at all, although entirely speculative, the contract will be enforced.[62]

§ 203. (2) As to total and partial failure of consideration.—The total failure of consideration is as good a defense to a suit upon a bill or note as the original want of it, and is confined to the like par-

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Sutton, 8 Ga. App. 20, 68 S. E. 488. Pratt v. Johnson, 100 Me. 443, 62 Atl. 242. Warder, Bushnell & Glessner Co. v. Myers, 70 Nebr. 15, 96 N. W. 992. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119, 110 Am. St. Rep. 938. Cormish v. Friedman, 94 Ark. 282, 126 S. W. 1079; Tygart v. Sutton, 8 Ga. App. 20, 68 S. E. 488; Pratt v. Johnson, 100 Me. 443, 62 Atl. 242; Warder, Bushnell & Glessner Co. v. Myers, 70 Nebr. 15, 96 N. W. 992; Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119, 110 Am. St. Rep. 938. "As an incident to a sale of a chattel the law implies a warranty, which the parties may waive or change by express agreement. The warranty, whether express or implied, necessarily enters into the consideration of the article sold. A plea of breach of warranty is the substantial equivalent of a plea of failure of consideration; and the defense is allowed upon the principle that the consideration of a note between the parties is always open to inquiry so far as the promise to pay depends upon its existence, continuance, or amount, and that, as a warranty is incident to every sale of a chattel, parol evidence is admissible, not for the purpose of showing that a different promise from the written one was made, but that it is different in legal effect as a consequence of the want, cessation, or shrinkage of the consideration." Pryor v. Ludden & Bates Southern Music House, 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267. Where a note is given for goods sold under such circumstances as to give the buyer the right to rescind the contract, if the buyer rescinds the note is avoided as between him and the seller; but if the buyer does not rescind, but allows the contract to stand, the seller can recover upon the note, subject to the right of the buyer to reduce the amount as though the action were brought on the contract of sale. Daniel v. Learned, 188 Mass. 294, 74 N. E. 322.

60. Thornton v. Wynn, 12 Wheat. 183; Rogers v. Mercantile Adjuster Pub. Co., 118 Mo. App. 1, 93 S. W. 328; Fenwick v. Bowling, 50 Mo. App. 516; Iowa Nat. Bank v. Sherman, 23 S. D. 8, 119 N. W. 1010; Moore v. Vogel, 22 Tex. Civ. App. 235, 54 S. W. 1061.

61. Shepherd v. Temple, 3 N. H. 455.

62. Johnson v. Titus, 2 Hill, 606; Harness v. Horne, 20 Ind. App. 134, 50 N. E. 395. *Contra*, Danforth v. Crookshanks, 68 Mo. App. 311. Under a statute, section 645, Rev. St. 1899, providing that in suits upon written contracts the defendant may prove want or failure of consideration either in whole or in part, when a note was given for the purchase of property and the defendant has pleaded breach of warranty, he can avail himself of the plea of want of consideration notwithstanding he has admitted that the property has some value. Broderick v. Andrews, 135 Mo. App. 57, 115 S. W. 519.

ties.[63] If the contract is rescinded, the consideration of the bill or note totally fails, and payment of it cannot be enforced.[64] Thus, if the vendee give his bill or note for goods of a certain manufacture, growth, or description, and the payee fails to deliver goods of the character contracted for, the former may rescind the contract, and refuse to pay his bill or note, there being a total failure of consideration.[65] So, where a purchaser of a patent gave his note for it, and the patent proved void, it was held that the consideration had totally

63. Pyle v. Gallaher, 6 Penn. (Del.) 407, 75 Atl. 373; Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567; Wells v. Potter, 120 Ga. 889, 48 S. E. 354; First State Bank v. Morton, 146 Ky. 287, 142 S. W. 694; German-American Security Co. v. McCulloch (Ky.), 89 S. W. 5; McNeill v. Bay Springs Bank (Miss.), 56 So. 333; Holmes v. Farris, 97 Mo. App. 305, 71 S. W. 116; McCormick Harv. Mach. Co. v. Williams, 83 Mo. App. 275; South Dakota Cent. R. Co. v. Smith, 22 S. D. 210, 116 N. W. 1120. Where notes were given as accessory contracts to a contract for subscriptions to stock in a certain company, and the company was never formed and no shares of stock were ever issued, there was no consideration as between the makers and the payee. Howe v. Raymond, 74 Conn. 68, 49 Atl. 854. The motive or inducement which prompted an acceptance of a bill of exchange, and the failure of the inducement, cannot be considered on the question of consideration as affecting the payee. Levy & Cohn Mule Co. v. Kauffman, 114 Fed. 170.

64. Thompson on Bills (Wilson's ed.), 66; Kreiss v. Faron, 118 Cal. 143, 50 Pac. 388; Risley v. Gray, 98 Cal. 40, 32 Pac. 884; Langan v. Langan, 89 Cal. 186, 26 Pac. 764. Tice v. Moore, 82 Conn. 244, 73 Atl. 133. Home Ins. Co. v. Daubenspeck, 115 Ind. 306; Fleetwood v. Brown (Ind.), 6 West. 256; Cooper v. King, 73 Iowa, 136; Sunderland v. Bell, 39 Kan. 21; Fort Payne Coal & Iron Co. v. Webster, 163 Mass. 134, 39 N. E. 786; Curtis v. Clark, 133 Mass. 509; Maltz v. Fletcher, 52 Mich. 484; Hacker v. Brown, 81 Mo. 68; Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 91; Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540. Where a note had been given payable to one with whom a contract for a year's services had been made, for the full amount of the year's contract, the contract having been rescinded, in an action on the note the full amount of the note may be recovered and not only such portion thereof as would remain after deducting an amount earned by the payee in other employment. Russell Electric Co. v. Bassett, 79 Conn. 709, 66 Atl. 531. A note given in consideration of the payee's agreement to furnish water for irrigation on the maker's land is supported by a valuable consideration, and no failure of consideration can occur until after the date fixed in the agreement to furnish the water. Moyses v. Bell, 62 Wash. 534, 114 Pac. 193. Where a check was given on a purchase price of real estate, the vendor agreeing in writing to convey the real estate and to sign a contract the next day, a refusal of the vendor to make the second contract the same in terms as the first did not defeat the consideration for the check, as the first contract was good against the vendor. Caren v. Liebovitz, 99 N. Y. S. 952, 113 App. Div. 674.

65. Wells v. Hopkins, 6 M. & W. 7; The Stockton Sav. & Loan Society v. Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181; Sayre v. Mohney, 30 Oreg. 238, 47 Pac. 197, citing text; Sydnor v. Boyd, 119 N. C. 481, 26 S. E. 92; Brevoort v. Hughes, 10 Colo. App. 379, 50 Pac. 1050. The fact that goods were

failed.[66] But proof that another patent had been issued for the same invention to another person would not show that the first was void.[67] Where the patented machine is worthless and unsuited to the purpose for which it was made, the consideration of a note given for the right to sell it totally fails. The adaptation of a machine to the uses for which it was made is always warranted.[68] So generally, if the thing purchased was utterly worthless when purchased, there is a total failure of consideration,[69] but not if it was of value when purchased but has depreciated in value by subsequent events.[70] So, also, if there

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not such as to meet the demands of the defendant's trade, as represented by the plaintiff's agent it would do, would not amount to a failure of consideration of a note given for the purchase of the goods. Shiretzki v. Julius Kessler & Co., 147 Ala. 678, 37 So. 422. The giving of a promissory note for the purchase money of an article will not preclude the maker from setting up the defense that the consideration thereof has failed for the reason that the article sold was defective, unless it be shown that at the time the note was given the maker had full and complete knowledge of the fact that the article was defective, or had inspected, and examined the article, and the defects therein were of such a character as to be patent to the person making the inspection or examination. Means v. Subers, 115 Ga. 371, 41 S. E. 633.

66. Hathorn v. Wheelwright, 99 Me. 351, 59 Atl. 517; Dickinson v. Hall, 14 Pick. 217; Hodge v. Mason, 21 D. C. 181; Lofland v. Goben, 16 Ind. App. 67, 44 N. E. 553, 651; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804. See McCroskey v. Ladd, 96 Cal. 455, 31 Pac. 558.

67. Crow v. Eichinger, 34 Ind. 65 (1870).

68. Smith v. Hightower, 76 Ga. 630; Herman v. Gray, 79 Wis. 183, 48 N. W. 113. As to resulting damages arising from defective machinery, which was the consideration of the note. Heebner v. Shephard, 5 N. Dak. 56, 63 N. W. 892; Humbert v. Larson, 99 Iowa, 275, 68 N. W. 1103; McCormick Machine Co. v. Gustafson, 54 Nebr. 276, 74 N. W. 576; Comings v. Leedy, 114 Mo. 454, 21 S. W. 804, citing text.

69. Taft v. Myerscough, 197 Ill. 600, 64 N. E. 711; Dille v. White, 132 Ia. 327, 109 N. W. 909, 10 L. R. A. (N. S.) 510; Arnold v. Wilts, 86 Ind. 368; Brown v. Weldon, 27 Mo. App. 251. Following the principle announced in the text, it has been held that where a purchaser of property gives his note therefor and afterward rescinds the contract of sale on the ground of breach of warranty, he may recover the amount of the note and interest, without first paying same, when the note was negotiated before maturity to an innocent purchaser for value. Fahey v. Esterley Machine Co., 3 N. Dak. 220, 55 N. W. 580, 44 Am. St. Rep. 554, note; Canham v. Piano Mfg. Co., 3 N. Dak. 229, 55 N. W. 583.

70. Leonard v. Draper, 187 Mass. 536, 73 N. E. 644, holding that a note given by a corporation for capital stock of the corporation was given for a valuable consideration though it subsequently proved to be worthless. See also Furber v. Fogler, 97 Me. 585, 55 Atl. 514. Where a note and chattel mortgage was transferred for notes, consideration for the notes has not failed by the bankruptcy of the maker of the note and mortgage when the note had indorsers against whom it

is defect or failure of title to property for the purchase price of which a note was given,[71] or if the property has been taken under execution,[72] or on a breach of covenant against incumbrances,[73] and may

would be enforcible. Central Sav. Bank v. O'Connor, 132 Mich. 578, 94 N. W. 11, 102 Am. St. Rep. 433.

71. Watkins v. American Nat. Bank, 134 Fed. 36; Williams v. Neeley, 134 Fed. 1, 69 L. R. A. 232; Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456; Meeks v. Meeks, 5 Ga. App. 394, 63 S. E. 270; Martin v. Turner (Ky.), 115 S. W. 833; Siglin v. Frost, 173 Mass. 284, 53 N. E. 143, 820; Morris v. Brown, 38 Tex. Civ. App. 266, 75 S. W. 1015; Acme Food Co. v. Older, 64 W. Va. 255, 61 S. E. 235, 17 L. R. A. (N. S.) 807. In Maine the rule had prevailed that a partial failure of title constituted no defense to a suit on a note given for real estate, but this rule was abrogated by statute in 1897 (Rev. St., ch. 84, § 40). Hathorn v. Wheelwright, 99 Me. 351, 59 Atl. 517. The measure of damages to be set off against purchase-money notes is the fair vendible value of the quantity of land lost, when considered with reference to the whole tract. Burkholder v. Farmers' Bank (Ky.), 67 S. W. 832. Where a note was executed in pursuance of a contract for the purchase of certain property and indorsed for accommodation, the right of the seller to maintain his action against the principal on the note was not affected by the seller's making a bill of sale to the property for which the note was given, after its maturity, to the indorser at the latter's solicitation, as at that time the seller had no title in the property to convey. Ketterson v. Inscho, 55 Tex. Civ. App. 150, 118 S. W. 626. Failure of title to real estate purchased by the defendant will not be a sufficient defense to an action on notes given for the purchase money, when he retains the deed, remains in possession, and has been subjected to no inconvenience or expense on account of the alleged defective title. Grubbs v. Barber, 102 Ind. 132; See also Manzy v. Flint, 42 Ind. App. 386, 83 N. E. 757. When a note was given for a tract of land agreed on but the maker of the note refused to accept the deed, claiming that it did not correctly describe the land, and the grantor changed the boundaries as requested so that a tract was described which the grantor did not own, whereas in fact the deed as originally tendered did not correctly describe the tract and was a good conveyance of the tract agreed on, the note was given for a good consideration. Fox v. Smith, 73 Conn. 144, 46 Atl. 879. A note given in consideration of a quitclaim deed to land in which the grantor claimed no interest (the deed being sought in aid of a loan being negotiated by the grantee), cannot be canceled on the ground that it is subsequently discovered that the grantor had no interest to convey. Mullen v. Hawkins, 141 Ind. 363, 40 N. E. 797. Where a note was given in part for transfer of government concessions, the forfeiture of the concessions will not work a partial failure of consideration for the notes where the forfeiture might have been prevented by performing the terms and conditions of the concessions. McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000.

72. Chenault v. Bush, 84 Ky. 528.

73. Dahl v. Stakke, 12 N. D. 325, 96 N. W. 353. When at the time notes were given for the purchase price of property, and at the time of the execution of the notes there was an unpaid mortgage upon the property, of which fact the maker of the notes had no knowledge, there was a failure of consideration. Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907. In an action on a note given for the

set off legal damages actually sustained in getting possession of the property.[74] Where a note was given for an insurance premium in a company, which had not complied with the laws of a State in procuring authority to transact business therein, it was held void between the parties.[75]

And a partial failure of the consideration is a good defense *pro tanto*.[76] But such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part, can be availed of by way of defense; and if it be an unliquidated claim the defendant must resort to his cross-action.[77]

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purchase of land, the defendant is entitled to a set-off of the amount he was compelled to pay to redeem the land from taxes which were a lien at the time of the conveyance. Swope v. Missouri Trust Co., 26 Tex. Civ. App. 133, 62 S. W. 947.

74. Weatherbee Bros. v. Lillybeck, 86 Miss. 156, 38 So. 284.

75. Barber v. Boehm, 21 Nebr. 450.

76. Story on Bills, § 184; Story on Notes, § 187; 1 Parsons on Notes and Bills, 207; Thompson on Bills (Wilson's ed.), 64; Drew v. Towle, 7 Fost. 412; Star Pad Co. v. Greenwood, 5 Ont. 28; Agnew v. Alden, 84 Ala. 502; Lanier v. Union Mortgage Co., 64 Ark. 39, 40 S. W. 466; Whitt v. Blount, 124 Ga. 671, 53 S. E. 205; Byrd v. Campbell Printing Press Mfg. Co., 94 Ga. 41, 20 S. E. 253; Robertson v. Merriam, 106 Ill. App. 610; Schaffner v. Kober, 2 Ind. App. 409, 28 N. E. 871; City Deposit Bank v. Green, 138 Ia. 156, 115 N. W. 893 (as to an agreement that a note should be signed by a certain number of responsible signers and a fraudulent substitution of an insolvent person as a signer); Dodge v. Oatis, 27 Kan. 762; Sullivan v. Sullivan, 122 Ky. 707, 92 S. W. 966, 7 L. R. A. (N. S.), 156; Brown v. Roberts, 90 Minn. 314, 96 N. W. 793; Torinus v. Buckham, 29 Minn. 128; Currey v. Harden, 109 Mo. App. 578, 83 S. W. 770; Catterlin v. Lusk, 98 Mo. App. 182, 71 S. W. 1109; Bouton v. Hill, 4 App. Div. 252, 38 N. Y. Supp. 498; Blanks v. Ripley, 8 Tex. Civ. App. 156, 27 S. W. 732. Under a statute (V. S., § 1152) providing that in actions between the original parties to a note, the defendant may show partial failure of consideration, it has been held that evidence offered tending to show a partial failure of consideration was properly excluded when the action was not between the original parties to the note, but the plaintiff was an indorsee after maturity, without value, and solely for the purpose of collection—two justices dissenting. Russell v. Rood, 72 Vt. 238, 47 Atl. 789. A partial failure of consideration may be shown against the original payee of a promissory note without alleging fraud. Rouse, Hempstone & Co. v. Sarratt, 74 S. C. 575, 54 S. E. 757. Where there are two or more independent considerations for a promissory note, and there is a failure of consideration as to one, the law will allow the defendant, in an action between the original parties, or between others standing in no better position, to show such partial failure of consideration in reduction of damages. Tuttle v. George H. Tuttle & Co., 101 Me. 287, 64 Atl. 496.

77. Pulsifer v. Hotchkiss, 12 Conn. 234; Elminger v. Drew, 4 McLean, 388; Drew v. Towle, 7 Fost. 412; Stone v. Peake, 16 Vt. 213; Ferguson v. Oliver. 8 Smedes & M. 332; Kernodle v. Hunt, 4 Blackf. 57; Bisbee v. Torinus, 26 Minn. 165. Where the defendant is sued upon promissory notes, and he relies for his

Thus, where bills have been accepted in consideration of the payee giving the acceptor the lease of a house, and he let him into possession, but gave no lease, it was held no defense to an action on the bill, but that there was merely a counterclaim for damages.[78] So where the bill was given for work to be done, and the work when done was bungled in part, and not worth the amount of the bill.[79] It may be observed, however, that in most of the States the common-law rule restricting the defense of set-off to liquidated claims, is so far modified as to admit equitable defenses in the nature of set-off, as fraud or mistake in the procurement of a contract, or any other matter entitling the party to relief in equity against the obligation of the contract.[80]

But failure of consideration cannot be set up as a defense when it is based on matters relating to contemplated and future events and not to past transactions or then existing conditions,[81] nor where it rests upon the failure of an obligation of a third person.[82] It was said

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defense upon failure of the consideration, and the evidence shows that the failure of consideration has not been total, he must, in order to authorize any diminution of the plaintiff's recovery introduce evidence showing the extent of the failure; merely to prove that there has been a partial failure of consideration, without giving the jury any facts from which they could calculate the extent of the failure is not sufficient. Krauss v. Flournoy, 7 Ga. App. 322, 66 S. E. 805. Where notes were given under a contract by which they were not to be paid in any other way than out of the profits of a venture, to the extent that the profits were insufficient there has been a failure of consideration. Hatzel v. Moore, 125 Fed. 828. Where a note was given in consideration of the good will in a business, accompanied by an agreement on the part of the vendor of the good will not to resume business in the same locality, a breach of the agreement does not defeat an action on the note, but the maker of the note may set up such breach and set off against the note such damages as results from the breach. Bradford & Carson v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979.

78. Moggridge v. Jones, 14 East 485, 3 Campb. 38.

79. Trickey v. Larne, 6 M. & W. 278; Hays v. Plumer, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153.

80. Applegarth v. Robinson, 65 Md. 493; Wuest v. Moehrig, 24 Tex. Civ. App. 124, 57 S. W. 124; Burns v. Weesner, 134 Ind. 442, 34 N. E. 10.

81. State Bank of Indiana v. Gates, 114 Ia. 323, 86 N. W. 311. Where a note was given towards the endowment of a chair in a University located in the town in which the maker resided, the consideration has not failed by the consolidation of the University with a college and the removal of the institution to another town. Central Univ. of Ky. v. Walters' Ex'rs., 122 Ky. 65, 90 S. W. 1066. See also Miller v. Central University (Ky.), 112 S. W. 669.

82. Page v. Geiser Mfg. Co., 17 Okl. 110, 87 Pac. 851; Terwilliger v. George O. Richardson Mach. Co., 15 Okl. 664, 83 Pac. 715.

in Story on Bills,[83] as it is said in a number of English cases,[84] that a partial failure of consideration is no defense; but it is conceived that the distinction already taken is the correct one, and the cases in which the contrary dictum occurs are those in which the sum was unascertainable by mere computation, and was matter of unliquidated damages.[85]

Under Negotiable Instrument statute.—Under the provision of the statute that in the hands of a holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable,[86] it has been held that a breach of warranty may be set up as a defense in an answer when it was based not upon an independent and separate transaction, but grew out of the original transaction for which the note was given; it is not necessary that such breach of warranty should be alleged as a counterclaim.[87]

§ 204. (3) As to partial illegality of consideration.—When the defense is founded on illegality of consideration it is to be distinguished from a defense on the ground of a want or failure in the consideration by this peculiarity—that a partial illegality vitiates the bill or note *in toto*, while the partial want or failure of consideration only vitiates it *pro tanto*.[88] And a mortgage to secure a bill

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83. Story on Bills (Bennett's ed.), § 184.

84. Morgan v. Richardson, 1 Campb. 40; Obbard v. Betham, Moody & M. 483; Tye v. Gwynne, 2 Campb. 346.

85. Chitty on Bills (13th Am. ed.) [*76], 91 Roscoe on Bills, 105; Bayley on Bills, 344; 1 Parsons on Notes and Bills, 207; Day v. Nix, 9 J. B. Moore, 159; Edwards on Bills, 335; Story on Notes, § 187. In an early case Lord Kenyon left it to the jury to consider what damages had been suffered by the defendant in a suit on a note, in the transaction in which it was given; but the case has not been followed as a precedent. Ledger v. Ewer, Peake, 216. In American Nat. Bank v. Watkins, 119 Fed. 545, the court said that the English rule that partial failure of consideration is not a good defense at law, the amount being unliquidated, was formerly followed in the United States, but the rule is now generally otherwise.

86. Appendix, sec. 58.

87. American Seeding Machine Co. v. Slocum, 108 N. Y. S. 1042.

88. Scott v. Gillmore, 3 Taunt. 226; Robinson v. Bland, 2 Burr. 1077; Hay v. Ayling, 3 Eng. L. & Eq. 416; Hanauer v. Doane, 12 Wall. 342; Wadsworth v. Dunnam, 117 Ala. 661, 23 So. 699; Wynne v. Whesenant, 37 Ala. 46; McTighe v. McKee, 70 Ark. 293, 67 S. W. 754; Chandler v. Johnson, 39 Ga. 85; First Nat. Bank of El Paso v. Miller, 235 Ill. 135, 85 N. E. 312; Douthart v. Congdon, 197 Ill. 349, 64 N. E. 348, 90 Am. St. Rep. 167; Keiser v. Jarrett, 119 Ill. App. 472; Burns v. Weesner, 134 Ind. 442, 34 N. E. 10; Ricketts v. Harvey, 106 Ind. 564; O'Connor v. Kleiman, 143 Iowa, 435, 121 N. W. 1088; Bugg v. Holt (Ky.), 97 S. W. 29; Kimbrough v. Lane, 11 Bush, 556; Oakes v. Merrifield, 93 Me. 297, 45

or note of which the consideration is in part illegal, is also wholly void.[89] The reason of the distinction is based mainly upon the ground of public policy, the court not undertaking to unravel a web of fraud for the benefit of the party who has woven it.[90] If, however, the legal portion of the consideration were distinctly severable, the party could still recover by the proper action to its proportionate extent,[91] though not upon the bill or note.[92] There is authority, however, to the effect that there may be recovery on the bill or note to the extent of the distinctly severable and valid consideration.[93] Where the legal

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Atl. 31; Wirth v. Roche, 92 Me. 383, 42 Atl. 794; Deering v. Chapman, 22 Me. 488; Brigham v. Potter, 14 Gray, 522; Carlton v. Bailey, 7 Fost. 230; McNamara v. Gargett, 68 Mich. 454; Wisner v. Bardwell, 38 Mich. 278; Snyder v. Willey, 33 Mich. 483; Cotten v. McKenzie, 57 Miss. 418; Padget v. O'Connor, 71 Nebr. 314; 98 N. W. 870; Griffith v. Short, 14 Nebr. 259; Kidder v. Blake, 45 N. H. 530; Clark v. Ricker, 14 N. H. 44; Hyslop v. Clarke, 14 Johns. 465; Covington v. Threadgill, 88 N. C. 187; Widoe v. Webb, 20 Ohio (N. S.), 637; Norbley v. Porter (Tex. Civ. App.), 54 S. W. 655; Wegner v. Biering, 65 Tex. 511; Woodruff v. Heniman, 11 Vt. 592; Fernekes v. Bergenthal, 69 Wis. 466.

89. State v. Wilson, 73 Kan. 334, 84 Pac. 737, 80 Pac. 639, quoting text; Brigham v. Potter, 14 Gray, 522; Denny v. Dana, 2 Cush. 160. And when such defense is made, the burden is on the defendant to establish it. See Fisher v. Fisher, 8 Ind. App. 665, 36 N. E. 296.

90. Byles on Bills (Sharswood's ed.) [*140], 256.

91. Carlton v. Woods, 8 Fost. 290, where it is held that if entire stock of goods be sold at one and the same time, but each article for a separate and agreed value, the contract of sale is divisible; and if the sale of some article be prohibited by law, the sale of the others will nevertheless be enforced as legal, in an action for goods sold and delivered. Robinson v. Bland, 2 Burr. 1077; Widoe v. Webb, 20 Ohio St. 431, 637; Hoyt v. Macon, 2 Colo. 508; Cotten v. McKenzie, 57 Miss. 423.

92. Robinson v. Bland, 2 Burr. 1077; Hanauer v. Doane, 12 Wall. 342. In Widoe v. Webb, 20 Ohio St. 431, there was action on a note given in settlement of an account of which some of the items were for intoxicating liquors sold in violation of law. Scott, C. J., said: "With respect to the items of the plaintiff's account which were unconnected with the illegal sales, he might well have maintained an action on the original contracts of sale, even after the giving of this note. For being utterly void, it discharged none of the just indebtedness of the defendant. But he chose to sue upon the note, which was *prima facie* evidence of indebtedness to the extent of the whole sum promised to be paid, and thus attempted to throw upon the defendant the burden of showing how much of it was given upon an illegal consideration, and upon the court the task of separating the sound from the unsound. If this effort should result in his losing what was justly due him, we can but repeat what was said in a similar case: 'It is but a reasonable punishment for his including with his just due that which he had no right to take.'" Brigham v. Potter, 14 Gray, 522; Perkins v. Cummings, 2 Gray, 258; Clark v. Ricker, 14 N. H. 44; Carlton v. Bailey, 7 Fost. 234; Carlton v. Woods, 8 Fost. 290.

93. Clopton v. Elkin, 46 Miss. 95. See Guild v. Belcher, 119 Mass. 257, as to

part of the consideration exceeds the amount of the note, though another part of the consideration be illegal, the note will be valid.[94] And it has been held that where a bill is given in renewal of other bills, one of which was upon an illegal consideration, it would be valid as to the amount which the legal bills evidenced, and void as to the rest for want of consideration.[95]

SECTION VII

RENEWAL BILLS AND NOTES; HOW ILLEGALITY MAY BE PURGED

§ **205. As to bills and notes given in renewal.**—An agreement to renew a bill or note is not valid unless upon consideration;[96] the surrender and cancellation of a valid and enforcible obligation, however, is generally considered a sufficient consideration for the execution of a renewal note,[97] and when the first note was without

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recovery against partners where one partner is not privy to the entire consideration. Glass v. Murphy, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545. Where several notes were given for independent deliveries of fertilizer, the want of a tag upon a single sack would defeat a recovery upon the note of which that sack formed in part the consideration, but this would not serve to defeat a recovery upon the other notes. Alabama Nat. Bank v. C. C. Baker & Co., 146 Ala. 513, 40 So. 987.

94. Warren v. Chapman, 105 Mass. 87.

95. Doty v. Knox County Bank, 16 Ohio (N. S.), 133.

96. Howe v. Klein, 89 Me. 376, 36 Atl. 620.

97. Garrigue v. Keller, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324; Dorris v. Cronan, 149 Mo. App. 177, 129 S. W. 1014; Zuendt v. Doerner, 101 Mo. App. 528, 73 S. W. 873; Siemans & Halske Electric Co. v. Ten Broek, 97 Mo. App. 173, 70 S. W. 1092. That the original note is still in possession of the holder is immaterial when the maker can obtain possession by demanding it. First Nat. Bank of Chattanooga v. Reid (Tenn. Ch. App.), 58 S. W. 1124. Where the indorser of a note was unable to pay and sought time thereon, a new note payable on demand signed by himself and wife was good given as collateral; the promise of the bank to forbear suing on the original note was a binding promise, as in delivering to the bank another note signed by his wife as well as by himself, the indorser did something he was not theretofore bound to do. Lowell v. Bickford, 201 Mass. 543, 88 N. E. 1. Where a demand note was executed by several persons, and the holder agreed to accept in payment thereof a note signed by one of them only payable three months after date, there was a sufficient consideration to support the second note as a payment of the original. Brink v. Stratton, 98 N. Y. S. 421, 112 App. Div. 299, affirmed 188 N. Y. 620, 81 N. E. 1160. Where a joint note was surrendered to one of the makers on the execution of a new note by him and the widow of his co-maker of the old note, this is a

consideration, a renewal note is also.[98] If the consideration of the original bill or note be illegal, a renewal of it will be open to the same objection and defense,[99] except that any illegality by reason of de-

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sufficient consideration; though the widow may have been mistaken as to her legal relation to her deceased husband's estate or to his debts, this does not relieve her from liability on the new note, as prejudice suffered by the promisee may be the consideration. Lyon v. Robertson, 127 Cal. XVIII, 59 Pac. 990. A note and mortgage given by the heirs in renewal of a note and mortgage given by their ancestor is based on a good consideration, and the circumstances that the old note was not delivered up and the old mortgage canceled of record may be regarded as immaterial. Humboldt Savings & Loan Soc. v. Dowd, 137 Cal. 408, 70 Pac. 274. In Lockner v. Holland, 81 N. Y. S. 730, the court said that when the original note was given for an adequate consideration, no new or additional consideration is necessary to give validity to a renewal note.

98. Cochran v. Perkins, 146 Ala. 689, 40 So. 351; Earle v. Robinson, 36 N. Y. S. 178, 91 Hun. 363; See also Pelton v. Spider Lake Sawmill, etc., Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963, as to a renewal of an accommodation note. Though a married woman is not, under statute, liable on a note signed as an accommodation maker for her husband, her moral obligation is sufficient to support a renewal note made by her after the death of her husband, and antedated to a time previous to his death, there being nothing to show any illegal or fraudulent purpose. Rathfon v. Locher, 215 Pa. 571, 64 Atl. 790. The defendants below had every opportunity, before the execution of the renewal note sued on, by the exercise of ordinary diligence, to discover whether they had any claim for damages on account of the failure to ship the machinery according to contract. Such a defense was waived by the execution of the renewal note. Hyer v. York Mfg. Co., 58 Fla. 283, 50 Sou. 485. One who executed and delivered a promissory note in renewal of a balance due upon a like note previously given for the purchase of personalty, and who at the time of giving the second note knew that the personalty was, when purchased, defective or worthless, was not, in defense to an action on that note, entitled to set up that the consideration thereof had failed because of the defectiveness or worthlessness of the property. Hogan v. Brown, 112 Ga. 662, 37 S. E. 880. The rule as to a renewal given with the knowledge that the property is defective is subject to exceptions, and is not applicable where a renewal note is given under such circumstances as to indicate that it was given and taken with a contrary understanding. McDaniel v. Mallary Bros. Machinery Co., 6 Ga. App. 848, 66 S. E. 146. Where a note was given by two persons, and one of them was relieved from payment by the holder, a renewal of the note signed by both is without consideration as to the one previously relieved. Farmers' & Mechanics' Bank v. Hawn, 79 N. Y. S. 524, 79 App. Div. 640.

99. Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522; Scudder v. Thomas, 35 Ga. 364; Kain v. Bare, 4 Ind. App. 441, 31 N. E. 205; Sawyer v. Wiswell, 9 Allen 39; Holden v. Cosgrove, 12 Gray, 216; Union Nat. Bank v. Fraser, 63 Miss. 231; Hunt v. Rumsey, 47 N. W. 105; Farmers' Bank v. Oliver, 55 Nebr. 774, 76 N. W. 449; McDonald v. Aufdengarden, 41 Nebr. 41, 59 N. W. 762; Levey v. Allien, 72 Hun, 321, 25 N. Y. Supp. 352; Union Bank v. Gilbert, 83 Hun, 417, 31 N. Y. Supp. 945, citing Swartwout v. Payne, 19 Johns. 294, 10 Am. Dec. 228; Merchants' Nat. Bank v. Tracey, 77 Hun. 443, 29 N. Y. Supp. 77; Schutt v.

fective authority or execution which might have affected a note does not attach to a renewal note validly authorized and executed.[1] And if the original instrument was obtained by fraud, a renewal of it by the original parties without knowledge of the fraud, would stand upon the same footing,[2] but if at the time the renewal was executed the parties signing knew of the fraud in the original or of the failure of consideration, they will be regarded as purging the contract of the fraud or of the defense of failure of consideration, and cannot then plead it.[3] So if the maker of a note held by an indorsee executes to

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Evans, 109 Pa. St. 627; Mason v. Jordan, 13 R. I. 193; Wegner v. Biering, 65 Tex. 511; Seeligson v. Lewis, 65 Tex. 115; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392. In National Bank v. Lewis, 75 N. Y. 524, the renewal note was held to be tainted with usury; and forfeiture of interest following that credit must be given for all interest charged from beginning of the loan. A note given solely in renewal of another, tainted with usury and void, is equally tainted and alike condemned because it operates merely as a renewal or continuance of the usurious contract, but if the usurious contract be mutually abandoned by the parties and the securities canceled or destroyed so that they may not become the foundation of an action, the borrower then makes a contract to pay the amount actually received by him, the last contract will not be tainted by the original usury and may be enforced. Levey v. Allien, 72 Hun, 321, 25 N. Y. Supp. 352.

1. Smith v. New Hartford Waterworks, 73 Conn. 626, 48 Atl. 754.

2. Sawyer v. Wiswell, 9 Allen, 39; Brown v. James, 2 App. Div. 105, 37 N. Y. Supp. 529, citing text; Gilpin v. Netograph Mach. Co., 25 Okl. 408, 108 Pac. 382. Following the doctrine of the text, it has been held that where a security tainted with usury is given, and a new security is substituted, the substituted security is void. See Feldman v. McGraw, 1 App. Div. (N. Y.) 574, 37 N. Y. Supp. 434. A maker of a note is not estopped from setting up the defense of fraud to an action on renewal notes, because of the fact that he paid the discount upon the several renewals, without at the time making any protests as to the misrepresentations which induced the giving of the original note, when the discounting of the various notes given in renewal was not done at the instance of the maker nor when it was not in any way for his benefit. Adams v. Ashman, 203 Pa. 536, 53 Atl. 375.

3. Tenney v. Porter, 61 Ark. 329, 33 S. W. 211; Franklin Phosphate Co. v. International Harvester Co. of America (Fla.), 57 So. 206; Monteford v. American Guano Co., 108 Ga. 12, 33 S. E. 636; Edison Elec. Co. v. Blount, 96 Ga. 272, 23 S. E. 306; Turner v. Pearson, 93 Ga. 515, 21 S. E. 104; Long v. Johnson, 151 Ind. App. 498, 44 N. E. 552; Calvin v. Sterrett, 41 Kan. 215, citing text; Sawyer v. Wiswell, 9 Allen, 39; National Bank of Cleburne v. Carper, 28 Tex. Civ. App. 334, 67 S. W. 188, citing text. And where one giving such renewal note either had knowledge of such facts and circumstances, or by the exercise of ordinary diligence could have discovered them and ascertained his rights, it became his duty to make such inquiry and investigation before executing the renewal note, and if he fails so to do he is as much bound as if he had actual knowledge thereof. Padgett v. Lewis, 54 Fla. 177, 45 So. 29. A renewal or an extension of time of payment constitutes a sufficient consideration for a waiver on the part of the vendee of any breach of

him a new note, it is a waiver of a defense to the old note of failure of consideration,[4] of fraudulent representations in obtaining the old note,[5] or of the defectiveness or worthlessness of property for which the old note was given.[6]

When a note secured by mortgage or deed of trust, or other security, is renewed, the mortgage or other security is valid as a security for the renewal note.[7] A change in the mode of time of payment of the note does not affect the validity of the mortgage,[8] and if the renewal note be a forgery, or be obtained by fraud,[9] it does not discharge the original, although the original was surrendered up, nor is the indorser of the original discharged, his liability having been fixed by notice.[10] "When a dealer at bank pays off a note by renewal, the debt is the same; the debt remains unpaid; the credit is extended." [11]

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warranty or of any failure of consideration of the article purchased and for which he gave his promissory note in the first instance. Sheffield v. International Harvesting Mach. Co., 3 Ga. App. 374, 59 S. E. 1113, the court saying: "While we are inclined to the opinion that the mere extension of time of payment does not itself estop the maker of the note from setting up as a defense a total failure of consideration, yet, where the evidence discloses the fact of his knowledge of such failure of consideration at the time that he gave the renewal note, and in the renewal note he expressly waives any failure of consideration we think he would unquestionably be bound."

4. Gill v. Morris, 11 Heisk, 614. So where the new note was executed to the payee. Keyes v. Mann, 63 Iowa, 560, 19 N. W. 666. Though a person was notified by a maker that a note was without consideration, this is not sufficient to impeach the consideration of a renewal note subsequently executed by him for a balance due, in the hands of such person as an innocent purchaser for value. Beattyville Bank v. Roberts, 117 Ky. 689, 78 S. W. 901.

5. Odbert v. Marquet, 163 Fed. 892.

6. Atlantic City St. R. Co. v. American Car Co., 103 Ga. 254, 29 S. E. 925; American Car Co. v. Railway Co., 100 Ga. 254, 28 S. E. 40; Blount v. Edison Gen. Elec. Co., 106 Ga. 197, 32 S. E. 113.

7. Aillet v. Woods, 24 La. Ann. 193; McNamara v. Coudon, 2 McArthur, 364; Collins v. Dawley, 4 Colo. 138; Wiener v. Peacock, 31 Mo. App. 244; Barrington v. Skinner, 117 N. C. 47, 23 S. E. 9; Moore v. Thompson, 100 Ky. 231, 37 S. W. 1042; Willis v. Sanger Bros., 15 Tex. Civ. App. 655, 40 S. W. 229. See *post*, § 748.

8. California Nat. Bank v. Ginty, 108 Cal. 149, 41 Pac. 38; Buck v. Wood, 85 Me. 209, 27 Atl. 103. See *post*, § 835.

9. Stratton v. McMakin, 82 Ky. 226; First Nat. Bank v. Gaines, 87 Ky. 597, 9 S. W. 396; Alpena Nat. Bank v. Greenebaum, 44 N. W. 1123; Tucker v. Coffin, 7 Tex. Civ. App. 415, 26 S. W. 323. Payment by a forged note is no payment. Bass v. Inhabitants of Wellesley, 192 Mass. 526, 78 N. E. 543. Central Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334.

10. Ritter v. Singmaster, 73 Pa. St. 400.

11. Farmers' Bank v. Mutual Ass. Society, 4 Leigh, 88; Moses v. Trice, 21

And as a general rule the surrender of the pre-existing note does not discharge it.[12]

§ 206. Partial illegality of instrument.—If a note or bill be given for a consideration which is in part illegal, a new note for the same, or in renewal of the first, is equally void.[13] But a new note for that part of the consideration which is legal, is good and valid. And if several new notes are given for the old one, some of the new ones may be taken to be for the legal part, and so be valid, especially if they are only adequate to this part, or if the deduction be otherwise favored by circumstances.[14]

§ 207. In what way illegal consideration may be purged.—When there is such illegality in the consideration of a bill or note which vitiates it in all hands, there are several ways in which it may be purged and a new security become valid. Thus, Firstly: If there was usury in the consideration, and it is either paid up or is remitted, there is no doubt that if a new bill or note were given, and the usury in the original instrument excluded, such new bill or note would be valid.[15] Secondly: If the usurious or otherwise invalid security had been acquired by a *bona fide* holder for value, and without notice, a new bill or note executed by the drawer, maker, acceptor, or other party bound upon the first to such *bona fide* holder, would be valid.[16]

Gratt. 556; Tardy v. Boyd, 26 Gratt. 638; Wheelock v. Berkeley, 138 Ill. 153, 27 N. E. 942.

12. See vol. II, § 1266.

13. 1 Parsons on Notes and Bills, 217; Chapman v. Black, 2 B. & Ald. 588; Wynne v. Callander, 1 Russ. 293; Preston v. Jackson, 2 Stark, 237; Seeligson v. Lewis, 65 Tex. 115; Sydner v. Mt. Sterling Nat. Bank, 94 Ky. 231; McDonald v. Beer, 42 Nebr. 437, 60 N. W. 868.

14. Hubner v. Richardson, Bayley on Bills, 362; Crookshank v. Rose, 5 C. & P. 19. And it has been held that where the consideration for which promissory notes were given has failed, there can be no recovery against the maker upon renewal notes, which merely included, as a new consideration therefor, the interest due upon old notes and extend the time of payment. See Earle v. Robinson, 91 Hun, 363, 36 N. Y. Supp. 178.

15. De Wolf v. Johnson, 10 Wheat. 367; Hammond v. Hopping, 13 Wend. 505; Barnes v. Hedley, 2 Taunt. 184, 1 Campb. 157; 2 Parsons on Notes and Bills, 420; Bayley on Bills, 361; McConkey v. Petterson, 15 App. Div. 77, 44 N. Y. Supp. 286; Garvin v. Linton, 62 Ark. 370, 35 S. W. 430; Johnson v. Lasker, etc., Assn., 2 Tex. Civ. App. 494, 21 S. W. 961.

16. Torbett v. Worthy, 1 Heisk, 107; Calvert v. Williams, 64 N. C. 168; Drake v. Chandler, 18 Gratt. 912; Cuthbert v. Haley, 8 T. R. 390; Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522.

Thirdly: If the usurious or otherwise invalid security is lifted, and a third party, a stranger in whole or part to the original security, intervenes, and for motives peculiar to himself, and unaffected by the illegal consideration, supplants it by a new security made by himself to the original payee, it would be valid,[17] and it matters not that the principal in the original becomes a surety upon the new security.[18] If the new party be released, and the old contract is revived, the novation is rescinded, and usury may be pleaded.[19] Fourthly: If A. makes a usurious or otherwise illegal agreement with B., and gives a bill or note to him for the amount, and then makes a new bill or note to C., to whom B. is indebted, the new note is valid.[20]

Fifthly: It has also been held that if A. makes a usurious or otherwise illegal note to B., and afterward supplant it by the joint note of himself and C. to B., the joint note is valid;[21] and Comyn says, "Where third persons are mixed up with the new transaction, the courts regard it with a favorable eye."[22] Sixthly: It has also been held that if a joint note be illegal, the note of one joint promisor,

17. Stone v. Smith, 6 Munf. 541; Law's Exr. v. Sutherland, 5 Gratt. 357; Drake v. Chandler, 18 Gratt. 912; Keckley v. Union Bank, 75 Ga. 458; Wales v. Webb, 5 Conn. 154; Windham v. Doles, 59 Ga. 266; Lanier v. Union Mortgage Banking & Trust Co., 64 Ark. 39, 40 S. W. 466.

18. Drake v. Chandler, 18 Gratt. 909.

19. Archer v. McCray, 59 Ga. 547; Horn v. McKinney, 5 Ind. App. 348, 32 N. E. 334.

20. Regina v. Sewel, 7 Mod. 118; Drake v. Chandler, 18 Gratt. 912; Sherwood v. Archer, 10 Hun, 73. In Macungie Sav. Bank v. Hattenstein, 89 Pa. St. 328, B. indorsed to a bank the note of A., which was tainted with usury; and the bank took in settlement the note of B, indorsed by C., and surrendered the note of A. Held usury purged. In King v. Perry Ins. Co., 57 Ala. 118, where the indorser of an usurious bill took it up with a new bill of which he was acceptor, it was held affected by the original taint.

21. Hulme v. Turner, 4 Esp. N. P. C. 111. In this case the payee of a note given for a usurious consideration arrested the maker, and to procure his liberation a third person joined the maker of the note in another note for the amount of the debt; and the chief justice said he was clearly of opinion the consideration of the first note could not be questioned in an action on the second, unless it could be shown that it was a colorable shift to evade the statute, devised when the money was originally lent and the first note granted. See Drake v. Chandler, 18 Gratt. 912. We have seen it decided in a *nisi prius* Virginia case, that the liberation of the party was the consideration of the new joint note, and that only upon that ground could the decision of Hulme v. Turner be sustained. In Drake v. Chandler there is no allusion to this view.

22. Comyn on Usury, 186.

with a new party as surety thereon, would be valid.[23] Seventhly: If the party principal in the original and invalid security executes a new one, leaving off a surety upon the first—or adding a surety where there was none upon the first—or substituting a new surety for one that was upon the first—in all these cases there would be a straight and unbroken line of obligation from the principal to the payee. And we should say that the new security was a mere renewal of the first, and would be invalid.[24] Eighthly: It has been held that where an indorser upon a note void for usury gives his own note for the amount apparently due, it is tainted with the original usury and invalid.[25] But if the original note were not usurious, usury in the renewal note would not prevent recovery of the amount due on the first, and an indorser of the first by indorsing the second, waives the necessity of protest and notice thereon in order to charge him.[26]

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23. Gresham v. Morrow, 40 Ga. 487. In this case it was held that where one who held the note of two joint promisors, given for slaves, and in full satisfaction thereof took the note of one joint promisor, with a stranger as his security, it was a novation of the debt, and the consideration of the new note was not slaves, but the satisfaction of the first note.

24. Campbell v. Sloan, 62 Pa. St. 481.

25. First Nat. Bank v. Plankinton, 27 Wis. 177; Pardoe v. Iowa State Nat. Bank, 106 Iowa, 345, 76 N. W. 800; First Nat. Bank v. Turner, 3 Kan. App. 352, 42 Pac. 936.

26. Leary v. Miller, 61 N. Y. 490.

BOOK II

WHO MAY BE PARTIES

CHAPTER VIII

PERSONS PARTIALLY OR WHOLLY DISQUALIFIED

§ **208.** It was once thought that none but merchants could be parties to bills and notes, as they are purely mercantile instruments, but this notion long since became obsolete.[1] And it is well settled that any person laboring under no personal or political disability may be a party to any negotiable contract. We shall first speak of those who are partially or wholly disqualified by such disability, and who are (I.) lunatics, (II.) alien enemies, (III.) infants, (IV.) married women, (V.) persons under guardianship, (VI.) bankrupts. We shall then speak of those who may be parties, other than private individuals, and who are (I.) personal representatives, (II.) guardians, (III.) trustees who may be included under the head of fiduciaries—and (IV.) agents, (V.) copartnership firms, (VI.) private corporations, (VII.) public corporations, and (VIII.) government.

SECTION I

LUNATICS, IMBECILES, AND DRUNKARDS

§ **209.** Every person is presumed to be of sane mind until the contrary be shown by him who asserts it;[2] and insanity or imbecility cannot in England be shown under a general plea that the defendant did not execute the bill, note, or other instrument declared on, but must be specially pleaded.[3]

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1. Chitty on Bills [*15], 20.

2. Rogers v. Rogers, 6 Penne (Del.) 267, 66 Atl. 374; Ireland v. White, 102 Me. 233, 66 Atl. 477; Jackson v. King, 4 Cow. 207; Jackson v. Van Dusen, 5 Johns. 144; Edwards on Bills, 64; 1 Parsons on Notes and Bills, 150.

3. Harrison v. Richardson, 1 Moody & R. 504; Byles (Sharswood's ed.) [*60], 150.

The earlier authorities of the English law held that a man should not be allowed to stultify himself by alleging his own lunacy or imbecility;[4] but such a doctrine sounds more like the gibberish of a lunatic than like the decree of a humane and enlightened lawgiver. The maxim of the civil law, "*furiosus nullum negotium gerere potest, quia non intelligit quid agit,*" expresses the sense of modern jurisprudence on the subject. And it may now be regarded as a general rule of universal law, that the contracts of a lunatic, idiot, or other person *non compos mentis*, from age or personal infirmity, are utterly void.[5]

§ 210. Lunatic protected, though other party ignorant of his incapacity.—Prof. Parsons qualifies the doctrine stated in the text, by observing, that "possibly this defense (of insanity, imbecility, or aberration), to be effectual must go far enough to show that this defect of mind was known to the other contracting party."[6] And this view has obtained in a number of cases in England and the United States. Thus it has been held no defense to an action for labor done and goods sold, that the defendant was of unsound mind, unless the plaintiff knew the fact, or took advantage of it.[7] But we can see no

4. Beverley's Case, 4 Rep. 126; Stroud v. Marshall, Cro. Eliz. 398; 1 Parsons on Contracts, 383.

5. Edwards on Bills, 63; Story on Bills, § 106; Story's Eq. Jur., § 223; Byles on Bills (Sharswood's ed.) [*60], 150. See 1 Parsons on Notes and Bills, 149; Dickerson v. Davis (Ind.), 19 N. E. 145, citing the text; Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720; American Trust & Banking Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182, quoting text; Milligan v. Pollard, 112 Ala. 465, 20 So. 620. A transfer of a note by an insane payee is void, and the payor may impeach the contract of transfer by showing the insanity of the transferrer at the time the contract was made. Walker v. Winn, 142 Ala. 560, 39 So. 12, 110 Am. St. Rep. 50. In Sebree v. Crutchfield, 142 S. W. 1017, 146 Ky. 517, it was held that where a note was executed by a person not having mental capacity, for money loaned, a holder with notice can recover only to the extent that the estate of the maker received the benefit of the proceeds of the note.

6. 1 Parsons on Notes and Bills, 149, 150.

7. Molton v. Camroux, 4 Exch. 17; Elliott v. Ince, 7 De G., M. & G. 478; Brown v. Todrell, 3 Car. & P. 30, Moody & M., 105; Beals v. Shee, 10 Pa. St. 56. See also Loomis v. Spencer, 2 Paige, 153; Lancaster County Bank v. Moore, 78 Pa. St. 407; Behrens v. McKenzie, 23 Iowa, 333; Wilder v. Weakly, 34 Ind. 181; Shoulters v. Allen, 51 Mich. 530; Matthiessen v. McMahon, 38 N. J. L. 536; Byles (Sharswood's ed.) [*61], 151. In Moore v. Hershey, 90 Pa. St. 196, quite a conservative and well-considered view of the question is taken, but one which, we think, goes beyond what right and equity require in holding imbeciles to re-

just philosophy in the doctrines held. If the defendant had no faculties of discretion, and were in fact deranged, the mere circumstance that, for the time being, he so deported himself as to conceal his lunacy or imbecility, cannot alter his right to be protected against his own misfortune. And though honest persons may be ignorant of his condition, that is their misfortune, and they should not be allowed to throw it upon one already helpless.[8] "It is a hard case either way, but it is very important that courts of justice should afford protection to those individuals who are unfortunately unable to be their own guardians," is the language of Lord Tenterden, C. J., in a case where a note, drawn, in an unusual form, by an imbecile, was held void in the hands of an innocent indorsee.[9] And no matter how perfect the

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sponsibility. The court said, per Paxson, J.: "I know of no case in which it has been held that a lunatic, when sued upon his contract, may not show want of consideration. The most that has been decided is, that when a man deals fairly with a lunatic, and without knowledge of his lunacy, he is entitled to recover the value of what he honestly parted with. It was held, however, by the learned judge of the court below, that as this was commercial paper, and the plaintiff a holder for value, the consideration could not be inquired into. It is doubtful if this rule, even if applicable to the facts of this case, would exclude the evidence referred to, as said evidence tends to show plaintiff's knowledge of the want of consideration. But we are not called upon to decide this question, as we place our ruling upon the broad ground that the principle of commercial law above referred to, does not apply to the case of commercial paper made by madmen. If it did we would soon have before us this state of things: It is well known that there are a large number of lunatics under restraint in this State who are possessed of large estates. It would be easy for a designing knave to obtain the paper of such person for a large amount. The making of it might even be a source of delight to the unfortunate lunatic. If such paper can be protected in the hands of a holder who has paid value, however trifling, this helpless class would have little protection. A principle that renders such results possible must be essentially and radically wrong; we believe that none such exists. On the contrary, the true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or minor. In neither of these cases can he recover against the maker. In the case of a lunatic, however, he may recover, provided he had no knowledge of the lunacy, and the note was obtained without fraud and upon a proper consideration. But the lunatic or his committee may defend upon either of these grounds. This rule affords reasonable protection to the estates of lunatics, and causes no serious injury to commercial interests, as it is believed the amount of such paper that can be floated in the face of such a rule will be inconsiderable."

8. Van Patton v. Beals, 46 Iowa, 63; Wierbach v. First Nat. Bank, 97 Pa. St. 543; American Trust & Banking Co. v. Boone, 102 Ga. 202, 66 Am. St. Rep. 167, 29 S. E. 182, citing text; Voris v. Harshbarger, 11 Ind. App. 555, 39 N. E. 521.

9. Sentance v. Poole, 3 Car. & P. (1827); Chitty on Bills (13th Am. ed.) [*18],

note may be in form, it would be void in the hands of every person, however innocent, as against the imbecile or lunatic; [10] but in this view, so obviously reasonable and just as it seems to us, the authorities are not entirely concurrent. And in New York they are strongly against the text.[11]

§ **211.** Mere weakness of mind, not amounting to imbecility or insanity—mere immaturity of reason, or want of experience and skill in business, is no ground of defense either in law or equity, provided no fraud has been practiced on the party.[12] But if the weakness of mind be so great as to incapacitate the party to guard against imposition and undue influence, it will suffice to vacate his contracts,[13] though one who assails an instrument as having been procured by undue influence bears the burden of proving both mental weakness and undue influence, when both are relied on.[14]

§ **212. In respect to necessaries** an exception arises. In this regard an imbecile stands upon the footing of an infant. And his executed contracts for necessaries, made while he was temporarily or apparently sane, with a party acting in entire good faith, would be enforced.[15] And if a bill or note were executed by him for necessaries under such circumstances, it would doubtless be valid, at least

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24; Thompson on Bills (Wilson's ed.), 555; Voris v. Harshbarger, 11 Ind. App. 555.

10. Seaver v. Phelps, 11 Pick. 304, where it was held that an imbecile could not pledge a note, although the pledgee were entirely ignorant of his condition, and innocent of fraud. Van Patton v. Beals, 46 Iowa, 63.

11. Mutual Life Ins. Co. v. Hunt, 79 N. Y. 541 (1880), and cases cited.

12. Stewart v. Lispenard, 26 Wend. 299; Farnum v. Brooks, 9 Pick. 212; Osmond v. Fitzroy, 3 P. Wms. 129; Lewis v. Pead, 1 Ves. Jr. 19. Where a person, at the time he executed a note, was capable of exercising thought, reflection, and judgment, knew what he was doing and had sufficient memory and understanding to comprehend the nature and character of the transaction, he was capable of making the note. Rogers v. Rogers, 6 Penn. (Del.), 267, 66 Atl. 374 (1907). Notes executed by an aged woman in favor of a religious sect which she had lately joined, who had attempted suicide and showed other symptoms of insanity such as hallucinations with respect to her children, depression, neglect of her family, belief in imaginary diseases, and thoughts and conversations but upon one subject, namely her new religious order, are not valid claims against her estate. *In re* Killen's Estate, 223 Pa. 301, 72 Atl. 521.

13. Johnson v. Chadwell, 8 Humphr. 145.

14. Bade v. Feay, 63 W. Va. 166, 61 S. E. 348 (1908).

15. McCullis v. Bartlett, 8 N. H. 569; La Rue v. Gilkyson, 4 Pa. St. 375; Richardson v. Strong, 13 Ired. 106.

to the extent of their actual and proven value.[16] A lunatic has been held bound for medical services rendered his wife; [17] and in England, where a nobleman ordered carriages suitable to his rank, and the coachmaker supplied them *bona fide* and they were actually used, it was held that an action was maintainable on the contract, notwithstanding there had been an inquisition of lunacy finding him to be of unsound mind at the time the carriages were ordered.[18] The recovery for necessaries, instead of being condemned, is encouraged by considerations of humanity. And the courts may safely go farther, and authorize recovery where the consideration has been full and fair, and has entered into the betterment of the lunatic's estate, it being followed like trust money into his hands, and restored in kind or its equivalent.

§ **213. Inquisitions of lunacy.**—In the United States, inquisitions of lunacy, under statutes providing for the appointment of guardians over persons of unsound mind, have been frequently regarded as conclusive evidence of lunacy as against all persons.[19] But other authorities hold the inquisition conclusive evidence only as against the parties to it; and permit others to rebut it by clear evidence.[20] And this seems to us the best view.[21] In England, the

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16. 1 Parsons on Notes and Bills, 149; Van Patton v. Marks, 46 Iowa, 63; McCormick v. Littler, 85 Ill. 62. Once the mental incapacity of the maker is established, it is a complete defense to an action on a note signed by him, and the burden would then be upon the plaintiff to prove the consideration for the note, and other facts necessary to overcome such defense, and entitled him to recover as for necessaries. Hosler v. Beard, 54 Ohio St. 398, 56 Am. St. Rep. 720, 43 N. E. 1040.

17. Pearl v. McDowell, 3 J. J. Marsh. 658; Fitzgerald v. Reed, 9 Smedes & M. 94.

18. Baxter v. Earl of Portsmouth, 7 Dowl. & Ry. 614, 2 Car. & P. 178. In Dane v. Kirkall, 8 Car. & P. 679, it was held that a lunatic was bound by agreement for use and occupation of a house, although not necessary for her, it not appearing that the plaintiff knew she was a lunatic.

19. Leonard v. Leonard, 14 Pick. 280; Wadsworth v. Sherman, 14 Barb. 169; Fitzhugh v. Wilcox, 12 Barb. 235.

20. Den v. Clarke, 5 Halst. 217; Rogers v. Walker, 6 Pa. St. 371; Edwards on Bills, 64; Moore v. Hershey, 90 Pa. St. 196.

21. Hicks v. Marshall, 8 Hun, 328 (1876). In this case suit was brought against the maker of note by *bona fide* holder for value without notice of any defect. Proceedings upon an inquisition of lunacy, had after making of the note and bringing of the suit, were given in evidence, and the defendant declared to be of unsound mind when he made the note. It was held that the inquisition established *prima facie* the insanity of the defendant at the time he made the note, and that

inquisition is only presumptive evidence of lunacy.[22] Before office found, the acts of a lunatic have been said to be voidable only;[23] afterward void.[24] But this distinction would not extend so far as to prevent the contract of a lunatic from being ratified and confirmed after his restoration to sanity.[25] And if after restoration, he continues to receive benefits under, instead of disaffirming, the contract, it will be deemed a ratification.[26]

§ **214. Drunkenness** is a species of mental aberration, produced by intoxicating stimulants. And if a person become so drunk as to be deprived of understanding and reason, there is no doubt that, while in such a condition, he has no capacity to enter into a contract. And if he should sign a negotiable instrument, either as maker, drawer, indorser, or acceptor, it would certainly be void as to all parties having notice of the condition in which he signed it.[27] If the drunkenness were so complete as to suspend all rational thought, the better

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in order to recover, the plaintiffs must show either that he was sane at the time, or that he had received such a consideration for the note, that justice and equity required it to be paid out of his estate. In Osterhout v. Shoemaker, 3 Hill, 516, Bronson, J., says: "I see no principle upon which the inquisition taken upon a commission of lunacy can be given in evidence to defeat the rights of third persons who were strangers to the proceedings. * * * But it seems to be settled that such evidence is admissible, though not conclusive." See also Hart v. Deamer, 6 Wend. 497; Goodell v. Harrington, 3 Thomp. & C. 345; Hoyt v. Adee, 3 Lans. 173.

22. Sergeson v. Sealey, 2 Atk. 412; Faulder v. Silk, 3 Campb. 126. Where after notes had been discounted at a bank, the makers sought and obtained renewals with new negotiable notes, this would estop the makers from setting up a defense of fraudulent representations so far as the bank, a holder for value, is concerned. Odbert v. Marquet, 175 Fed. 44, affirming 163 Fed. 892. See also Harfst v. State Bank of El Campo (Tex. Civ. App.), 119 S. W. 694, wherein the court said that in such case the new notes were in effect but a voluntary payment of the first notes and that this was not the case of an illegal consideration nor a case of forgery.

23. Jackson v. Gumaer, 2 Cow. 552.

24. Pearl v. McDowell, 3 J. J. Marsh. 658; Edwards on Bills, 64.

25. 1 Parsons on Notes and Bills, 151.

26. Arnold v. Richmond Iron Works, 1 Gray, 434. But see Berkley v. Cannon, 4 Rich. (Law) 136.

27. Gore v. Gibson, 13 M. & W. 623; Pitt v. Smith, 3 Campb. 33; Molton v. Camrony, 2 Exch. 487, 4 Exch. 17; Wigglesworth v. Steers, 1 Hening & M. 154; Jenners v. Howard, 6 Blackf. 240; Clark v. Caldwell, 6 Watts, 139; 1 Parsons on Contracts, 383–384; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632; Taylor v. Purcell, 65 Ark. 606; Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057.

opinion is that any instrument signed by the party would be utterly void even in the hands of a *bona fide* holder without notice, for, although it may have been the party's own fault that such an aberration of mind was produced, when produced, it suspended for the time being his capacity to consent, which is the first essential of a contract.[28] "It is just the same," says Alderson, B., "as if the defendant had written his name on the bill in his sleep in a state of somnambulism." [29] But it has been thought and held, that even when the drunkenness was complete, a bill or note then signed would be valid in the hands of a *bona fide* holder without notice.[30] If the party were fully aware of what he was doing when he signed the paper it would clearly be binding, as we think, in the hands of a *bona fide* holder.[31] Clearly, "the merriment of a cheerful cup, which rather revives the spirits than stupefies the reason, is no hindrance to the contracting of just obligations." [32]

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28. 1 Parsons on Notes and Bills, 151.

29. Gore v. Gibson, 13 M. & W. 623.

30. State Bank v. McCoy, 69 Pa. St. 204; McSparran v. Neely, 91 Pa. St. 17; Johnson v. Medlicott, 3 P. Wms. 130; Thompson on Bills (Wilson's ed.), 63; Chitty on Bills (13th Am. ed.) [*18] 24. That one indorsed an obligation as surety while in a drunken condition will not affect the rights of a payee who had no knowledge of such drunkenness and no hand in causing it. Abbevill Trading Co. v. Butler, Stevens & Co., 3 Ga. App. 138, 59 S. E. 450.

31. In Miller v. Finley, 26 Mich. 249, it was claimed that a father who signed a note already signed by his son, while in such a state of drunkenness, procured by the payee, that he was not responsible for his acts. The evidence for the plaintiff tended to show that he was fully aware of the transaction between his son and the payee, and took some part in it. The evidence of the son did not indicate his extreme intoxication; and the father himself seemed to recollect signing the note. Campbell, J., said: "The defense rests upon the ground of fraud, and not of illegality, and while if the old man's story is true, the note would be voidable as against the payee, it would not be a nullity as to all persons."

32. Puffendorf, book 3, chap. 6, § 4; Story on Contracts, § 27; Cook v. Clayworth, 18 Ves. 12, Sumner's note. A charge to the jury that if the maker of a note was unable, from intoxication, to give "proper attention" to a transaction, the note was void, was held to be erroneous. Wright v. Waller, 127 Ala. 557, 29 So. 57, 54 L. R. A. 440, the court saying: "The foregoing texts and adjudications clearly declare and thoroughly establish the modern doctrine on this subject, departing from the ancient rule, which forbade a party to a contract to stultify himself by setting up his want of mental capacity to enter into it, to the extent, and only to the extent, of allowing him to show in avoidance that from insanity, drunkenness, and the like he was incapable of exercising judgment, understanding the proposed engagement, and of knowing what he was about when he entered into the contract sought to be avoided."

§ **215. Preconcerted drunkenness.**—If the party made himself drunk for the purpose of entering into agreements and then avoiding them, the fraudulent intent antedating his drunkenness would render it incompetent for him to avail of the defense.[33]

Drunkenness, when relied upon as a defense, must be specially pleaded.[34] If the party buy goods when drunk, and keep them when sober, he estops himself, and cannot then plead his drunkenness.[35] Where a note based on insufficient consideration was obtained from a person under the influence of liquor at the time of its execution, and enfeebled in body and mind by long-continued disease and drunkenness, it was held in Alabama that a presumption of fraud arises, which must be countervailed by proof of fair consideration, and fair dealing on the part of the holder seeking to enforce payment.[36]

SECTION II

ALIENS AND ALIEN ENEMIES

§ **216.** The mere fact that a person is an alien and a resident of a foreign country in nowise impairs the right of the citizens of another country to contract with him, or his right to contract with them. On the contrary, commercial intercourse between different nations, under relations of amity with each other, are to be favored and encouraged. But if war should break out between two countries, it at once interposes a barrier to, and an interdiction of, all commercial correspondence, intercourse, and dealing between the citizens of the two countries. The hostile countries become sealed as against each other; and both for the purpose of identifying the citizen thoroughly and emphatically with the policy and interests of his country, and of preventing communications to the enemy which might be damaging in their character, the law of nations absolutely prohibits all intercourse between the citizens of belligerent countries, and pronounces all contracts between them utterly void.[37] Such contracts are not

33. 1 Parsons on Notes and Bills, 151; 1 Parsons on Contracts, 384, 385.

34. Gore v. Gibson, 13 M. & W. 623; Byles on Bills (Sharswood's ed.) [*61], 152.

35. Gore v. Gibson, 13 M. & W. 623.

36. Holland v. Barnes, 53 Ala. 83.

37. Griswold v. Waddington, 16 Johns. 438, Chancellor Kent saying of this interdiction: "It reaches to all interchange or removal of property, to all negotiations and contracts, to all communication, to all locomotive intercourse, to a state

merely voidable, but *ab origine* void, and incapable of being enforced or confirmed.[38] And the rule applies not only to citizens and native subjects, but as well to all persons domiciled in the respective countries.[39]

This disability of alien enemies to contract does not rest upon any peculiarity of English or American law, but upon the universal public law of nations, as stated and approved by the most eminent writers, such as Grotius, Puffendorf, Vattel, Bynkershoek; and in the present age, Wheaton, Story, Kent, Parsons, and others.[40]

§ 217. Alien enemy as drawer.—It results from these principles, that if the United States and the United Kingdom of Great Britain, Scotland, and Ireland were at war, a citizen of the United Kingdom could not legally draw a bill of exchange upon a citizen of the United States;[41] nor could a citizen of the United States draw a bill upon a citizen of the United Kingdom.[42] This latter proposition of law has been denied in one of the Circuit Courts of the United States, and in Kentucky;[43] but the weight of authority, as well as the

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of utter seclusion, to any intercourse but one of open hostility, to any meeting but in actual combat." The Julia, 8 Cranch, 131.

38. Griswold v. Waddington, 16 Johns. 438; Thompson on Bills, 73; Story on Notes, § 94.

39. McConnell v. Hector, 3 Bos. & P. 707; Roberts v. Hardy, 3 Maule & S. 533.

40. Wheaton's International Law, 556; Story on Bills, § 99; 1 Parsons on Notes and Bills, 152; 1 Kent Com. 67.

41. Willison v. Patteson, 7 Taunt. 439, 1 Moore, 133 (1817). In this case, a British subject, resident in England, had in his hands funds of an alien enemy, who drew on him a bill payable to the drawer's order, and indorsed it to the plaintiff, an English-born subject resident in hostile territory. Held, that the indorsee could not recover. In Moon v. Foster, decided by Chase, C. J., in United States Circuit Court at Richmond, Va., in 1868 (Chase's decisions reported by Johnson, p. 222), it appeared that during the late Confederate war the drawer at Winslow, N. C., drew on a drawee at Portsmouth, Va., the latter place being within the United States military lines. The chief justice instructed the jury that "if they should find that Winslow was not, at the time of making and issuing the draft, in the occupation or control of the national forces, then the draft in controversy, being an act of prohibited commercial intercourse, was not valid, negotiable paper." Cited in 19 Gratt. 433; Billgerry v. Branch, 19 Gratt. 393, 433; Woods v. Wilder, 43 N. Y. 164; Wheaton on International Law, § 317; 1 Kent Com. 67; Story on Bills, § 100; Thompson on Bills, 73: 1 Parsons on Notes and Bills, 152; Tarleton v. Southern Bank, 49 Ala. 229.

42. Ibid.

43. United States v. Barker, 1 Paine C. C. 156 (1820). On the 2d of July, 1814, a bill of exchange was drawn by a citizen of the United States on a British

clearly defined principles of international law, which have been already stated, overwhelmingly sustain the text. And it has been observed, in respect to the Circuit Court decision above referred to, that "even that case contains special circumstances not existing in the present case. The bill in that case was drawn here by a citizen of the United States against funds which he had in England, and was indorsed to the United States Government, and prosecuted in its name and behalf." [44] It was not upon these special circumstances that the decision turned, but they suggest an exception to the general rule in favor of the Government, which, upon considerations of public policy, may govern itself differently from its subjects.

§ 218. Alien enemy as acceptor, indorser, or indorsee.—In like manner, the citizen of a country cannot accept a bill drawn by an alien enemey— that is, a citizen of a country at war with his own,[45] nor indorse a bill or note to such alien enemy, nor be indorsee of one from him.[46] Nor can he execute a note to such alien enemy, nor be payee of a note made by him; [47] though it would seem that if the note were given by an agent acting under authority given before the war, and in renewal of a note made before the war, it would be valid.[48]

In the late war between the Confederate States and the United States, many transactions between parties on opposite sides of the hostile line occurred, and the principle that forbids communication between alien enemies has been regarded by the courts of the United States, and of the several States as applicable to them. For while the Confederate States were short-lived, for the time being they

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subject in Liverpool, in favor of the United States, which was then at war with Great Britain. It was held a lawful transaction, and Livingston, J., said: "The opinion of the court, then, is, that the plaintiff, by drawing the bill in question, violated neither the laws of nations nor any municipal regulation of his own country; that he did an act perfectly innocent, if not meritorious, and which has too long received the sanction of public opinion and general usage to render it necessary or proper to be checked by the interposition of a court of justice, which could not be done without sacrificing the interest of our innocent and unsuspecting merchants, to gratify the cupidity of those who may since have been advised that the transaction was unlawful, and may be desirous of taking advantage of it." Followed and approved in Haggard v. Conkwright, 7 Bush, 16 (1869).

44. Woods v. Wilder, 43 N. Y. 164, Rapallo, J.

45. Woods v. Wilder, 43 N. Y. 164.

46. Billgerry v. Branch, 19 Gratt. 393.

47. Billgerry v. Branch, 19 Gratt. 393; McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

48. McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

waged war like an independent nation, and were accorded belligerent rights.[49]

§ 219. Indorsee's knowledge of invalidity by reason of alienage of parties.—The subject of a country at war with another cannot acquire the rights of an indorsee of a bill drawn by an alien enemy upon a citizen of his own country, provided he knew at the time of the state of war between them; for by receiving a bill which is the enemy's property, he makes himself an instrument to enable such enemy to sue in the courts of his own country, and either encourages or participates in that intercourse and correspondence which the laws of nations interdict.[50] If it does not appear that the indorsee knew that the instrument was invalid as between the original parties on account of the existence of war between their respective countries, they would be liable to him upon it; but, as a general rule, the place where the bill or note is dated, and the names or addresses of the parties thereon noted, will indicate its true nature; and a declaration of war is always matter of such immediate and general notoriety that no one can long remain ignorant of it.[51] It has been held, however, that an assignment of a certificate of deposit issued by a bank within the lines of a hostile government, is valid.[52]

§ 220. Rights of neutrals.—Although a bill or note drawn, indorsed, or accepted in favor of an alien enemy, may not be valid as between the original parties, yet if it be drawn upon the citizen of a hostile country by an alien enemy, in favor of a neutral, and no illegal use of it were intended or participated in, it would be valid in the hands of the neutral as against the drawer, and also as against the drawee if he accepted. And the same rule would apply to indorsements to neutrals of bills or notes executed between citizens of countries at war; and to the drawing of bills, making of notes, and indorsing of bills or notes by neutrals in favor of fellow-subjects or other neu-

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49. Billgerry v. Branch, 19 Gratt. 393; Moon v. Foster, Chief Justice Chase's decision, cited in 19 Gratt. 433; Chase's Decisions, 222; Wood v. Wilder, 43 N. Y. 164; Ward v. Smith, 7 Wall. 447; The Prize Cases, 2 Black, 635; The Venice, 2 Wall. 258; The Hampton, 5 Wall. 372; The William Bagaley, 5 Wall. 377; Hanger v. Abbott, 6 Wall. 532; Tarleton v. Southern Bank, 49 Ala. 229; McVeigh v. Bank of Old Dominion, 26 Gratt. 785.

50. Thompson on Bills, 74.

51. Thompson on Bills, 74.

52. Morrison v. Lovell, 4 Hagan, 346.

trals; for a state of war does not suspend commerce between neutrals.[53]

§ **221. Exceptions to general rule.**—There are some exceptions to the general interdiction of intercourse between alien enemies. Thus, if a prisoner of war should draw a bill on a fellow-citizen in his own country, or should make or indorse a note, that bill or note, whether payable or indorsed to an alien enemy, would be valid if it were drawn, made, or indorsed for the purpose of obtaining necessary articles of subsistence or comfort.[54] So, if it were drawn, made, or indorsed for the ransom of a captured ship,[55] or for the repairs of a ship in an enemy's country, protected by cartel between the belligerents.[56] And such instruments might be sued upon on the return of peace. But it would have to appear affirmatively that the consideration of the bill or note exempted it from the general rule. After the expiration of a temporary act prohibiting the payment of bills drawn during a state of war, under a penalty, a mere verbal promise to pay such bills would be valid.[57]

§ **222. Effect of war on agency.**—The effect of war between two countries is to suspend at once all contracts between the citizens of those countries which require communication between them.[58] But if an alien enemy has an agent in the hostile country, war does not revoke the agency; and the agent may still act for, receive, and pay out money for his principal; give or receive notice of dishonor of his commercial paper, and represent his principal in all transactions not contrary to the policy or interests of the government wherein the agent resides,[59] that is to say, provided they can be conducted without intercourse or communication between the citizens or subjects

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53. Story on Bills, §§ 103, 104; Story on Notes, §§ 98, 99; Edwards on Bills, 74.

54. Daubuz v. Morehead, 6 Taunt. 332; Edwards on Bills, 74.

55. Ricord v. Benttenhem, 3 Burr. 1734; Cornu v. Blackburne, 2 Doug. 641; Yates v. Hall, 1 T. R. 73.

56. Patts v. Bell, 8 T. R. 548; Sackley v. Furse, 15 Johns. 338; Edwards on Bills, 74, 75; Story on Notes, § 97; Story on Bills, § 102.

57. Duhammel v. Pickering, 2 Stark. 90.

58. Griswold v. Waddington, 16 Johns. 438.

59. Ward v. Smith, 7 Wall. 447; Dennistoun v. Imbrie, Wash. C. C. 396; Manhattan Ins. Co. v. Warwick, 20 Gratt. 614; Hale v. Wall, 22 Gratt. 424; Monseaux v. Urquhart, 9 La. 485; Clarke v. Morey, 10 Johns. 70; Fisher v. Krutz, 9 Kan. 510; Hubbard v. Matthews, 54 N. Y. 48; Maloney v. Stephens, 11 Heisk. 738.

of the contending powers—such as agencies to collect and preserve, but not to transmit money or property.[60] But it seems they must be created before the war begins.[61] Of the character described is an agency to receive notice of protest of commercial paper.[62]

SECTION III

INFANTS

§ 223. In the next place, as to infants. Persons under twenty-one years of age are minors, or infants as they are more generally termed, and contracts made by them have been divided into three classes: First, void contracts, which are those clearly to the infant's disadvantage—as, for instance, a bond made with a penalty; second, voidable contracts, which are those which may or may not be for his benefit, according to circumstances—as, for example, a lease of his lands rendering rent; and third, valid contracts, which are such as are entered into for necessaries.[63] And by necessaries are meant those things which are needed by the infant, and are suited to his means and rank in life.

But this distinction as to void and voidable contracts is now regarded as practically obsolete; all the contracts of an infant, not in themselves illegal, being capable of ratification by him after he has attained his majority, and, therefore, being voidable only. For if absolutely void, they would be incapable of ratification.[64]

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60. Small's Admr. v. Lumpkin, 28 Gratt. 835. See cases in preceding note.

61. United States v. Lapine, 17 Wall. 602; United States v. Grossmayer, 9 Wall. 72; Small's Admr. v. Lumpkin, 28 Gratt. 835; Hubbard v. Matthews, 54 N. Y. 44.

62. Hubbard v. Matthews, 54 N. Y. 44.

63. Story on Notes, § 77.

64. 1 Parsons on Contracts, 295; Byles on Bills (Sharswood's ed.) [*59], 145; Edwards on Bills, 65; 2 Kent Com. [*234], Lect. 31; Bingham on Infancy, 45. Chancellor Kent, in his Commentaries, says (see 2 Kent Com., Lect. 31): "It is held that a negotiable note given by an infant, even for necessaries, is void, and his acceptance of a bill of exchange is void; and a bond with a penalty though given for necessaries, is void. It must be admitted, however, that the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election, when they become of age, either to affirm or disallow them. If their contracts were absolutely void, it would follow as a consequence that the contract could have no effect, and the party contracting

§ 224. Necessaries and torts.—For necessaries an infant may undoubtedly bind himself, and the better opinion is that he may execute a note not negotiable for the amount, the consideration of which might be inquired into, and his protection from imposition insured—he being bound not absolutely for the amount of the note, but only for the real value of the necessaries for which it was given.[65] But it is denied by some of the authorities that an infant can execute any note whatever, of any binding force, even for necessaries.[66] In England it has been held that an infant may execute a single bill (a bond without a penalty) for the exact sum due for necessaries; but not a bond with a penalty, or carrying interest.[67] An infant cannot bind himself for necessaries when he has a parent or guardian who supplies his wants;[68] but when he has authority from his guardian or parent, he may purchase them and bind himself for them.[69] An infant is in general liable for his torts as any other person would be;[70] and if he give a note in satisfaction of damages it has been held that he is bound thereby.[71]

§ 225. Negotiable paper signed by infants.—In respect to negotiable paper to which infants have signed their names as parties, it may be stated as a general principle, universally recognized wherever the common law prevails, that an infant cannot bind himself absolutely as drawer, indorser, acceptor, or maker of a bill of exchange or negotiable note;[72] the contract is voidable and may be disaffirmed after attainment of majority,[73] unless it was executed for necessaries.[74] In a case where the acceptor of a bill pleaded infancy, and it was

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with the infant would be equally discharged." See Harner v. Dipple, 31 Ohio St. 72; Reed v. Batchelder, 1 Metc. (Mass.) 559.

65. Bradley v. Pratt, 23 Vt. 378; Ray v. Tubbs, 50 Vt. 688; 1 Parsons on Notes and Bills, 68.

66. Bouchell v. Clary, 3 Brev. 194; Chitty on Bills [*19], 26.

67. Russell v. Lee, 1 Lev. 86; Byles (Sharswood's ed.) [*57], 144; Chitty on Bills [*19], 26; Bateman v. Kingston, 6 L. R., Ireland, 328 (1880).

68. Angel v. McClellan, 16 Mass. 28; Guthrie v. Murphy, 4 Watts, 80.

69. Rundel v. Keeler, 7 Watts, 237; Watson v. Heasel, 7 Watts, 344.

70. Cooley on Torts, 103 *et seq.*

71. Ray v. Tubbs, 50 Vt. 688.

72. Williamson v. Harrison, Holt, 359 (1690), Carthew, 160, 3 Salk. 197 (1691); Chitty, Jr., 180. The court said: "Here the infant was a trader, and the bill of exchange was drawn in the course of trade, and not for necessaries." Story on Notes, § 78; Edwards on Bills, 65.

73. Watson v. Ruderman, 79 Conn. 687, 66 Atl. 515.

74. Heffington v. Jackson, 43 Tex. Civ. App. 560, 96 S. W. 108.

replied that it was given for necessaries, Lord Mansfield, C. J., said: "Did any one ever hear of an infant being liable as an acceptor of a bill of exchange? The replication is nonsense, and ought to have been demurred to." [75] And although the tenor of the modern authorities is to liberalize the law on the subject of infancy, the doctrine is generally followed that an infant cannot be a party to a negotiable instrument—the reason assigned being, that otherwise, should it be transferred to a *bona fide* holder for value, and without notice of the infancy, the infant, if bound at all, would be bound for the entire sum, and if inquiry were admitted into the consideration, the instrument would lose its character as negotiable paper.[76]

§ **226. Liabilities of infant.**—The views of this subject which strike us as the most reasonable may be stated as follows: If the payee of a note made by an infant were to sue him upon it as maker, and he pleaded infancy, the payee might reply that it was executed for necessaries, and that such necessaries were reasonably worth the amount specified in the note. The burden of proof would rest upon the plaintiff to show that the consideration was necessaries, and also to show their value; and no more than the value proved could be recovered. And this view would apply whether the note were in form negotiable or not.[77] If the indorsee of the payee of such a note were to sue the indorser, the latter would, of course, be bound to him whether the maker were an infant or not, for by indorsement he warrants the capacity of prior parties and the entire validity of the paper.[78] And were the indorsee to sue the maker, and he were to plead infancy, there seems to be no good reason why it might not be replied that the note was given for necessaries, and that they were worth the amount specified; and that the indorsee, like the payee, should be entitled to recover upon proving the consideration to have

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75. Williamson v. Watts, 1 Campb. 552.

76. Swasey v. Vanderheyden, 10 Johns. 33; Wamsley v. Lindenberger, 2 Rand. 478; McCrillis v. How, 2 N. H. 348; Conn v. Coburn, 7 N. H. 368; McMinn v. Richmonds, 6 Yerg. 9; Henderson v. Fox, 5 Ind. 489; Ayers v. Burns, 87 Ind. 245; Fenton v. White, 1 South. 100; Bouchell v. Clary, 3 Brev. 194; Morton v. Steward, 5 Ill. App. 533; 1 Parsons on Notes and Bills, 69; Story on Notes, § 68; Story on Bills, § 84.

77. See Earle v. Reed, 10 Metc. (Mass.) 387; Du Bois v. Wheddon, 4 McCord, 221 (1827); Haines' Admr. v. Tannant, 2 Hill (S. C.), 400 (1834). See Edwards on Bills, 65; Kyd on Bills, 29; Gregory v. Lee, 64 Conn. 407, 30 Atl. 53; Hyman v. Kain, 3 Jones L. (N. C.) 111.

78. See chapter XXI, on Transfer by Indorsement, § 675.

been necessaries, and upon showing their value.[79] The distinction taken in some cases,[80] that the payee may sue the infant as maker, but that an indorsee cannot do so, seems extremely technical and unreasonable. If not absolutely void as to the payee, we cannot perceive why it should be so held as to an indorsee, who, while he could not stand upon a better footing than the indorser as against the infant, certainly should not be placed upon a worse; for the payee must generally have a better opportunity to know the fact of infancy than he. Nor can we see that holding the original consideration to be open to proof, upon infancy being shown, would damage the character of a negotiable note more than declaring it utterly void.

Justice seems to require that the mere negotiable form of the paper should not destroy all validity; and although it could not be said to be negotiable in the full sense of that term—protection to the infant--which is the sole object of the law—requires no more than that his infancy should shield him from all liability beyond the actual value of the necessaries furnished; and justice to the holder demands that at least that should be given him.[81] The Scotch law is entirely in harmony with these views.[82]

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79. This doctrine is intimated in Du Bois v. Wheddon, 4 McCord, 221, by Chancellor Nott, who said: "I see no reason why he (an infant) may not be bound by a bond or a bill of exchange. It is not true that no inquiry can be made into the consideration. The statutes against usury and gaming are every day set off as defenses to actions on bills of exchange and negotiable notes, even in the hands of innocent indorsees." In Bradley v. Pratt, 23 Vt. 378, Redfield, J., favors this view, but says it could not probably be recognized "without too great an infringement of the rules of law in regard to negotiable paper while current."

80. Earle v. Reed, 10 Metc. (Mass.) 387.

81. In a note to Byles on Bills [*59], 148, note 1, the learned American editor, Judge Sharswood, says: "A note may be valid as such, though not negotiable; in other words, though it may be so circumstanced as to let in all inquiries as to consideration in the hands even of a *bona fide* holder. So here, on proof that the maker is an infant, the negotiability of the note is at an end, but it does not cease to be a note. It may be sued on by the holder in his own name. He stands in the shoes of the original payee, and can recover whatever he would have been entitled to recover. If the note is voidable, then without ratification it cannot be sued on at all. The holder, at most, must be subrogated to the rights of the original payee, in an action against the infant in the name of the payee, on a declaration founded on the original consideration. It is evident that the Kentucky case (Beeler v. Young, 1 Bibb, 520) can only be supported on this footing; and, contrary to its own syllabus, it really affirms that the note is valid as a note, though it is not a negotiable note."

82. Thompson on Bills (Wilson's ed.).

§ 227. **Infant as payee and indorser.**—An infant may undoubtedly be the payee of a bill or note, and may sue upon and enforce it, since it cannot be but for his benefit if the consideration thereof does not move from himself, but from some third person, or if it be for a debt justly due to him.[83] But whether or not an infant can personally receive payment is a different question. As a general rule, payment should be made to his guardian, and if it be made to the infant personally, and be thereby dissipated and lost, the payer would not be discharged.[84] An infant may also indorse a bill or note made payable to him or order, so far at least as to enable the indorsee to recover against the drawer, acceptor, or maker, who, by undertaking to pay to him or to his order, are estopped to deny his capacity to order payment to be made to the indorsee.[85] And to this extent the infant's indorsement would be valid, even if made by his authorized agent or attorney.[86] "It would be absurd," it has been said by Parker, C. J., "to allow one who has made a promise to pay to one who is an infant, or his order, to refuse to pay the money to one to whom the infant had ordered it to be paid, in direct violation of his promise."[87] And in respect to the drawer of a bill payable to an infant or order, Lord Mansfield said: "The drawer says, 'let anybody trust the payee on my credit.'"[88]

§ 228. **Rights and liabilities of antecedent parties.**—The infant cannot, of course, be bound by his indorsement to pay the bill or note, and Story says: "The infant may indeed avoid it, and intercept the payment to the indorsee, or by giving notice to the antecedent parties of his avoidance, furnish to them a valid defense

83. Warwick v. Bruce, 2 Maule & S. 205; Holladay v. Atkinson, 5 B. & C. 501; Teed v. Elworth, 14 East, 210; Story on Notes, § 79; Story on Bills, § 85; Byles on Bills (Sharswood's ed.) [*60], 150; Chitty on Bills [*20], 28; Castor v. Peterson, 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854, citing text. See *ante*, § 93.

84. Phillips v. Paget, 2 Ark. 80.

85. Nightingale v. Withington, 15 Mass. 272; Frasier v. Massey, 14 Ind. 352; Hardy v. Waters, 38 Me. 450; Grey v. Coopers, 3 Doug. 65 (1782); Taylor v. Croker, 4 Esp. 187 (1803); Jones v. Darch, 4 Price, 300 (1817); Drayton v. Dale, 2 B. & C. 293, 2 Dowl. & R. 534 (1823); Chitty on Bills [*20], 26–29; Story on Notes, § 80. Story on Bills, § 85; Thompson on Bills, 134, 135; Byles (Sharswood's ed.) [*60], 149; Edwards, 246; Castor v. Peterson, 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854, citing text.

86. Hardy v. Waters, 38 Me. 450.

87. Nightingale v. Withington, 15 Mass. 272.

88. Grey v. Coopers, 3 Doug. 65.

against the claim of the indorsee. But until he does so avoid it, the indorsement is to be deemed, in respect to such antecedent parties, as a good and valid transfer."[89] But whatever might be the infant's right to rescind his contract as against those deriving title through him, it is clear that when they have parted with value for the instrument, prior parties who, by making it payable to the infant, have warranted his capacity to indorse it, cannot escape responsibility for such warranty. And they may consequently be compelled to pay the bill or note twice.[90] The case would be different in respect to an indorsement by an infant himself an indorsee and not the payee.[91]

§ 229. Infant's indorsement voidable only.—An infant's indorsement is voidable, not absolutely void.[92] And it has been thought that where he receives a full consideration for the transfer of property, such as a negotiable bill or note, and makes a manual delivery of it, his right to rescind or avoid the contract is suspended until he becomes of age.[93] And then he is not allowed to disaffirm the contract unless he returns the consideration paid to him.[94] We should say that he might disaffirm the contract and return the consideration at any time, provided it was not unreasonably delayed after he became of age,[95] unless in case of emancipation, or engagement in independent business to an extent which would afford the party dealing with him good reason to believe him legally capable of contracting.[96]

§ 230. Ratification by adult of bills and notes executed when an

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89. Story on Notes, § 80.

90. Smith v. Marsack, 6 C. B. 488, 18 L. J. C. P. 65 (1848). See *post*, § 242, and *ante*, § 90; Taylor v. Croker, 4 Esp. 187.

91. See Story on Bills (Bennett's ed.), § 85, p. 98, note 2.

92. Goodsell v. Myers, 3 Wend. 479; Edwards on Bills, 245. *Contra*, see 10 Johns. 33.

93. Roof v. Stafford, 7 Cow. 179, 9 Cow. 626. On the last hearing of this case it was held that the infant might avoid a sale of chattels while an infant, but not a sale of land.

94. Medbury v. Watrous, 7 Hill, 110. The same general rule as to the necessity of restoring the consideration and placing the opposite party in *statu quo* applies to the disability of insanity, if the party so dealing with such insane person did not know of the insanity and acted in a *bona fide* way. See Voris v. Harshbarger, 22 Ind. App. 555.

95. See Bool v. Mix, 17 Wend. 119; 2 Kent Com. [*237], notes; Schouler on Domestic Relations, 546, as to personal property.

96. Seeley v. Seeley-Howe-Le Van Co., 128 Iowa, 294, 103 N. W. 961.

infant.—The bill of exchange or promissory note of an infant is not absolutely void, but voidable only at his election.[97] And if, after reaching full age, the then adult ratify and confirm his bill or note executed while he was an infant, whether it were framed so as to be negotiable or not, he will be bound to pay the instrument according to its terms. For by ratification the adult validates the instrument in all respects, and it becomes the same as if it had been executed by an adult.[98] The effect of the ratification, as stated by Shaw, C. J., is "to ratify and confirm the contract, and give it the same legal effect as if the promisor had been of legal capacity to make the note when it was made."[99] And consequently the bill or note may be sued upon, without any allegation of ratification—that being necessary to appear only in rebuttal of the plea of infancy, when pleaded.[1] It was held in England at one time, and also in the United States, that if an action be brought on a contract made by an infant, a ratification proved to have been made after action brought would not suffice;[2] but this view has been sharply criticised, and is not tenable.[3] The ratification inures to the benefit of every subsequent holder.[4]

§ 231. What amounts to ratification.—Unless a written ratifica-

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97. Cole v. Pennell, 2 Rand. 174; Wamsley v. Lindenberger, 2 Rand. 479; Williams v. Moore, 11 M. & W. 266, Parke, B., saying: "The promise of an infant is not *void* in any case, unless the infant chooses to plead his infancy." Byles (Sharswood's ed.) [*58], 145; Edwards on Bills, 65, 66.

98. *Ibid.*, Hunt v. Massey, 5 B. & Ad. 902. In this case the drawer sued the acceptor of a bill. It appeared that the acceptor was an infant when he accepted, but had ratified the bill after he reached full age. Taunton, J., said: "Where a voidable contract is made by a party under age, and ratified after he has attained full age, is it not usual to declare on the original promise? The first promise here was voidable only. As soon as it was ratified, it became binding *ab initio*." West v. Penny, 16 Ala. 186; Edgerly v. Shaw, 5 Fost. 514; Lawson v. Lovejoy, 8 Greenl. 405; Reed v. Batchelder, 1 Metc. (Mass.) 559; Cheshire v. Barrett, 4 McCord, 241; Little v. Duncan, 9 Rich. 55; Goodsell v. Myers, 3 Wend. 479; King v. Jamison, 66 Mo. 498. Within the meaning of section 3423, Rev. St. 1899, to ratify the nonenforceable contract of an infant by a payment after he becomes of age, the payment must be a voluntary one, made on a debt which the payor at the time recognizes and acknowledges as a subsisting debt against him. Snyder v. Gericke, 101 Mo. App. 647, 74 S. W. 377.

99. Reed v. Batchelder, 1 Metc. (Mass.) 559.

1. See preceding notes, this section.

2. Thornton v. Illingworth, 2 B. & C. 824; Byles (Sharswood's ed.).

3. 1 Parsons on Notes and Bills, 72; Byles (Sharswood's ed.) [*58], 145, note 1.

4. Reed v. Batchelder, 1 Metc. (Mass.) 559.

tion be required by statute, a verbal ratification will be effectual.[5] As to what words will amount to a ratification, a mere recognition that the debt existed, or contract was made, is not sufficient.[6] No peculiar form of words is requisite, but there must be a direct and explicit recognition of the contract, and words expressing or necessarily implying a promise to fulfill it. Thus, if the adult says, "I have not the money now, but when I return from my voyage I will settle with you," or, "I owe you, and will pay you when I return," it is sufficient.[7] So if he promises to "remit in a short time," [8] or says, "all that is justly your due shall be paid," [9] or declares his intention to pay the note, and authorizes an agent to pay it, though nothing is done.[10] And the words, "I will pay the note as soon as I can make it, but not this year. I understand the holder is about to sue it, but she had better not," have been held enough.[11]

§ **232. Effect of admissions by adult.**—An admission by the adult, and the declaration that the party would get his pay, but accompanied by a refusal to give a note, would not amount to a ratification.[12] Nor would an admission, accompanied by a promise to endeavor "to get my brother bound with me." [13] Nor would the language, "I consider your claim worthy my attention, but not my first attention," [14] "I will have to pay, I suppose, but I shall do so at my convenience." [15] Nor would a direction in the adult's will, that his just debts be paid, apply to debts contracted in infancy.[16]

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5. Martin v. Mayo, 10 Mass. 137; West v. Penny, 16 Ala. 186; Reed v. Boshears, 4 Sneed, 118.

6. Thrupp v. Fielder, 2 Esp. 628; Robbins v. Eaton, 10 N. H. 561; Benham v. Bishop, 9 Conn. 330; Whitney v. Dutch, 14 Mass. 460; Hale v. Gerrish, 8 N. H. 374; Chitty on Bills [*20], 27; Bresee v. Stanly, 119 N. C. 278, 25 S. E. 870. The defendant in this case testified that "I said it was a just debt and I would pay it, if I ever got so that I could without inconvenience to myself. Mr. Perry, plaintiff's agent, then asked me if I could not fix some time at which I would pay the note. I replied that I would not promise to pay the note in one year, nor in ten years, nor at any time."

7. Whitney v. Dutch, 14 Mass. 460.

8. Hartley v. Wharton, 11 Ad. & El. 934.

9. Wright v. Steele, 2 N. H. 51.

10. Orvis v. Kimball, 3 N. H. 314.

11. Bobo v. Hansel, 2 Bailey, 114, but query; 1 Parsons on Notes and Bills, 74.

12. Hale v. Gerrish, 8 N. H. 374.

13. Ford v. Phillips, 1 Pick. 202.

14. Wilcox v. Roath, 12 Conn. 550.

15 Dunlap v. Hale, 2 Jones (N. C.), 381.

16. Smith v. Mayo, 9 Mass. 62.

§ 233. Promise must be direct, and not to third party.—The promise of the adult must be made to the party with whom he contracted, or his authorized agent, in order to amount to ratification; and if made to a third party, it will be insufficient.[17] "It results from the fact of the original contract not being binding on the infant, that the new promise must possess all the ingredients of a complete agreement, to enable the plaintiff to recover against the infant. Hence, as no agreement is complete until the minds of the contracting parties meet, the new promise, to be binding on the infant, must be made to the creditor in person, or to his agent. The new promise creates a new contract; and the old debt supplies the consideration." [18] And if it be coupled with a condition, as to pay "when able," the plaintiff must show the happening of the contingency, but need not show that payment may be made without inconvenience.[19] If the promise be shown to have depended on any other condition, its fulfilment must be proven.[20]

§ 234. Effect of part payment.—Mere part payment does not amount to ratification by the adult.[21] Nor does a submission to arbitration, unless it proceed to a decision that the adult must pay.[22] But expressions of intention to abide by a former award, or accepting its benefits, would suffice.[23] And the infant's conduct may be such as to amount to ratification. Mere silence and failure to disaffirm will not in general be sufficient alone; [24] but connected with circumstances may become so. Thus, if the adult keep property purchased in infancy, after being requested to return it if he did not intend to keep it, it was held to be a ratification.[25] And where an infant bought a yoke of oxen, for which he gave his note, and after his majority sold

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17. Goodsell v. Myers, 3 Wend. 479; Bigelow v. Grannis, 2 Hill, 150; Hoit v. Underhill, 9 N. H. 439; Reed v. Boshears, 4 Sneed, 118.

18. Hodges v. Hunt, 22 Barb. 150, Paige, J.

19. Thompson v. Lay, 4 Pick. 48; Cole v. Saxby, 3 Esp. 159; Everson v. Carpenter, 17 Wend. 419.

20. *Ibid.*; Procto v. Sears, 4 Allen, 95; Chandler v. Glover, 32 Pa. St. 509.

21. Smith v. Mayo, 9 Mass. 62; Robbins v. Eaton, 10 N. H. 561; Hinely v. Margaritz, 3 Barr. 428.

22. Benham v. Bishop, 9 Conn. 330; 1 Parsons on Notes and Bills, 75, 76.

23. Barnaby v. Barnaby, 1 Pick. 221; Jones v. Phœnix Bank, 8 N. Y. 228.

24. Green v. Green, 69 N. Y. 553, where there was failure to disaffirm for three years. But see Davis v. Dudley, 70 Me. 236, where nine years elapsed.

25. Aldrich v. Grimes, 10 N. H. 194.

them and used the money, the like decision was rendered.[26] And there are other decisions to like effect, where the adult has retained land purchased in infancy,[27] or personal property,[28] or taken a deed to property.[29] If the adult refuse to return the consideration when notified to do so, and still has it in his power, it seems clear that he should be bound; but mere retention of the consideration, without such notice to return, would not alone suffice,[30] and if it had been disposed of before the infant reached his majority, the failure to return it would be no ratification.[31]

§ 235. Adult's knowledge of invalidity of contract not necessary to valid ratification.—Ignorance of the law excuses no one, and, therefore, it is not necessary to a valid ratification of a contract made by an infant, that the adult ratifying should know the fact that his infancy rendered his contract invalid,[32] and it matters not that he supposed he was already bound.[33] A different view has been taken in some cases,[34] but the doctrine of the text is sustained both by decisions of courts and opinions of distinguished juridical writers.[35] It will, at least, be presumed that an adult, ratifying a contract entered into in infancy knew the fact that he was not legally bound.[36]

§ 236. Written ratifications.—In England and some of the United States, ratification must be in writing. In 1828, Parliament enacted the statute of 9 George IV., c. 14, commonly called Lord Tenterden's act, whereby it is provided that "no action shall be maintained whereby to charge any person, upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." And

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26. Lawson v. Lovejoy, 8 Greenl. 405.

27. Armfield v. Tate, 7 Ired. 258.

28 Cheshire v. Barrett, 4 McCord, 241; Thomasson v. Boyd, 13 Ala. 419.

29. Montgomery v. Whitbeck, 23 Minn. 173.

30. Benham v. Bishop, 9 Conn. 330.

31. Robbins v. Eaton, 10 N. H. 506.

32. Morse v. Wheeler, 4 Allen, 570.

33. King v. Jamison, 66 Mo. 424.

34. Harmer v. Killing, 5 Esp. 102; Reed v. Boshears, 4 Sneed, 118; Hinely v. Margaritz, 3 Barr, 428; Curtin v. Patten, 11 Serg. & R. 305.

35. Schouler on Domestic Relations, 583.

36. Taft v. Sergeant, 18 Barb. 322.

similar statutes have been enacted in most of the United States.[37] In England, the Court of Exchequer held that the statute made a distinction between new promises and ratification, and that "ratification," as therein used, would go so far as to comprehend such a ratification as would make a person liable as principal for an act done by another in his name.[38] But this view has been criticised.[39] And in view of Martin, B., in a later case, in the same court (in which, however, the judges were divided in opinion), defining ratification to be a "consent by a person, after he becomes of full age, to be liable for a debt contracted during infancy, expressed to the effect that he is willing to affirm it and treat it as valid," [40] seems to be a clear and correct conception of the subject.

§ **237.** If an infant, after he becomes of age, retire from a firm, of which he has been a member, he must give notice of the fact; otherwise he will be bound by its contracts made after his majority.[41] But the mere fact that he continues in a firm, after his majority, is no ratification of contracts made by the firm while he was an infant.[42]

§ **238. Note of infant and adult.**—If an infant, together with an adult, make a joint promissory note, it has been held, in England, that the payee may bring his action upon it against the adult, without making the infant a party.[43] But in some American cases a different view is taken, the infant's undertaking being voidable, not absolutely void; [44] and this view is specially applicable when the note is not negotiable.[45]

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37. Code of Virginia (ed. 1873), chap. 140, p. 985. See Brown on Statute of Frauds, and Throop on Verbal Agreements.

38. 1 Parsons on Notes and Bills, 77; Schouler on Domestic Relations, 576.

39. Harris v. Wall, 1 Exch. 122.

40. Mawson v. Blane, 10 Exch. 206.

41. Goode v. Harrison, 5 B. & Ald. 147.

42. Crabtree v. May, 1 B. Mon. 289.

43. Burgess v. Merrill, 4 Taunt. 468; Chandler v. Parkes, 3 Esp. 76; Jaffray v. Frebain, 5 Esp. 47; Edwards on Bills, 67, note; Byles [*59], 149. In Taylor v. Dansby, 42 Mich. 84, held that adult comaker with infant might be treated as sole maker, suit against the infant having been discontinued.

44. Slocum v. Hooker, 12 Barb. 563, 13 Barb. 536.

45. Cole v. Pennell, 2 Rand. 174; Wamsley v. Lindenberger, 2 Rand. 478, Green, J., saying: "In England, a note of hand given by an infant, even for necessaries, is perhaps void, because, having the effect of a bill of exchange by statute, he might be precluded from contesting the consideration against a third person. But no such objection exists as to the note of hand given in this case."

SECTION IV

MARRIED WOMEN

§ 239. By the common law of England, and of many of the States of the United States, in which it has been adopted and preserved, the wife merges her personality by marriage in the person of her husband. They two become in law one person, in so far as affects the business concerns of life. That person is the husband, and the wife can make no contract binding upon herself, or upon her husband, without his consent.[46] This rule of the common law, which grew out of the feudal system, has been modified or abolished by statute in some of the States, and the tendency of legislation is to enlarge and enfranchise the capacity of married women, especially in those States which are the seats of great commercial centers. Experiments upon social institutions are the order of the day, but innovations of the kind are, to say the least, of very doubtful policy.

§ 240. Incapacity of married woman to contract at common law.—Wherever the common law prevails a married woman cannot bind herself as the drawer, acceptor, maker, or indorser of a negotiable instrument, and such instruments signed by her (unless as agent for another) are absolutely void.[47] And even a promise made by her after her husband's death to pay a bill or note which she executed during his lifetime will not bind her unless upon a new and good consideration.[48]

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46. 1 Bl. Com. 442; 2 Kent Com. 129.

47. Mason v. Morgan, 2 Ad. & El. 30; Howe v. Wildes, 34 Me. 566; Chouteau v. Merry, 3 Mo. 254; Van Steenburgh v. Hoffman, 15 Barb. 28; Chitty on Bills (13th Am. ed.) [*20], 28; Waterbury v. Andrews, 67 Mich. 282; Kohn v. Collison, 1 Mary. 109, 27 Atl. 834; Petingale v. Barker, 21 D. C. 156; Westervelt, Receiver, v. Baker, 56 Nebr. 63, 76 N. W. 440; Smith v. Bond, 56 Nebr. 529, 76 N. W. 1062; Harper v. O'Neil, 194 Pa. St. 141, 44 Atl. 1065. A married woman's notes under the Constitution and laws of Florida, are void, and afford no basis for a common-law suit. (Virginia-Carolina Chemical Co. v. Fisher, 58 Fla. 377, 50 Sou. 504), unless the married woman shall have been made a free dealer. First Nat. Bank v. Hvischkwitz, 46 Fla. 588, 35 So. 22.

48. Lloyd v. Lee, 1 Stra. 94; Chitty, Jr., 242 (1717); Meyer v. Haworth, 8 Ad. & El. 467; Littlefield v. Spee, 2 B. & Ad. 811; Eastwood v. Kenyon, 11 Ad. & El. 438; Vance v. Wells, 6 Ala. 737, 8 Ala. 399; Watkins v. Halstead, 2 Sandf. 311; Schouler on Domestic Relations, 74; Byles on Bills (Sharswood's ed.) [*63], 153. A void note of a married woman cannot be ratified, and a renewal of such

Under Negotiable Instrument statute.—The section of the statute declaring that every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value, gives no validity to the contract of a married woman made by way of surety or promise to pay the debt of another person.[49]

§ 241. Contracts between husband and wife.—The wife's identity is so completely merged in the husband's that she can no more contract with him than with a stranger.[50] Therefore the drawing or indorsement of a bill or note by a husband to his wife is void, and she cannot sue upon it either in his lifetime,[51] or against his executor after his decease.[52] But the husband may indorse it to her in order that she may be the mere conduit, and indorse it over to another party, the whole transaction being regarded as the husband's.[53] So the bill or note of a married woman payable to her husband is void, but if he

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a note after she has become discovert, is of no binding force. Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 7 L. R. A. (N. S.) 1053. And *see post* p. 249.

49. Appendix, sec. 24. People's Nat. Bank v. Schepflin, 73 N. J. L. 29, 62 Atl. 333.

50. National Bank v. Brewster, 49 N. J. L. 231.

51. Gay v. Kingsley, 11 Allen, 345; Ellsworth v. Hopkins, 58 Vt. 705; Seyfert v. Edison, 45 N. J. L. 393. Held otherwise in Nebraska under statute. May v. May, 9 Nebr. 16; Leahy v. Leahy, 97 Ky. 59. *Contra*, Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189. The doctrine of the text was applied in Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515, in a case in which the notes were made payable by a husband to his son and by the son indorsed to the wife. But where a note was given by a man to a woman for money loaned, the subsequent marriage of the maker and payee did not extinguish it or render it void. McKeown v. Lacey, 200 Mass. 437, 86 N. E. 799, 21 L. R. A. (N. S.) 683. It was also so held in Spencer v. Stockwell, 76 Vt. 176, 56 Atl. 661, under a statute which has abrogated the doctrine of the common law by which all the personal property of the wife became the husband's upon marriage. Where a husband became the owner of a note without being a party to it, and delivered the note to his wife as security for a debt owing by him to her for more than the amount of the note, and the debt has not been paid, the wife is the lawful holder of the note and may recover thereon. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285.

52. Jackson v. Parks, 10 Cush. 550; Sweat v. Hall, 8 Vt. 187. But held in Tennessee that in equity the wife, then widowed, might enforce a note of her late husband when given during coverture for her moneys collected by him. McCampbell v. McCampbell, 2 Lea, 661. And also held in the same State, that a note from husband to wife, executed upon a valid consideration, will be enforced in equity against the husband, or his estate, as a declaration of trust in favor of the wife. Templeton v. Brown, 86 Tenn. 51.

53. Slawson v. Loring, 5 Allen, 340.

indorse it he is liable upon his indorsement,[54] as is, also, the wife upon her indorsement of the husband's note, upon the ground that an indorser warrants the capacity of all prior parties to contract, and cannot deny the same for the purpose of escaping his or her liability.[55] And if a note be given by a husband to his wife for money advanced by her out of her separate estate, it constitutes a declaration of trust in favor of the wife.[56]

Under Negotiable Instrument statute.—Under the statutory provisions as to the effect of negotiating or indorsing a note, it has been held that a wife, who indorsed a note made by a partnership of which her husband was the manager and which he had indorsed, became an accommodation indorser of the note, and, by the above statute, warranted to the indorsee, as a holder in due course, that the instrument was genuine.[57]

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54. Haly v. Lane, 2 Atk. 181; Kenworthy v. Sawyer, 125 Mass. 29; Wyman v. Whitehouse, 80 Me. 257; Herron v. Frost, 9 Mont. 308, 23 Pac. 469; Kohn v. Collison, 1 Mary. 109, 27 Atl. 831. A married woman is not liable on a note given by her in consideration of a previous debt due to the payee from the husband of the maker. Burnham-Hanna-Munger Dry Goods Co. v. Carter, 52 Tex. Civ. App. 294, 113 S. W. 782. The fact that a negotiable note of the wife is made payable to the husband does not of itself import invalidity, because apparently made without the approval of the superior court of the wife's domicile. Where such note does not involve a sale of the separate estate of the wife to the husband, it is valid without such approval. Farmers' & Traders' Bank v. Eubanks, 2 Ga. App. 839, 59 S. E. 193. A married woman may voluntarily, upon her own responsibility, and in good faith borrow money for the purpose of paying a debt of her husband and give her notes therefor, and such a contract will be binding upon her although the lender may know, at the time it is made, that she is borrowing it for this purpose, if he is not the husband's creditor who is to be thus paid, and is no party to any arrangement or scheme between the husband and wife of which the borrowing of the money by her for such purpose is the outcome. Rood v. Wright, 124 Ga. 849, 53 S. E. 390.

55. National Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444; Kenworthy v. Sawyer, 125 Mass. 29; Binney v. Globe Nat. Bank (Mass.), 6 Law. Rep. Annot. 381; Sherrod v. Dixon, 120 N. C. 60, 26 S. E. 770. Held, that the liability of a married woman, who signs a note with her husband and mortgages her land to secure it, is not personal, but is limited to the value of the land so mortgaged. Witkowski v. Maxwell & Peal, 69 Miss. 56, 10 So. 453, text cited.

56. Murray v. Glasse, 23 L. J. Ch. 126.

57. Appendix, secs. 65, 66. Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781, wherein the court said that before the enactment of the statute she would have been bound in the same way; that a promissory note made by a husband to his wife is void, and cannot be enforced against the husband by any subsequent holder of it, but if the wife indorses it to a holder in due course, she is bound by her contract of indorsement, and may be compelled to pay it.

§ 242. Married woman as payee and indorser.—If a bill or note be made payable to a single woman, and she afterwards marries, it becomes the property of her husband; and if made to her after marriage, it is the property of her husband. For two reasons, therefore, a married woman, who is the payee of a negotiable instrument, cannot transfer a perfect legal title to it, or bind herself by indorsing it; first, because she has no capacity to contract; and, second, because the instrument is her husband's.[58] But still, although the husband might recover the instrument which has been transferred by his wife, in an action of trover against the holder, the drawer, and acceptor of a bill and the maker of a note, who have bound themselves to pay to the payee or order, are estopped, when that order is made, to deny its sufficiency. It does not lie in their mouths to declare the effect of their own engagement to be different from its terms; and the holder, under the indorsement of a payee, who is a married woman, may recover against them.[59] And if there be an indorser, after the

58. Cotes v. Davis, 1 Campb. 485 (1808); Barlow v. Bishop, 3 Esp. 266, 1 East, 432 (1801); Connor v. Martin, 1 Stra. 516; Rawlinson v. Stone, 5 Wilson, 5; Evans v. Secrest, 3 Ind. 545; Savage v. King, 17 Me. 301; Shuttleworth v. Noyes, 8 Mass. 229. Under constitutional and statutory provisions, a married woman can make a valid transfer to another of a note belonging to her without the written consent of her husband. Vann v. Edwards, 135 N. C. 661, 47 S. E. 784, 67 L. R. A. 461. Where a husband causes a note or deed of trust to be executed in her favor, it becomes her separate property, and cannot be reduced to possession by the husband, or the title thereto passed to a third person by the husband, except by her written consent, as provided for by statute. Case v. Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. Rep. 633.

59. In Smith v. Marsack, 6 C. B. 486, Wilde, C. J., said: "In support of a contrary doctrine the cases of Connor v. Martin, 1 Stra. 516; Barlow v. Bishop, 1 East, 432, and Prince v. Brunatte, 1 Bing. N. C. 435, 1 Scott, 342, were cited, on the argument, by the counsel for the defendant. In Connor v. Martin as reported in Strange, the plaintiff declared on a note made to a *feme covert*, and indorsed by her to him; and, on argument, judgment was given for the defendant—the right being in point of law in the husband, and the wife having no power to dispose of it. But this case was cited by Dennison, J., in Rawlinson v. Stone, 3 Wils. 1, 5, from a note taken by himself in court; and it appears from that learned judge's statement, that the promissory note in question had been given to the wife before marriage. Barlow v. Bishop is certainly a direct authority for the position, that if a note is drawn payable to a woman or order, and her indorsee sues the maker, he may set up as a defense that she was a married woman, though he knew her to be such at the time he made the note. But it was observed by Lord Abinger, in Pitt v. Chappelow, 8 M. & W. 616, that in Barlow v. Bishop, the plaintiff must be taken to have known the fact of the husband's property in the bill, and, therefore, could not take an assignment of it from the wife. Indeed, it appears from the report of the case at *nisi prius*, in Espinasse, 3 Esp. 266, that the

married woman, he cannot dispute her capacity, as his indorsement warrants it.[60] But other parties to the instrument, not being estopped by their relation to it, may show that one—not the payee—who has indorsed it, is a married woman. These views clearly apply where the paper has been executed to the woman after her marriage; but if made to her before, disability subsequently created might be pleaded by any party.[61]

§ 243. Effect of wife's living separate from husband.—The mere fact that the wife is living separate and apart from her husband,[62] or that she has eloped from her husband and is living in

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wife had given a previous note for the money in her own name, and that the note in question was given in consequence of such former note not being negotiable, which appears to favor Lord Abinger's supposition, that the plaintiff must have known of her coverture before the note was indorsed to him. In Prince v. Brunatte, it was certainly assumed by the court, as well as by the counsel on both sides, that such a plea as the present would be a good answer to the action; and the same observation arises with respect to the case of Cotes v. Davies, 1 Campb. 485, and that of Prestwick v. Marshall, 7 Bing. 565, 5 Moore & P. 513. But in none of these cases does it appear that the point now under consideration was ever made, viz., that the case falls within the general principle—which is stated by Bayley, J., in his judgment, in Drayton v. Dale, 2 B. & C. 293, as applicable to all negotiable securities—that a person shall not dispute the power of another to indorse an instrument when he asserts, by the instrument, that the other has such power. And we can discover no reason why this principle should not be applicable; and if it is, it appears to us to govern the present case, and to prove that the plea in question is bad. It need scarcely be added that, in so deciding, we do not mean at all to impugn the proposition that, if a bill or note is made payable to the order of a married woman, the property in it will pass by the indorsement of the husband, or he may sue on it, either joining his wife as a party to the action, or in his own name, at his option. And, consequently, it cannot be denied that the defendant may possibly be compelled to pay the bill in question twice. But this is a consequence which follows from his own act of accrediting the capacity of a woman to indorse, by accepting a bill payable to her order, who in truth was incapable." Castor v. Peterson, 2 Wash. 204, 26 Pac. 223, 26 Am. St. Rep. 854, citing text; Shirk v. North, 138 Ind. 210, 37 N. E. 590. When a husband executed to his wife a note for money received by her as an heir at law, he made the note her separate property, and thereby deprived himself of any right to, or interest in, either the money or note, and at the same time conferred upon her the power to dispose of the note in any manner she might deem proper, and this is so, although he might have appropriated the money as part of his wife's general estate. Bennett v. Bennett, 134 Ky. 444, 120 S. W. 372.

60. Prescott Bank v. Caverly, 7 Gray, 217.

61. See Smith v. Marsack, 6 C. B. 486.

62. Marshall v. Rutton, 8 T. R. 545; Hatchett v. Baddeley, 2 W. Bl. 1079;

adultery with another person,[63] or that she has a separate maintenance secured to her,[64] or that she has been divorced from her husband's bed and board (*a mensa et thoro*),[65] will not at common law restore to the married woman her right to contract. In Massachusetts, a different rule prevails when there has been a divorce from bed and board, and the married woman may then contract.[66] And now in that State, as in many others, she may make contracts, and sue and be sued, as if she were a *feme sole*.[67] Everywhere a divorce from the bonds of matrimony (*a vinculo matrimonii*) restores the woman to full competency.[68] The fact that a married woman represents herself to be unmarried does not alter her disability.[69]

§ **244. When married woman is bound by her contracts.**—There are certain exceptional circumstances under which the contracts of a married woman may be binding upon her, or upon her husband, and we shall consider them under these heads: (1) When husband is an alien or civilly dead; (2) When wife has separate estate; (3) When wife is sole trader by special custom or statute; (4) When wife purchases necessaries; (5) When husband adopts her name as binding him; (6) When wife is agent of husband.

§ **245. And in the first place, when the husband is an alien enemy,** the wife may contract, for it may be necessary to her support and maintenance that she may sue and be sued, and her husband is legally barred from coming to or communicating with her.[70] So if a married woman be a resident in any country, and her husband is an alien who has never been in that country, it has been held that she

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Lean v. Schultz, 2 W. Bl. 1195; Hyde v. Price, 3 Ves. Jr. 443; Story on Bills, § 90; Chitty on Bills (13th Am. ed.) [*21], 28.

63. Ibid.

64. Ibid.

65. Fairthorne v. Blaquire, 6 Maule & S. 73; Lewis v. Lee, 3 B. & C. 291; Chitty on Bills (13th Am. ed.) [*21], 28; Byles (Sharswood's ed.) [*62], 152. In Scotland it is otherwise. Thompson on Bills, 138; and in England as it seems now by statute, 24 & 25 Vict., chap. 86, § 6.

66. Dean v. Richmond, 5 Pick. 461. See also 2 Kent Com. 136.

67. Kenworthy v. Sawyer, 125 Mass. 28, in which case wife was held bound as accommodation indorser of a firm in which her husband was a partner.

68. Chamberlaine v. Hewson, 5 Mod. 71; Chitty on Bills [*21], 28; Story on Bills, § 90; 1 Parsons on Notes and Bills, 78.

69. Cannam v. Farmer, 3 Exch. 698; Lowell v. Daniels, 2 Gray, 161.

70. Derry v. Duchess of Mazarine, 1 Ld. Raym. 147; M'Arthur v. Bloom, 2 Duer, 151.

may then contract like a *feme sole*.[71] This would clearly be the case if by the laws of the country of which the husband was a citizen he could not leave without the sovereign's permission, for then there would be a legal barrier between them.[72] But in the case of an alien who has once resided in a country, the *animus revertendi* is to be presumed, and it has been held in England that a woman by birth an alien, and the wife of an alien, cannot be sued as a *feme sole* if her husband has lived in that country, although he has left it and entered the service of a foreign State.[73]

§ 246. Nonresidence of husband not equivalent to alienage.— In Massachusetts it has been held that the residence of the husband in another of the United States is the same as if he were in a State entirely foreign, he being then beyond the jurisdiction of the State courts;[74] and that whenever the husband has never been in the commonwealth, or has gone beyond its limits, deserted his wife, and renounced his marital rights, her ability to contract and sue is restored.[75] But this view, though perhaps salutary, is denied elsewhere,[76] and seems an innovation on the strict rules of the common law.

If the husband has abjured the realm, or if he is "civilly dead," as he is termed, when by judicial sentence he has been banished or transported; or if he has by a religious profession renounced civil life, the disability of the wife is suspended during that period, and her

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71. Kay v. Duchesse de Peinne, 3 Campb. 123; Gregory v. Paul, 15 Mass. 31; Story on Bills, § 91; Chitty (13th Am. ed.) [*22], 29; 1 Parsons on Notes and Bills, 84.

72. M'Arthur v. Bloom, 2 Duer, 151.

73. Kay v. Duchesse de Peinne, 3 Campb. 123.

74. Abbott v. Bailey, 6 Pick. 89.

75. Gregory v. Paul, 15 Mass. 31.

76. Chouteau v. Merry, 3 Mo. 254. In this case the husband abandoned his wife in Missouri, and removed to Arkansas Territory in 1821, and it was held that she was not bound on a note given by her in 1831 in Missouri. The court said: "Coverture operates a legal disability to contract, and all contracts of a *feme covert* are absolutely void. The facts in this case do not bring it within any of the exceptions. The cases cited from the English books are where the husbands abjured the realm, or were foreigners residing abroad. The principles settled in these cases do not apply. If by a removal from one State to another, or a separate residence in different States, the indissoluble connection by which the wife is placed under the power and protection of her husband could be canceled, and the parties thereby relieved of their respective liabilities and disabilities, there would be little need of troubling the legislature or the courts on the subject of divorces."

ability to contract restored.[77] So, if he is imprisoned by judicial sentence.[78] And if the husband has been abroad and unheard of for seven years, he is presumed to be dead, and the wife's ability to contract revives.[79]

§ 247. **Second: When the wife has a separate estate,** it is held in England liable in equity for all of her debts contracted on the faith of it.[80] There, where a married woman borrowed money, promising to repay it out of her separate property, the rents and profits thereof were appropriated to its payment.[81] So, where a married woman gave a note jointly with her husband, and as a security for his debt;[82] where a married woman accepted a bill drawn and indorsed by her daughter;[83] and where a married woman living separately

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77. Hatchett v. Baddeley, 2 W. Bl. 1079; Story on Bills, § 91.

78. *Ex parte* Franks, 7 Bing. 762; Byles on Bills (Sharswood's ed.) [*63], 154; 2 Kent Com. 136.

79. Loring v. Steineman, 1 Metc. (Mass.) 204; Byles (Sharswood's ed.) [*63], 154; Chitty [*22], 29.

80. Byles on Bills (Sharswood's ed.) [*62], 153; Edwards on Bills, 68, 69; Chitty on Bills [*21], 28, 29.

81. Bulfin v. Clarke, 17 Ves. 366.

82. Hulme v. Tenant, 1 Bro. C. C. 16. *Contra*, Wright v. Parvis & Williams Co., 1 Marv. 325, 40 Atl. 1123; Frederick Institute v. Michael, 81 Md. 487, 32 Atl. 189, 340. In this case it was held that "A married woman may become surety on a note executed by her jointly with her husband, and in such case it is not necessary, in order to hold her liable, that the consideration of the contract should inure to her benefit." In Indiana, held, that the mere fact that the wife joins with the husband in a note does not negative the idea that she was a principal with her husband. See Young v. McFadden, 125 Ind. 254; Laster v. Stewart, 89 Ga. 181. But see Newman v. Newman, 152 Mo. 398. Compare Sawtelle v. Muncy, 116 Cal. 435, 48 Pac. 387. See also *post*, under § 249. While a wife cannot legally make a contract of suretyship or assume the debt of her husband, yet where she has given a negotiable note payable to her husband's order and intended to be used as surety for or in payment of his debt, and it has been transferred to a *bona fide* purchaser for value, before maturity, and without notice, it is valid, and binds her. Farmers' & Traders' Bank v. Eubanks, 2 Ga. App. 839, 59 S. E. 193. Where a note was signed first by a married woman and then by her husband as surety, the payee knowing that a married woman could not bind her separate estate as surety, the woman is primarily liable though she may have allowed the husband to use the money borrowed in his own business. Swearingen v. Tyler, 132 Ky. 459, 116 S. W. 331. Where a note was given by a wife and her husband upon representations by the wife that the money was for herself individually and for her separate estate, she is liable on the note. National Lumberman's Bank v. Miller, 131 Mich. 564, 91 N. W. 1024, 100 Am. St. Rep. 623.

83. Bingham v. Noyes, Chitty on Bills [*21], 28.

from her husband accepted a bill, her separate property was held liable.[84]

§ 248. Different State doctrines.—In the United States the authorities on this subject differ. In New York it has been held upon full consideration that it is essential in order to charge the wife's separate property, either (1) That the intention to do so should be declared in the very contract which is the foundation of the charge, or (2) That the consideration should be obtained for the direct benefit of the estate itself,[85] though it is not necessary that the bill, note, or other contract should specify the particular property to be charged.[86] The general rule in this country, however, still seems to be, that the wife's separate property is liable in equity for all debts which she, by implication, or expressly by writing or parol, charges thereon, because it is right that her debts should be paid.[87] And as the doctrine arises

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84. Stewart v. Lord Kirkwall, 3 Mad. Ch. 387.

85. Yale v. Dederer, 22 N. Y. 450, 18 N. Y. 265 (overruling same case in 21 Barb. 286); followed in White v. McNett, 33 N. Y. 371; Ledlie v. Vrooman, 41 Barb. 109; White v. Story, 43 Barb. 124; Barnett v. Lichtenstein, 39 Barb. 194; Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613. In New York it is held that if the married woman borrows money for the express purpose of benefiting her separate estate, her note for the amount is good, though the money be used for another purpose. McVey v. Cantrell, 70 N. Y. 295; Scott v. Otis, 25 Hun, 33. *Contra*, Heugh v. Jones, 32 Pa. St. 432; Sonnemann v. Loeb, 11 App. D. C. 143; Thacker v. Thacker, 125 Ind. 489, 25 N. E. 595; Berridge v. Banks, 125 Ind. 561, 25 N. E. 805; State Nat. Bank v. Smith, 55 Nebr. 54, 75 N. W. 51.

86. Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613.

87. Vandeventer v. Davis, 92 Ark. 604, 123 S. W. 766; Crenshaw v. Collier, 70 Ark. 5, 65 S. W. 709; Lanier v. Olliff, 117 Ga. 397, 43 S. E. 711; Wyatt v. Walton Guano Co., 114 Ga. 375, 40 S. E. 237; Thorton v. Lemon, 114 Ga. 155, 39 S. E. 943; Taylor v. American Freehold Co., 106 Ga. 238, 32 S. E. 153; Major v. Symmes, 19 Ind. 117; Grapengether v. Fejervary, 9 Iowa, 163; Rogers v. Ward, 8 Allen, 387; Frank v. Lilienfeld, 33 Gratt. 394, and cases cited in notes, § 249; Todd v. Lee, 15 Wis. 365; Pentz v. Simeon, 2 Beasley, 232; 2 Story's Eq. Jur., §§ 1398, 1401; 2 Kent Com. 164; Edwards on Bills, 70. And accordingly it has been held in South Carolina that where a married woman gives her note in payment of lumber used in construction of a house on her land, she cannot avoid the payment of the note by a plea that she, as a married woman, had no power to make such contract. See Ferguson v. Harris, 39 S. C. 323, 17 S. E. 782, 39 Am. St. Rep. 731, note. The signing of a promissory note by a married woman does not raise the presumption that she intended thereby to render her separate estate liable for its payment, nor that it was given with reference to her separate property, trade, or business, or upon the faith and credit thereof; and to an action upon such note coverture is a complete defense, unless the plaintiff shall establish by a preponderance of the evidence, that the note was made with reference to, or

entirely out of equity, it seems to us correct, as it is the existence of the intention to charge the separate estate, and not the peculiar mode of expressing it, which creates the equity.[88] At the present day, in New York, contracts of a married woman in relation to her separate estate can be enforced at law or in equity, as the case may be,[89] and the executory contracts of married women are *prima facie* valid.[90] The intent to charge the separate estate may be inferred from circumstances, and a specific agreement is not necessary.[91] But as to

upon the faith and credit of, the wife's separate estate or business, or with an intention on her part to charge her separate estate with its payment. Northwall Co. v. Osgood, 80 Nebr. 764, 115 N. W. 308. Where a husband, in the presence of the wife, and with her express consent, signs her name to a promissory note which she knows is to be delivered to the payee in settlement of an existing indebtedness for which she herself is individually liable, and such note is delivered in cancellation of the indebtedness, the mere fact that she remarked to her husband, at the time of authorizing him to sign the paper, "You may sign my name to the note, but I will have nothing to do with it," the same not being heard by or communicated to the payee, does not relieve her from liability on the note. Wyatt v. Walton Guano Co., 114 Ga. 375, 40 S. E. 237.

88. Owens v. Dickenson, 1 Craig & Ph. 48; Lord Chancellor Cottenham saying: "The separate property of a married woman being a creature of equity, it follows that if she has a power to deal with it, she has the other powers incident to property in general—namely: the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satisfied." Eckman v. Scott *et al.*, 34 Nebr. 817, 52 N. W. 822.

89. Hier v. Staples, 51 N. Y. 136; Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613.

90. Willsey v. Hutchins, 10 Hun, 502. And where representations were made by a married woman in a promissory note secured by a mortgage, that the instruments were given for the benefit of her separate estate, she would be estopped from denying the truthfulness of said representation, in the absence of notice to the holder of the note that said representation was untrue. See White v. Goldsberg, 49 S. C. 530, 27 S. E. 517; Union Stock Yards Nat. Bank v. Coffman, 101 Iowa, 594, 70 N. W. 693.

91. Conlin v. Cantrell, 64 N. Y. 219. See Frank v. Lilienfeld, 33 Gratt. 395. Where a married woman leases a farm in her own name, acquiring the right to its possession and the rents and profits thereof, for which she executes her notes, she is bound by such contract, and the fact that she permitted her son-in-law to occupy the premises who did not, in fact, pay her rent, does not affect her liability. See Crisman v. Leonard, 126 Ind. 202, 25 N. E. 1101. And if a married woman executes a promissory note and mortgage, where she declares the same to be for the benefit of her separate estate, and the maker transfers the same without notice to the contrary and for value before maturity, she is estopped from denying that they were executed for the benefit of her separate estate. See White v. Golds-

note of married woman payable to and indorsed by her husband, it has been held in New York *prima facie* a nullity, and that evidence *aliunde* was necessary to charge her by showing that it was in her separate business or for the benefit of her separate estate.[92]

§ 249. In Virginia, where a married woman had separate estate

berg, 49 S. C. 530, 27 S. E. 517; Schmidt v. Spencer, 87 Mich. 121, 49 N. W. 479; Webb v. Feathers' Estate, 119 Mich. 473, 78 N. W. 550; Vosburg v. Brown, 119 Mich. 697, 78 N. W. 886. It has been held that it is immaterial that the wife intended to give the money to the husband when she had obtained the same on account of the loan. Todd v. Bailey, 58 N. J. L. 10, 32 Atl. 696.

92. Second Nat. Bank v. Miller, 60 N. Y. 639; Saratoga County Bank v. Pruyn, 90 N. Y. 254. But when a married woman executes a promissory note and mortgage wherein she declares the same is for the benefit of her separate estate, and the mortgagee transfers the same without notice to the contrary, and for value before maturity, she is estopped from denying that they were executed for the benefit of her separate estate in foreclosure by the transferee. See White v. Goldsberg, 49 S. C. 530, 27 S. E. 517; Bratton v. Lowry, 39 S. C. 383, 17 S. E. 832. And where a statute declares that "all conveyances, mortgages, and like formal instruments affecting her separate estate, executed by a married woman, shall be effectual to convey or charge her separate estate, whenever the intention so to convey or charge such separate estate, is declared in such conveyances, mortgages, or other instruments of writing" does not include in its terms promissory notes, with no such intention specifically declared therein. See Martin v. Suber, 39 S. C. 525, 18 S. E. 125. The plea that the defendant is a married woman is a personal one and cannot be availed of by a comaker of the note. Carter v. Dickson, 39 S. C. 433, 17 S. E. 996. Following the principle announced in the text it has been held that where a married woman made her promissory note in terms that show it was made with reference to her separate estate, an innocent indorsee for value before maturity has a right to rely upon the statements in the note and the maker is estopped from denying them against such indorsee, unless she proves that he knew them to be untrue. Knowledge by the payee will not affect the indorsee. See Nott v. Thomson, 35 S. C. 461, 14 S. E. 23. But if a married woman who signs a negotiable promissory note apparently has a coprincipal, though in fact she is a surety only, she becomes liable to a *bona fide* purchaser for value who gives the note before its maturity and without notice of the suretyship. Veneable v. Lippold, 102 Ga. 208, 29 S. E. 181. And accordingly it has been held in Georgia, that if a husband and wife execute a joint promissory note as the basis of credit for goods to be furnished the husband, in conducting his business, and the husband "traded out" the note, the husband is liable but the wife is not. Smith v. Hardman, 99 Ga. 381, 27 S. E. 731. But one who takes such a note is chargeable with notice of such facts concerning the real consideration of the paper, and of the wife's true relation thereto as are known to another who, in behalf of the payee and at his instance and request, denies the negotiations leading to the execution and delivery of the note to the latter. See Strickland v. Vance, 99 Ga. 531, 27 S. E. 152, 59 Am. St. Rep. 241; Grand Island Banking Co. v. Wright, 53 Nebr. 574, 74 N. W. 82.

settled upon her with ample powers over it, it was held to be liable for payment of her accommodation indorsement for her husband.[93]

A married woman is held liable where she joins her husband in a note for the payment of his debt and gives a mortgage upon her separate estate to secure the same.[94] And the doctrine obtains in numerous decisions that the mere act of becoming a party to a bill or note implies the intent to make it a charge upon her separate estate.[95] In Massachusetts, where the statute confers upon mar-

93. Frank v. Lilienfeld, 33 Gratt. 394, Burks, J.: "It is necessary that it (the contract of the married woman) be entered into with reference to, and in the credit of, the separate estate. There must be an intention to make the separate estate liable. It need not, however, be express; it may be implied. It is implied when the wife executes a bond, note, or other instrument for the payment of money, either as principal or as surety for another, even for her husband, no undue influence being used." See also Burnett v. Hawpe, 25 Gratt. 481; Darnall v. Smith, 26 Gratt. 878; Garland v. Pamplin, 32 Gratt. 303. In Missouri it is held that a married woman, being like a *feme sole* as to her separate estate, may bind it by a note executed in blank. Morrison v. Thistle, 67 Mo. 596. The Court of Appeals of Maryland construing the statute of that State holds that a married woman is liable to be sued at law only upon such contracts or agreements as she is empowered by statute to make, her common-law disability still continuing as to all other undertakings. And specially construing the Code, art. 45, § 2, which provides that a married woman may be sued at law jointly with her husband upon any note, contract, etc., which she may have executed jointly with him—in an action against husband and wife one count of the declaration set forth a promissory note made by the wife alone, payable to the husband and by him indorsed in blank. Held, that since the liability of the maker of a note is absolute and primary, and that of an indorser contingent and conditional, the note sued on was not evidence of a contract executed by the wife *jointly* with her husband, was not within the statute; and consequently evidence is not admissible to show that a note which on its face is her note alone, was in reality the joint note of the two, since it would make her liability depend in part upon parol testimony, while the statute prescribes a writing. See Harvard Pub. Co. v. Benjamin, 84 Md. 333, 35 Atl. 930, 57 Am. St. Rep. 402; Laster v. Stewart, 89 Ga. 181, 15 S. E. 42. Same as held in Nebraska. Watts v. Gantt *et al.*, 42 Nebr. 869, 61 N. W. 104. It is and was held in Nebraska. McKinney v. Hopwood, 46 Nebr. 871, 65 N. W. 1055.

94. Buffalo Nat. Bank v. Sharpe, 40 Nebr. 123, 58 N. W. 730; Smith v. Spaulding, 40 Nebr. 339, 58 N. W. 952. Where a husband and wife executed notes and secured the same by a mortgage on the wife's real estate, the wife is liable and there can be a foreclosure of the mortgage only for the amount received for her own use and benefit and not for the amount loaned to her husband. Equitable Trust Co. v. Torphy, 37 Ind. App. 220, 76 N. E. 639. See also *ante*, under § 247.

95. Bell v. Kellar, 13 B. Mon. 381; Wicks v. Mitchell, 9 Kan. 80; Metropolitan Bank v. Taylor, 62 Mo. 338; Williams v. Urmston, 35 Ohio St. 296 (overruling Levi v. Earl, 30 Ohio St. 147). *Contra*, Kenton Ins. Co. v. McClelland, 43 Mich. 564; Union Stock Yards Nat. Bank v. Coffman, 101 Iowa, 594; Schmidt v.

ried women the capacity to sell and convey their separate property, enter into contracts, and carry on trade,[96] it has been held that the note of a married woman given in payment for land conveyed to her sole and separate use,[97] or for money borrowed to enable her to pay for farming land of which she holds a title bond to her sole and separate use, is valid.[98] And in North Carolina it is held that a note signed by the husband and wife, binding her separate estate for the payment of the debt, the amount therein having been advanced for the benefit of her separate estate, is sufficient to bind her separate personal estate.[99]

When a married woman charges her separate estate with a debt, all her estate held at the time of trial and judgment is liable, as well as that held when the contract was entered into.[1]

A promise made by a widow to pay a debt contracted during coverture would be void,[2] unless she had a separate estate, in which case it would be valid.[3]

§ **250. Third: When the wife is a sole trader,** by the custom of London she is liable on her contracts in the city courts, and though the husband must be joined in the action for conformity, execution will be against the wife alone.[4] Statutes empowering married women to be sole traders have been passed in some of the States of the United States, and when so empowered they make bills or notes; [5] but, unless

Spencer, 87 Mich. 121, 49 N. W. 479. In Gilbert v. Brown, 123 Ky. 703, 97 S. W. 40, 7 L. R. A. (N. S.) 1053, it was held that a note of a married woman is void, unless it comes within the statutory exception allowing a wife to bind her separate estate only for necessaries, and that one seeking to recover a married woman's note must show affirmatively that it comes within the exception.

96. The general statutes, chap. 108, § 3, provide that "a married woman may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or service on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole."

97. Stewart v. Jenkins, 6 Allen, 300.

98. Chapman v. Foster, 6 Allen, 130.

99. Harvey Blair & Co. v. Johnson, 133 N. C. 352, 45 S. E. 644.

1. Todd v. Ames, 60 Barb. 462.

2. Lloyd v. Lee, 1 Stra. 94; Littlefield v. Shee, 2 B. & Ad. 84.

3. Leer v. Muggridge, 5 Taunt. 36. And see *ante*, p. 240.

4. Beard v. Webb, 2 Bros. & P. 93; Byles on Bills (Sharswood's ed.) [*62], 152, 153.

5. Camden v. Mulen, 29 Cal. 566; First Nat. Bank v. Hirschkowitz, 46 Fla. 588, 35 So. 22.

so empowered, a married woman cannot, without her husband's consent, bind herself in trade, except under the circumstances which are here enumerated. But, with the husband's consent, she may carry on trade separately as a regular merchant, and bind herself as a party to a negotiable instrument.[6]

§ 251. **Fourth: As to necessaries.**—Every husband is bound to provide for his wife, and the common law enforces this obligation, lest the wife may become a burden to the community.[7] And if the husband fail to furnish her with the necessaries of life, such as food, raiment, lodging, and medical attendance, the law presumes an authority in her to procure them on his credit, and he will not be permitted to deny that authority was given.[8]

§ 252. **Fifth: When husband adopts wife's name.**—A person may adopt whatever name he pleases in his business dealings, and then when he uses such adopted name he will be bound by it.[9] Therefore, if a husband sign his wife's name to a bill or note, he will be considered as having adopted it *pro hac vice*, and will be bound accordingly.[10] So, if the wife executes a note for her husband, in his presence, and signs her own name merely, with his knowledge and consent, it will bind him.[11] And in any case where the husband clearly authorizes his wife to draw or indorse bills or notes on his account and sign her name, and she does so, he will be regarded as intending thereby to bind himself, and will be so held.[12] And if, after the wife has signed her name, the husband promises to pay the bill or note, or otherwise ratifies the wife's act, it will be presumed that she had

6. Todd v. Lee, 16 Wis. 480; Partridge v. Stocker, 36 Va. 108; Richardson v. Merrill, 32 Vt. 27; Wieman v. Anderson, 42 Pa. St. 311; James v. Taylor, 43 Barb. 530; Schouler on Domestic Relations, 245, 246.

7. Schouler on Domestic Relations, 76–79, 85; Mudge v. Bullock, 83 Ill. 22.

8. Schouler on Domestic Relations, 76–79, 85; Mudge v. Bullock, 83 Ill. 22.

9. See §§ 304, 393, 399; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716, citing and approving text.

10. Prestwick v. Marshall, 7 Bing. 565.

11. Prestwick v. Marshall, 7 Bing. 565; Menkins v. Heringhi, 17 Mo. 297.

12. Cotes v. Davis, 1 Campb. 485; Hancock Bank v. Joy, 41 Me. 568. See Miller v. Delamater, 12 Wend. 433. Where a married woman signed a note for the purchase of goods in a business carried on by her sons, her husband is not liable on the note when he did not know of the purchase and the giving of the note, and though he subsequently became aware of the transaction and did not enter a protest. Richburg v. Sherwood, 101 Tex. 10, 102 S. W. 905.

authority from him, and he will be estopped to deny it.[13] Thus, where a bill was addressed to "William Bradwell," and was accepted by "Mary Bradwell," his wife, who wrote her name across it, and William Bradwell, after its dishonor, promised to pay it very shortly, it was held that it was William Bradwell's acceptance, and Maule, J., said: "He, in effect, says that his wife was authorized by him to accept this particular bill in the way she did." [14]

And where the husband carries on business generally in his wife's name, that is conclusive that he adopts it and is bound by it.[15]

§ 253. Sixth: When the wife is agent of her husband.—Marriage does not incapacitate a married woman from being the agent of her husband. The power to act as his attorney implies no separation from, but is rather a representation of, her lord.[16] Therefore, the husband will be bound, whenever she uses his name by his express or implied authority. Unless the husband has adopted her name as binding on him, by authorizing its use, the wife must sign the husband's name.[17] The form may be: "A. (husband) by B. (wife);" or "B. (wife) for C. (husband)." But the mere signature of the husband's name, if by his authority, would doubtless suffice.[18]

The wife's authority must be clearly proved.[19] If she be the husband's amanuensis in his business, because he cannot write, a note signed by her must be proved to have been given on account of his business concerns.[20] If the husband allow the wife to purchase goods, and to give a note, he may make any defense that would have been available had he made the note himself; but against a *bona fide* holder for value he would be defenseless.[21] The wife cannot delegate

13. Cotes v. Davis, 1 Campb. 485; Lindus v. Bradwell, 5 C. B. 583; Shaw v. Emery, 38 Me. 484; Mudge v. Bullock, 83 Ill. 23; Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512, citing text.

14. Lindus v. Bradwell, 5 C. B. 583.

15. Abbott v. McKinley, 2 Miles, 220.

16. 1 Bl. Com. 442. The converse of the proposition is equally true, viz: a married woman may employ her husband as her agent, and if he acts within the scope of his authority she is bound by it. Wright v. Parvis & Williams Co., 1 Marv. 325, 40 Atl. 1123.

17. Minard v. Mead, 7 Wend. 68; Abbott v. McKinley, 2 Miles, 220.

18. 1 Parsons on Notes and Bills, 80. But see Wood v. Goodridge, 6 Cush. 117.

19. Coldstone v. Tovey, 6 Bing. N. C. 98.

20. Smith v. Pedley, Chitty, Jr., on Bills, 1241.

21. Reakert v. Sanford, 5 Watts & S. 164.

authority granted her; but another person, in her presence, may write her husband's name for her.[22]

§ 254. Husband's rights to wife's choses in action.—Bills and notes possessed by a single woman before her marriage are her choses in action, and by marriage the husband becomes entitled to reduce them into his possession, and to make them his own.[23] And so if a bill or note is made payable to a married woman, or becomes her property after marriage, the right thereto vests in her husband, and he alone is competent to indorse it,[24] or to receive payment.[25]

And the husband may, at his election, indorse or negotiate the instrument, or sue upon it alone in his own name;[26] or he may sue upon it in the joint names of himself and his wife;[27] or he may allow her to indorse it or negotiate it in her own name.[28] In this last case it may be declared on, either as indorsed by the husband, or in the wife's name by his consent; and a good title may be thus acquired against the husband, as well as other parties.[29] It was once held that a

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22. Lord v. Hall, 8 C. B. 627.

23. Richards v. Richards, 2 B. & Ad. 447; Garforth v. Bradley, 2 Ves. 675; Howard v. Oakes, 3 Wels., H. & G. 136; Dean v. Richmond, 5 Pick. 461; Legg v. Legg, 9 Mass. 99; Chitty [*22], 30; Story on Bills, § 93. A contrary rule prevails in Texas, where the common law is changed by statute. Kempner v. Corner, 73 Tex. 200.

24. Ibid.; Philliskirk v. Pluckwell, 2 Maule & S. 399; Chitty [*22, 23], 30.

25. Byles [*65], 157; 1 Parsons on Notes and Bills, 89. And if a wife deposits in bank in her own name money which was her general estate, and the bank becomes insolvent, and the husband is indebted to the bank, he has the right to set off the wife's deposit against his indebtedness. See Hall v. New Farmers' Bank's Tr., 98 Ky. 144, 32 S. W. 400.

26. Mason v. Morgan, 2 Ad. & El. 30; Burrough v. Moss, 10 B. & C. 558; McNeilage v. Holloway, 1 B. & Ald. 218; Gaters v. Madeley, 6 M. & W. 423; Arnold v. Revonet, 4 J. B. Moore, 70; Sutton v. Warren, 10 Metc. (Mass.) 451.

27. Richards v. Richards, 2 B. & Ad. 447.

28. Stevens v. Beals, 10 Cush. 291; Menkins v. Heringhi, 17 Mo. 297; Roland v. Logan, 18 Ala. 307. Under a statute recognizing a note made to a wife to be her separate property, which cannot be reduced to possession by the husband, or the little thereto passed to a third person by the husband, except by her written consent, the mere indorsement in blank of a promissory note payable to her by the wife is not such written consent as is required by the statute to clothe the husband with apparent ownership. Case v. Espenschied, 169 Mo. 215, 69 S. W. 276, 92 Am. St. Rep. 633.

29. Story on Bills, § 92.

negotiable instrument was a personal chattel in possession; [30] but it is well settled that it is a chose in action.[31]

§ **255.** If a husband, loaning money, takes therefor a note payable to himself and wife, it imports a gift to his wife in the event she survives him.[32] And if, after marriage, a bill or note be executed to the husband and wife as joint payees, the legal interest, in the absence of statute to the contrary, survives to the survivor.[33]

§ **256. Reduction into possession.**—It is necessary, to the perfection of the husband's right of property in the bills, notes, and other choses in action of his wife, that he should reduce them into his own possession during the marital relation. And if he dies without having done so, and the wife survives him, the right to their sole possession revives to her, and does not pass to his personal representative, and she may then sue upon or indorse them.[34] If the wife dies, the husband surviving, her personal representative will be entitled to sue for them, but the husband will be entitled to the proceeds, when recovered in right of his survivorship.[35] And the husband is entitled to be her personal representative.[36] It has been held that if the husband gets actual possession of her unreduced choses in action after her death, although not her personal representative, they become his property.[37] If he dies without having taken out letters of administration on his

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30. McNeilage v. Holloway, 1 B. & Ald. 218.

31. Scarpellini v. Atcheson, 7 Ad. & El. (N. S.) Q. B. 846; Richards v. Richards, 2 B. & Ad. 447; Gaters v. Madeley, 6 M. & W. 423; Hart v. Stephens, 6 Q. B. 937; Needles v. Needles, 7 Ohio St. 432; Tritt v. Colwell, 31 Pa. St. 228; Edwards on Bills, 72.

32. Sandford v. Sandford, 45 N. Y. 723; Wells v. Moore, 68 Mo. App. 499.

33. Richardson v. Daggett, 4 Vt. 336; Draper v. Jackson, 16 Mass. 480; Byles on Bills (Sharswood's ed.) [*64], 156. See *Re* Gadbury, 32 L. J. 380; Allen v. Tate, 58 Miss. 588; Borst v. Spelman, 4 N. Y. 284; Sandford v. Sandford, 45 N. Y. 723; Wells v. Moore, 68 Mo. App. 499.

34. Vance v. McLaughlin, 8 Gratt. 289; May v. Boisseau, 12 Leigh, 521; Draper v. Jackson, 16 Mass. 480; Hayward v. Hayward, 20 Pick. 517; Gaters v. Madeley, 6 M. & W. 423; Richards v. Richards, 2 B. & Ad. 447; Philliskirk v. Pluckwell, 2 Maule & S. 393; Byles [*64], 155.

35. Betts v. Kimpton, 2 B. & Ad. 273; Story on Bills, § 93; 1 Parsons on Notes and Bills, 85.

36. *Ibid.*

37. Whitaker v. Whitaker, 6 Johns. 112; Lee v. Wheeler, 4 Ga. 541; Revel v. Revel, 2 Dev. & Bat. 272.

wife's unsettled estate, the right to do so passes to his next of kin, and not to hers.[38]

§ 257. What operates as a reduction into possession.—Any act of the husband during marriage manifesting a distinct purpose to make his wife's choses in action his own, operates as a reduction into possession, and bars her right of survivorship; [39] but mere intention, unaccompanied by act, will not suffice.[40] If the husband elects to bring suit upon the instrument in his own name, in cases in which he may join his wife or not, as he pleases,[41] or collects the proceeds and applies them to his own use,[42] it is a reduction into possession. So, if the husband assumes ownership of the instrument, places it among his own effects, and indicates no intention to hold it in trust for his wife, it would seem that it is sufficient.[43] But the mere fact that he takes it in custody would not be alone sufficient *per se*, as it might be in trust for his wife.[44] Indorsing or transferring the instrument is a reduction into possession; [45] but collecting interest or part payment is only a reduction *pro tanto*.[46] And even collecting the whole amount, if it were promptly reinvested for the wife in other choses in action, would not defeat the wife's rights.[47]

Nor would mere authority to an agent to collect, not being a power coupled with an interest.[48] The bankruptcy of the husband does not operate a reduction into possession.[49] But, in the United States, it has been held that an assignment under an insolvent law defeats the wife's right of survivorship.[50]

§ 258. Marriage of single woman who is party to bill or note.—

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38. Schouler on Domestic Relations, 162.

39. 1 Parsons on Notes and Bills, 86.

40. Blount v. Bestland, 5 Ves. Jr. 515.

41. Oglander v. Baston, 1 Vern. 396; 2 Ves. Sr. 677. See Schouler on Domestic Relations, 127.

42. 1 Parsons on Notes and Bills, 86. See Schouler, 119.

43. See Schouler on Domestic Relations, 119.

44. Holmes v. Holmes, 28 Vt. 765.

45. Scarpellini v. Atcheson, 7 Q. B. 864 (53 Eng. C. L.); Tuttle v. Fowler, 22 Conn. 58; Byles (Sharswood's ed.) [*65], 156; 1 Parsons on Notes and Bills, 86.

46. Nash v. Nash, 2 Mad. 133; Hart v. Stevens, 6 Q. B. 937.

47. Stanwood v. Stanwood, 17 Mass. 57.

48. 1 Parsons on Notes and Bills, 87.

49. Sharrington v. Yates, 12 M. & W. 855 (overruling s. c., 11 M. & W. 42); Byles (Sharswood's ed.) [*65], 156.

50. Glasgow v. Sands, 3 Gill & J. 96; Richwine v. Heim, 1 Pa. St. 373.

If a single woman, who is a party to a bill, note, or other contract, marries, her husband becomes responsible for by marriage he adopts her fortunes "for better for worse." [51] And it matters not that he did not know, and that his wife had concealed from him the existence of such obligations.[52] Husband and wife must be sued jointly on such obligations.[53] But this liability ceases with the marital relation. If the husband dies, the wife alone is liable, and not his personal representative.[54] If the wife dies, only her personal representative is liable.[55] But the wife's choses in action unreduced to possession by the husband at the time of her death may be followed in the hands of the husband, when he is her administrator, by her creditors, and subjected to payment of her debts contracted when a *feme sole*.[56]

SECTION V

PERSONS UNDER GUARDIANSHIP AND IN BANKRUPTCY

§ **259.** Persons under guardianship, whether for infancy, imbecility, improvidence, or otherwise, cannot contract, and, therefore, cannot be parties to negotiable instruments.[57] Therefore, if a spendthrift under guardianship indorse a note, he does not pass title, and is not bound by the indorsement. It is simply void.[58]

§ **260. Incapacities of bankrupt.**—All rights of property belonging to a bankrupt pass by his bankruptcy to his assignee. He has, therefore, no power of disposition over it, and cannot sue upon his choses in action, or transfer or indorse them to another.[59] But if after bankruptcy, a note be made payable to the bankrupt or order, and by him transferred, the maker is estopped to deny his right to

51. 1 Bl. Com. 443; 2 Kent Com. 143–146.

52. Schouler on Domestic Relations, 69.

53. Mitchinson v. Hewson, 7 T. R. 348.

54. Woodman v. Chapman, 1 Campb. 189; Curtton v. Moore, 2 Jones Eq. 204; Byles (Sharswood's ed.) [*65], 157.

55. 2 Kent Com. 144; Byles [*65], 157.

56. Heard v. Stamford, 3 P. Wms. 409; Morrow v. Whitsides, 10 B. Mon. 411; 1 Parsons on Notes and Bills, 86.

57. Manson v. Felton, 13 Pick. 206; Chew v. Bank of Baltimore, 14 Md. 299; 1 Parsons on Notes and Bills, 89.

58. Lynch v. Dodge, 130 Mass. 458.

59. 1 Parsons on Notes and Bills, 153; Story on Notes, § 102.

transfer by having made it payable to him on order.[60] If the property in the instrument had passed from the bankrupt before his bankruptcy, and the indorsement, which was intended, omitted, he or his assignee may be compelled to indorse it afterward.[61] A note given by a bankrupt after his discharge for a debt existing prior to the adjudication, upon condition that the payee would dismiss a proceeding to set aside the discharge, is void; and a subsequent promise to pay such a note would be also void.[62] If a bankrupt, who is the payee of a bill or note, sells the same without indorsement before, and indorses it after bankruptcy, such indorsement will enable the holder to bring action in his own name, for the property in the note passed by the sale, and the indorsement is a mere form.[63]

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60. Drayton v. Dale, 2 B. & C. 293. See *ante*, § 93.

61. Smith v. Pickering, Peake, 50; *Ex parte* Mowbray, 1 Jac. & W. 428; Watkins v. Maule, 2 Jac. & W. 237; Hughes v. Nelson, 29 N. J. Eq. 549. The liability of a bankrupt indorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy. *In re* Philip Semmer Glass Co., 135 Fed. 77, appeal dismissed 203 U. S. 141, 27 S. Ct. 50, 51 L. Ed. 128. See also Whitwell v. Wright, 120 N. Y. S. 1065, 136 App. Div. 246.

62. Fell v. Cook, 44 Iowa, 485.

63. Hersey v. Elliot, 67 Me. 527; Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512, citing text.

CHAPTER IX

FIDUCIARIES AS PARTIES TO BILLS AND NOTES

§ 261. **(1) As to personal representatives.**—When a person dies, the administration of affairs of his personal estate, and its distribution among those to whom it descends, or its appropriation to the payment of debts, devolves upon his personal representative. When such representative is appointed by the will of the deceased, he is termed his executor. When none is named in his will, or the one named declines to act, the appointment devolves upon the courts, and the appointee is termed administrator. The executor's powers accrue at the date of the testator's death, for it is then that his will takes effect. But the administrator's powers accrue only from the time of his appointment; [1] but they relate back to the date of the decedent's death.[2] If the will be admitted to probate, a payment to the executor nominated will be valid, although it afterward transpire that the will was forged.[3]

§ 262. **Whether estate bound by negotiable instruments.**—When given authority by the will, an executor may bind the estate by a note,[4] and it has been held that where an administrator, not interested in the real estate of his intestate, obtains an order of court authorizing him to execute notes to raise assets with which to pay debts, and to mortgage real property to secure the same, and the notes recite his authority, he is liable as administrator without assuming any personal liability; and purchasers of the notes take with notice that they were made in a representative capacity.[5] Otherwise, however, an adminis-

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1. Wooley v. Clark, 5 B. & Ald. 744; Rand v. Hubbard, 4 Metc. (Mass.) 256; Allen v. Dundas, 3 T. R. 125; 1 Parsons on Notes and Bills, 161.

2. Jewett v. Smith, 12 Mass. 309; Lawerence v. Wright, 23 Pick. 128; Miller v. Reigne, 2 Hill (S. C.), 592; McVaughters v. Elder, 2 Brev. 307.

3. Allen v. Dundas, 3 T. R. 125; Byles on Bills (Sharswood's ed.) [*54], 139; Thompson on Bills, 242; 1 Parsons on Notes and Bills, 161.

4. Harris v. Woodward, 133 Ga. 104, 65 S. E. 250; Prieto v. Leonards, 32 Tex. Civ. App. 205, 74 S. W. 41.

5. Wisconsin Trust Co. v. Chapman, 121 Wis. 479, 99 N. W. 341, 105 Am. St.

trator or executor cannot bind the decedent's estate by any negotiable instrument; he can only bind himself. If he make, accept, or indorse a negotiable instrument he will bind himself personally, even if he adds to his own name the designation of his office as personal representative. Thus, if he signs himself "A. B., executor (or administrator) of C. D.," or "A. B., as executor of C. D.," the representative terms will be rejected as surplusage.[6] And an accommodation in-

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Rep. 1032. Where an executor made a note and borrowed money for the benefit of the estate, and the money was used in the interest of the estate, he is liable on the note as executor though the note does not disclose the fact on its face. Ellis v. Littlefield, 41 Tex. Civ. App. 318, 93 S. W. 171.

6. Edwards on Bills, 79, 248; Story on Notes, § 63; Story on Bills, § 74; Thompson on Bills, 145, 146; Childs v. Monins, 5 Moore, 282, 2 Brod. & B. 460, 6 Eng. C. L. 201; Aspinall v. Wake, 10 Bing. 55; Christian v. Morris, 50 Ala. 586; McCalley v. Wilburn, 77 Ala. 552; Kirman v. Benham, 28 Ala. 501; McEldery v. Chapman, 2 Port. 33; Higgins v. Briggs, 21 Fla. 112, citing the text; Harris v. Woodard, 133 Ga. 104, 65 S. E. 205; Hughes v. Treadway, 116 Ga. 663, 42 S. E. 1035; Harrison v. McClelland, 57 Ga. 531; Wisdom v. Becker, 52 Ill. 346; Cornthwaite v. First Nat. Bank, 57 Ind. 269; Tryon v. Oxley, 3 Iowa, 289; Davis v. French, 20 Me. 21; Walker v. Patterson, 36 Me. 273; White v. Thompson, 79 Me. 207; Sims v. Stillwell, 3 How. (Miss.) 176; Carter v. Saunders, 2 How. (Miss.) 851; Robertson v. Banks, 1 Smedes & M. 666; First Nat. Bank v. Collins, 17 Mont. 433, 43 Pac. 499, 52 Am. St. Rep. 695; Casco Nat. Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705; Jenkins v. Phillips, 41 App. Div. 389, 58 N. Y. Supp. 788; Packard v. Dunfee, 104 N. Y. S. 140, 119 App. Div. 599; Sutherland v. St. Lawrence County, 85 N. Y. S. 696, 42 Misc. Rep. 38, reversed on other grounds 91 N. Y. S. 962, 101 App. Div. 299; Morehead Banking Co. v. Morehead, 124 N. C. 622, 32 S. E. 317, 122 N. C. 318, 30 S. E. 331; McKinney v. Peters, Dallam's Decisions, 545; Williams National Bank v. Groton Mfg. Co., 16 R. I. 597, 17 Atl. 170, 27, Am. St. Rep. 767; Erwin v. Carroll, 1 Yerg. 145; Warren v. Harrold, 92 Tex. 417, 49 S. W. 364; Gregory v. Leigh, 33 Tex. 813; Armstrong v. Cache Valley Land Co., 14 Utah, 450, 48 Pac. 640; Whitten v. Bank of Fincastle, 100 Va. 546, 42 S. E. 309; Snead v. Coleman, 7 Gratt. 305. King v. Thom, 1 T. R. 487, Buller, J.: "It is immaterial whether they (the executors) indorse it (the bill of exchange) as executors or not. If they indorse it at all they are liable personally, and not as executors, for their indorsement would not give an action against the effects of the testator." The bill had been indorsed to the executors after the decedent's death. Where two executors gave a creditor of the testator a note whereby they "as executors severally and jointly promised to pay the demand, with interest," they were held personally responsible. Burrough, J., said: "They could only charge his estate with the original debt, and although the giving the note in question might not have amounted to the admission of assets in their hands at the time, still, by the promise of the payment of interest thereon, they made the debt their own, as it clearly showed it was to be paid on a future day, and amounted in effect to a request to the plaintiff to forbear to sue them on the original demand." To the same effect see Hadlock v. Brooks, 178 Mass. 425, 59 N. E. 1009, distinguishing Bank v. Wing, 172 Mass.

dorser, or acceptor, who pays the amount of the instrument, has no claim against the decedent's estate.[7] But if the bill or note of the personal representative be taken for a debt of the decedent, the estate is discharged from liability, and the representative alone is bound.[8]

§ 263. Personal representative's own note for debt of decedent.[9]—A personal representative may, however, execute a bill or note for the debt of his testator, and he will be personally bound to pay it even in the hands of the original holder; for assets in the hands of the personal representative constitute a sufficient consideration for a promise by him to pay the testator's debt, and the promise being in writing, no proof of consideration is necessary, even if the instrument be nonnegotiable.[10] But as between the original parties the personal representative may rebut the *prima facie* evidence of assets, and show total or partial deficiency; and he will then be exonerated from liability, unless there was some other consideration moving to him personally.[11] And he may, if he desires, exclude all personal liability

513, in which the executor purported to bind the estate by the form of his endorsement, and claimed to have the right to bind it, and so was held not to have bound himself personally. And while a note given by one as executor is a personal obligation, it will not prevent the enforcement of a mortgage given to secure said note by the executor upon the property of the estate, where it appears that such obligation was made and the money obtained thereunder was used by the executor for the benefit of the estate. See Iowa Loan & Trust Co. v. Holderbaum, 86 Iowa, 1, 52 N. W. 550. Notes signed by an executor in renewal of outstanding notes of the testator do not create any new liability against the estate. Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482.

7. Kirkman v. Benham, 28 Ala. 501.

8. Erwin v. Carroll, 1 Yerg. 145; Wisdom v. Becker, 52 Ind. 346; Cornthwaite v. First Nat. Bank, 57 Ind. 269; Carter v. Thomas, 3 Ind. 213. When persons interested in an estate assented to the making of a note for the estate by the executor, they are not in a position to complain that presentment for payment was not made in a reasonable time. State of New York Nat. Bank v. Kennedy, 13 O. N. Y. S. 412, 145 App. Div. 669.

9. *Post*, § 270.

10. Snead v. Coleman, 7 Gratt. 300; Boyd v. Johnson (Tenn.), 14 S. W. 804, citing the text.

11. Bank of Troy v. Topping, 13 Wend. 273; Rucker v. Wadlington, 5 J. J. Marsh. 238; Steele v. McDowell, 9 Smedes & M. 193; Byrd v. Holloway, 6 Smedes & M. 199; Edwards on Bills, 78. In Missouri, in an action on a note, signed "P. A., Executor," it was held: 1. That the style executor, etc., should be treated as mere *descriptio personæ*, especially as the note was on time and carried interest; 2. That it *prima facie* imported consideration, but it was competent for the maker to show that as an individual contract it was without consideration; 3. That in such case where consideration of the note accrued after testator's death, the

by restricting his promise to pay "out of the assets of C. D.," or "out of the assets of C. D, and not otherwise," by such expression or its equivalent.[12] But the instrument in that case, being payable out of a particular fund, would not be negotiable.[13] The surrender of promissory notes made by the decedent is a sufficient consideration for a note made individually by his personal representative.[14]

§ 264. As to his powers over negotiable instruments of the deceased.—The executor or administrator (and not the heir) has a right to the possession of the bills and notes of the deceased; and it is his duty to present and demand payment of them, to give notice in case of their dishonor, and make protest—in short, to do respecting them what would have been the duty of the decedent to do were he alive.[15] And if a bill or note be indorsed or assigned to a dead man, whose death is not known, it becomes the property of his personal representative, in like manner as if he had died after the transfer;[16] so, likewise, if the transfer were made in good faith with knowledge of his death, as it could be made with no other intention than to place the instrument among his assets.[17] A personal representative cannot purchase in his own right a note indorsed by his decedent. He can only pay it, as the law forbids his speculating on the subject of his trust.[18]

§ 265. Power of personal representative to transfer by indorsement or assignment.—If a bill or note held by the decedent be negotiable, the personal representative may transfer it by indorse-

administrator would in the first place be liable *de bonis propriis*, but would be entitled to reimbursement out of the assets of the estate. Rittenhouse v. Ammerman, 64 Mo. 197.

12. Childs v. Monins, 6 Eng. C. L. 201; Snead v. Coleman, 7 Gratt. 303; Carter v. Saunders, 2 How. (Miss.) 851; Kirkman v. Benham, 28 Ala. 501; Bank of Troy v. Topping, 9 Wend. 273; Story on Notes, § 63; Story on Bills, § 74; 1 Parsons on Notes and Bills, 161; Edwards on Bills, 79. Or by adding the words "but not personally." Banking Co. v. Morehead, 116 N. C. 413, 21 S. E. 190.

13. Ibid.; Edwards on Bills, 78; see, *ante*, § 50.

14. Harrison v. McClelland, 57 Ga. 531.

15. King v. Thom, 1 T. R. 487; Thompson on Bills, 145; Byles (Sharswood's ed.) [*53], 139; Jacobs v. Maloney, 64 Mo. App. 270; Powell v. Hurt, 108 Mo. 507, 17 S. W. 985; Barnum v. Reed, 136 Ill. 388, 26 N. E. 572.

16. Murray v. East India Co., 5 B. & Ald. 204 (Eng. C. L.); Morse v. Clayton, 13 Smedes & M. 373.

17. 1 Parsons on Notes and Bills, 154.

18. Burton v. Slaughter, 26 Gratt. 919.

ment; and if nonnegotiable, by assignment,[19] unless the power is restricted by statute.[20] But the representative would be liable in the event of dishonor, unless he distinctly exempted himself by the terms of the indorsement.[21] If, however, such transfer be for the private debt of the personal representative, it is a fraud on the estate, and is void as to all parties with notice or knowledge of it, even if they paid full value.[22]

It is considered, however, that if a check be payable to and indorsed by an administrator to a bank, the amount may be properly placed to his own individual account and then checked on by him in his personal character.[23]

§ 266. Transfer by one of several personal representatives.—It seems to be now settled that if there be several executors or administrators the bills or notes executed to the deceased in his lifetime may be indorsed by either one of them; [24] and an assignment of a note of the testator by one of several executors as collateral security for a judgment against the estate has been held valid.[25] It has been held otherwise where the note was made payable to several executors for a debt due the estate; [26] but the better opinion seems to recognize

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19. Rowlinson v. Stone, 3 Wils. 1; Cryst v. Cryst, 1 Smith (Ind.), 370; Fisher Machine Works Co. v. Leavenworth Nat. Bank, 77 Kan. 268, 94 Pac. 124; Cahoun v. Moore, 11 Vt. 604; Morse v. Clayton, 13 Smedes & M. 373; Graw v. Hannah, 6 Jones's Law, 94; Story on Notes, § 123. And such transfer will enable the indorsee to sue in a State other than that of the administrator's domicile. Mackay v. St. Mary's Church, 15 R. I. 121; Munson v. Bank, 19 Wash. 125, 52 Pac. 1011.

20. Jones v. Wheeler, 23 Okl. 771, 101 Pac. 1112. But in such a case, when the will makes the executor a trustee, or gives him the powers of a trustee, to hold a note in trust for the purpose contemplated by the testator, he has power to sell the note. Marshall v. Myres, 96 Mo. App. 643, 70 S. W. 927.

21. Foster v. Fuller, 6 Mass. 58; Edwards on Bills, 248.

22. Miller v. Williamson, 5 Md. 219; Scott v. Searles, 7 Smedes & M. 498; Miller v. Helm, 2 Smedes & M. 687; Makepeace v. Moore, 5 Gilm. 474. (This rule was held not to apply where an administrator transferred notes belonging to the estate, to his sureties on his official bond, as security against their liability. Rogers v. Squires, 98 N. Y. 49.) Nugent v. Laduke, 87 Ind. 432; Mathis v. Barnes, 1 Ind. App. 164, 27 N. E. 308.

23. Safe Deposit & Tr. Co. v. Bank, 194 Pa. St. 234, 44 Atl. 1064.

24. Moseley v. Graydon, 4 Strobh. 7; Dwight v. Newell, 15 Ill. 333; Sanders v. Blaine, 6 J. J. Marsh. 446; Hertell v. Bogert, 9 Paige, 52, 4 Hill, 492; Edwards on Bills, 79, 80, 248.

25. Wheeler v. Wheeler, 9 Cow. 34.

26. Smith v. Whiting, 9 Mass. 334.

no such distinction, and regarding the note in either case as assets, the indorsement by one representative is considered as effectual as that of all.[27]

§ 267. **Incomplete transfer by decedent.**—If the paper be transferable by indorsement (which includes delivery), the mere writing by the deceased in his lifetime of his name upon it will be nugatory; and the personal representative cannot complete the transfer by delivery. He must himself in its full legal sense indorse the paper: that is, write the transfer on it and deliver it.[28] In such a case it has been said respecting the holder, to whom the executor delivered the note with his testator's indorsement upon it, but without his own: "He failed to show any legal title to the note because of the manner in which it was transferred. He also failed to show any equitable title to it because of the manner in which it was transferred." [29] But if the paper were transferable by indorsement, and the deceased delivered it in his lifetime, for value, without indorsement, he passed the equitable title to it; and it would be the duty of the personal representative (which equity, if appealed to, would compel him to perform) to complete the formal transfer by his indorsement; [30] but he would be entitled to add words protecting himself from personal liability.[31]

§ 268. **Note payable to executor.**—It is settled now that a bill or note payable to "A., as executor," is assets in his hands—at least, at his election; [32] and if he declares upon it as payable to him as ex-

27. Bogert v. Hertell, 4 Hill, 492; 1 Parsons on Notes and Bills, 155, 159; Mackay v. St. Mary's Church, 15 R. I. 121, citing the text.

28. Clark v. Boyd, 2 Ohio, 56; Clark v. Sigourney, 17 Conn. 511; Bromage v. Lloyd, 1 Exch. 32; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Thompson on Bills (Wilson's ed.), 91; Drum v. Benton, 13 App. D. C. 246, citing text.

29. Taylor v. Surget, 14 Hun, 116 (1878), Brady, J.

30. Malbon v. Southard, 36 Me. 147; Watkins v. Maule, 2 Jac. & W. 237; Thompson on Bills, 146, and Ogilvie v. Moss, Fair v. Cranstown, McDonald v. Rankin, there cited.

31. Thompson on Bills, 146; Story on Notes, § 120.

32. Baker v. Baker, 4 Bibb, 346; Hemphill v. Hamilton, 6 Eng. Rep. 425; Henshall v. Roberts, 5 East, 150; Ratcliff v. Everman, 87 Ind. 446. *Contra* in Georgia, Saffold v. Banks, 69 Ga. 293; 1 Parsons on Notes and Bills, 155; Wood v. Tomlin, 92 Tenn. 514, 22 S. W. 206, citing text. Where a note is made payable to a person by name, the mere addition of the word "administrator," "executor," or the like, is generally considered a mere description of the person, not tending so much to show the capacity in which he takes the note as serving to identify

ecutor, and charges it to have been made to him in his representative capacity, he may join counts upon promises to his testator in his lifetime.[33] In an English case involving this subject, Graham, B., said: "Whenever the money, when recovered, will be assets, counts in each character may be joined; and that is a fair and sound criterion, and one which is sufficient to prevent all ambiguity and doubt; it ought, therefore, to be adopted as a never-failing rule." [34] If a note be payable to a party as executor, and be indorsed by him in his representative capacity, it has been held to be notice that it was assets in his hands.[35]

A note executed by an executor in favor of himself and his co-executor for his liability to the testator's estate, is not void for want of consideration. Upon such a note, where the obligation was joint and several, it was held that an action might be maintained by the two executors against an indorser, although one of the plaintiffs be both obligor and obligee, but that it would be otherwise if the obligation were joint only.[36]

§ 269. It was a general rule of the common law that if a creditor appointed his debtor executor, it discharged his liability; and it was applied where the holder appointed the maker of a note or the acceptor of a bill his executor.[37] But this rule was subject to exception where the assets, without such bill or note, were insufficient.[38] It would be going beyond the purview of this work to discuss this rule here, as it has been generally reversed in the United States by statute. It did not extend to administrators.

him as an individual, although, in connection with other circumstances, it may indicate an intention to limit the maker's liability to him in a representative capacity. Kitchen v. Holmes, 42 Oreg. 252, 70 Pac. 830. Both the legal and equitable title to a promissory obligation payable to R., "executor of" a named estate, are *prima facie* in R. individually; but parol evidence is admissible to show that the real interest is in the estate represented by him, whenever it is competent, under the form of action before the court, to assert an equitable title. Kennedy v. Gelders, 7 Ga. App. 241, 66 S. E. 620.

33. Bogert v. Hertell, 4 Hill, 503; Sheets v. Peabody, 6 Blackf. 120; Fry v. Evans, 8 Wend. 530; King v. Thom, 1 T. R. 487; Byles (Sharswood's ed.), 142. But see Turnbull v. Ferret, 17 Mart. 703; 1 Parsons on Notes and Bills, 155, 156, note n.

34. Partridge v. Court, 5 Price, 412.

35. Payne v. Flournoy, 29 Ark. 500.

36. Faulkner v. Faulkner, 73 Mo. 328.

37. Byles on Bills (Sharswood's ed.), 140; Story on Notes, 444. See chapter XXVIII, vol. II, on Payment.

38. 1 Parsons on Notes and Bills, 162.

§ 270. Negotiable note of personal representative for decedent's debt.—In Edwards on Bills it is said: [39] "In this State (New York) the giving of a note is not payment, and consequently, as between the original parties, the consideration may be inquired into, and where that fails, no recovery can be had on a note executed by a trustee or administrator; the effect of his giving a promissory note in his representative character which is not negotiable or not transferred, is to cast upon him the burden of showing that he had no funds out of which to pay.[40] If such a note shows on its face that it is made for value received by the heirs of the intestate, it does not raise even a presumption against the administrator.[41] But where the note is negotiable, and contains an unqualified promise to pay, though signed with the addition of the words, 'as administrator,' the note will be valid in the hands of a *bona fide* holder. Such words are merely descriptive of the person, and do not limit the maker's liability on the note." [42]

§ 271. (2 and 3) As to guardians and trustees.—Guardians cannot bind their wards' estates, nor trustees the estates of their *cestuis que trustent* by bills or notes; and hence, though they sign themselves as guardians or trustees, they are personally bound, because otherwise the instrument would be invalid.[43] It is true that they may contract

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39. Page 79.

40. Bank of Troy v. Topping, 9 Wend. 273.

41. Ten Eyck v. Vanderpoel, 8 Johns. 121.

42. King v. Thom, 1 T. R. 478. *Ante*, § 263.

43. Taylor v. Davis, 110 U. S. 330, 4 Supp. Ct. Rep. 147; Wright v. Byrne, 129 Cal. 614, 62 Pac. 176; Conner v. Clark, 12 Cal. 168; Willet v. Young, 8 Iowa, 291, 47 N. W. 990; Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782; Foster v. Fuller, 6 Mass. 58; Thacher v. Dinsmore, 5 Mass. 299; Robertson v. Banks, 1 Smedes & M. 666; Payne v. First Nat. Bank, 43 Mo. App. 377; Webster v. Switzer, 15 Mo. App. 351; Farrell v. Reed, 46 Nebr. 259, 64 N. W. 959; Hills v. Banister, 8 Cow. 31; Ogden Ry. Co. v. Wright, 31 Oreg. 150, 49 Pac. 975; Bank v. Looney, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830; Warren v. Harrold, 92 Tex. 417, 49 S. W. 364; Story on Notes, § 63; Story on Bills, §§ 74, 75; 1 Parsons on Notes and Bills, 89, 90. In Roger Williams Nat. Bank v. Manufacturing Co., 16 R. I. 504, 17 Atl. 170, an indorsement, "Trustees estate of A," under a power in a will authorizing indorsements by the trustees, was held to create a personal liability on the part of the trustees, as being merely *descriptio personæ*. The fact that a manager of a business concern, who was trustee, has made himself personally liable by signing a note as manager, with the addition of the name of the business concern, does not affect the liability of such concern where it has received the benefit of the proceeds of such note. Froelich v. Trading Co., 120 N. C. 39, 26 S. E. 647. Where no duty has been imposed on a trustee which would render it necessary for him to borrow money and execute his note

to pay out of an estate; but then the payment would be conditional on the sufficiency of the estate, and the instrument, therefore, not negotiable.[44] If a guardian take a note payable to his order as guardian for the property of his ward, and indorse it to a *bona fide* party for value, it has been held that it is a good transfer, the words, "as guardian," etc., being mere *descriptio personæ*.[45] But the better opinion seems to be that while if the fiduciary, indicated as payee, may transfer a good title, provided he makes the transfer within the authority of and for the benefit of his trust, yet that such words as trustee, etc., suffixed to a payee's name put his indorsee upon inquiry as to the title, and if the transfer be in fraud of the trust, the indorsee must suffer the consequence.[46]

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therefor, a note executed by him in an attempt to bind the trust estate is in violation of his duty and is nothing more than his individual obligation, and could not be enforced against the trust estate except to the extent its proceeds have been used for the benefit of the estate. Farmers' & Traders' Bank v. Fidelity & Deposit Co., 108 Ky. 384, 56 S. W. 671. Where a trust estate authorizes the trustee to mortgage the trust property, but not to enter into any obligation binding the trustor or beneficiaries personally, he is individually liable on a note signed by himself "trustee," when a mortgage on trust property was given by him to secure the note. Hall v. Jameson, 151 Cal. 606, 91 Pac. 518, 12 L. R. A. (N. S.), 1190, 121 Am. St. Rep. 137 (1907). A trustee of two different trust estates may transfer a note from one estate to the other where full value was received from one estate and paid by the other, and such a transfer will be regarded in equity as a completed and executed transfer though there may not have been a formal indorsement of the note. French v. Hall, 198 Mass. 147, 84 N. E. 438, 16 L. R. A. (N. S.) 205.

44. 1 Parsons on Notes and Bills, 90; Story on Bills, §§ 74, 75. In a suit upon a note signed by a guardian, containing a provision that the amount therein promised is to be paid out of the ward's estate, in the hands of the guardian, when available, the plaintiff must allege and prove that the time fixed for the payment of the note has arrived, and that the condition can be complied with. While the note will be construed on an individual undertaking of the maker, regardless of his representative capacity, still the contract is only a conditional promise to pay. Teasley v. Brenan Assn., 4 Ga. App. 243, 61 S. E. 141 (1908).

45. Zellner v. Cleveland, 69 Ga. 633. In Thornton v. Rankin, 19 Mo. 193, one Engleman bought land from the guardian of a minor, and gave him a note describing him as "guardian." The latter indorsed it to plaintiff, using simply his name, and it was held that it carried no notice of a trust, the words being descriptive merely. Westmoreland v. Foster, 60 Ala. 448 (*semble*), and Fountain v. Anderson, 33 Ga. 372 (*semble*), accord. See Field v. Schieffelin, 7 Johns. Ch. 150; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726; Farrell v. Reed, 46 Nebr. 259, 64 N. W. 959.

46. Third Nat. Bank v. Lange, 51 Md. 138, note payable to "A. B., Trustee." See also Sturtevant v. Jaques, 14 Allen, 523 (bond and mortgage); Shaw v. Spencer, 100 Mass. 382 (certificate of stock). See *post*, § 789; Dorr v. Davis,

Under Negotiable Instrument statute.—The statute provides that where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.[47] Under such statute it has been held that where by will a trustee was not clothed with authority to pledge any part of the fund as security for the payment of a promissory note made by him as trustee, although the money thus received went into the trust funds and was expended for purposes for which income could have been lawfully appropriated, such a promissory note was his personal obligation and enforcible against him alone while living, and after his death, against his estate.[48] Where a note was signed by several persons "as trustees," and when the note was given the payee was informed substantially that the defendants would not incur personal liability, and would not give their individual notes or indorsements, because they were acting as trustees only, they could not be held individually liable.[49] So far as innocent purchasers for value are concerned, however, the representative character of the party must be disclosed upon the face of the note.[50]

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76 Me. 311, case of guardian; Strong v. Straus, 40 Ohio St. 87. As between the trustee and the beneficiary, if the transaction is otherwise unobjectionable, the former will not lose his recourse against the latter merely because the *descriptio personæ* is omitted in the note. Bushong v. Taylor, 82 Mo. 660; Hanover Nat. Bank v. American Dock & Trust Co., 75 Hun, 55, 26 N. Y. Supp. 1055. But the use of the word "trustee" is not of itself sufficient to put the receiver of the check on notice that the funds belong to a trust of such a character that the trustee is limited in the investment thereof to solely what are called "legal investments," so as to render the receiver of the check liable for a spoliation of the trust estate if he loans the proceeds of the check to stock procurers on stock collaterals. See Isham v. Post, 71 Hun, 184, 23 N. Y. Supp. 211, 1168; Freeman v. Bailey, 50 S. C. 241, 27 S. E. 686; Galloway v. Gleason, 61 Mo. App. 21; McLeod v. Despain, 49 or 536, 90 Pac. 492, 92 Pac. 1088, 19 L. R. A. (N. S.) 276, 124 Am. St. Rep. 1066, citing text; Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953, as to a note payable one as "attorney," and quoting text; Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089. See also, *post*, § 301, 795*a*.

47. Appendix, sec. 20.

48. Tuttle v. First Nat. Bank, 187 Mass. 533, 73 N. E. 560, 105 Am. St. Rep. 420.

49. Kerby v. Ruegamer, 95 N. Y. S. 408, 107 App. Div. 491.

50. Megowan v. Peterson, 173 N. Y. 1, 65 N. E. 738, as to a note signed "Trus-

§ 271a. Clerks, commissioners of court and receivers.—In Tennessee it has been held that although a clerk or commissioner of court has no power, unless conferred by the court, to sell or otherwise dispose of negotiable securities taken for property sold under decree of the court, and although no person can acquire a good title to such securities if the trust character appear upon their face, yet the indorsement by such fiduciary would be not absolutely void, but voidable only.[51] And it has been held that where a receiver, authorized to continue and carry on the business of a corporation, and to purchase supplies and materials for that purpose, accepted a draft in consideration for supplies furnished, signed by his name "Receiver," he was not personally liable.[52]

§ 271b. Tax collectors.—Where funds were held by an officer as tax collector, the State may recover money paid to such person on a personal indebtedness by such officer on a check signed by him with the letters "T. C." following his signature.[53]

tee," the court saying: "We do not understand that the statute to which we have alluded was designed to change the common-law rule in this regard, which is to the effect that, as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown."

51. Harrison v. Black, 10 Lea, 117.

52. Olpherts v. Smith, 66 N. Y. S. 976, 54 App. Div. 514.

53. State v. Jahrans, 117 La. 286, 41 So. 575, 116 Am. St. Rep. 208.

CHAPTER X

AGENTS AS PARTIES TO NEGOTIABLE INSTRUMENTS

SECTION I

COMPETENCY AND AUTHORITY OF THE AGENT—EXPRESS AUTHORITY AND GENERAL PRINCIPLES OF LIABILITY

§ **272.** Every person who becomes a party to a negotiable instrument does not always do so by his own manual act. Such are the needs and conveniences of business, that bills, notes, checks, and all other instruments of indebtment, are frequently signed by some one authorized, or professing to be authorized, to sign for another; and the principles by which the authority of the agent, the liability of principal and agent, and the interpretation of such instruments, are governed, are of prime importance to the commercial world. We have seen already what persons are competent to become parties to negotiable instruments. All such persons may empower agents to act for them, and bind them to all intents and purposes as effectually as they could bind themselves. But it is to be observed that it is not necessary that the agent should be himself competent to make a contract. He is the mere instrument of the contracting capacity and will, and Mr. Chitty says: "As this agency, is a mere ministerial office, infants, *feme coverts*, persons attainted, outlawed, excommunicated, aliens and others, though incapable of contracting on their own account, so as to bind themselves, may be agents for these purposes." [1]

During the existence of slavery in the United States it was held that a slave might be an agent.[2] But imbeciles, lunatics, and children of tender years, who actually lack capacity to be intelligent instruments, and have not the power or discretion to consent, could hardly be regarded as competent to be even the agents of another.[3]

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1. Chitty on Bills (13th Am. ed.) [*28], 36. See Edwards, 95; Coke's Littleton, 52*a*.

2. The Governor v. Daily, 14 Ala. 469.

3. Thompson on Bills, 147.

§ 273. **As to the authority of the agent to bind the principal.**—The first question which propounds itself to a party treating with another who represents himself to be an agent and offers to execute or indorse a negotiable instrument, in the name of an alleged principal, is this: Has this person authority to bind his alleged principal in this manner? The inquiry is vital. For if there be no such authority, express or implied, the alleged principal is not bound; and the only remedy is against the person falsely assuming to be agent.[4] It is to be observed, too, that one may be agent for another in certain matters, but not in other matters. It is important, therefore, to see if the transaction proposed comes within the scope of the agent's authority. But again, the agent may have authority to bind the principal in a certain way, and yet not to execute or indorse a negotiable instrument. It is important, therefore, to see if he has authority to act in the particular way which he proposes. And we shall pursue these inquiries by considering the evidences of agency under the several heads of, (1) Express Authority, (2) Implied Authority, and hereafter we shall consider Ratification.

Under Negotiable Instrument statute.—Under the statute,[5] it has been held that the authority of an agent to indorse notes for the payee may be proved as agency is proved in other cases, and by a writing conferring the authority.[6]

§ 274. **In the first place, as to the express authority of an agent,** it is not necessary that it should be granted in any particular form, unless it be authority to execute an instrument under seal, in which case it also must be under seal. Otherwise the authority may be written, or oral; and the agent, to execute or indorse a negotiable instrument, needs nothing more than verbal authority so to do,[7]

4. The Floyd Acceptances, 7 Wall. 676; Mechanics' Bank v. N. Y. & N. H. R. Co., 13 N. Y. 631; Andover Bank v. Grafton, 7 N. H. 289; Lederer v. Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954. See Brown v. Rouse, 93 Cal. 237, 28 Pac. 1044; Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

5. Appendix, sec. 19.

6. Scotland County Nat. Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539.

7. Chitty (13th Am. ed.) [28], 36, §§ 74, 299; Curtin v. Salmon River Hydraulic Gold Min., etc., Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75; Philips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749; Foster v. Cochran, 89 Ga. 466, 15 S. E. 551; Connor v. Hodges, 7 Ga. App. 153, 66 S. E. 546 (as to authority to indorse); Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17; Bettis v. Bristol, 56 Iowa, 41; A declaration of a wife that her husband is authorized to execute promissory notes in her name, is not within the statute of frauds. Arnold v. Hopper, 77 Kan. 819, 91 Pac. 76.

though it was once thought that a formal power of attorney was necessary.[8] It is obvious, however, that it is safer for one, dealing with an alleged agent, to require production of written authority; or otherwise unmistakable oral proof that authority had been given. If the authority is in writing, it cannot be disputed by parol proof of contrary verbal instructions to the agent, or otherwise;[9] besides, it proves itself whenever produced, and its genuineness is established.

§ 275. As to joint agencies.—If two or more persons are authorized to bind their principal by conjoint action, all must unite, as it is their aggregate, and not their separate, action which the principal engages shall make him liable.[10] Thus, where A. addresses a letter to B., say, "I hereby authorize you and C. to use my name as indorser," and B., without being joined by C., alone signed A.'s name as indorser, it was held that A. was not bound.[11] And where a number of persons unite in a power of attorney, authorizing the attorney, "for us, and in our names and our behalf, to sign our names as indorsers," upon bills and notes offered by A. B. for discount, it imports authority to sign their names as joint indorsers only, and not as several and successive indorsers.[12]

If four directors of a company are essential to act for it, and three only authorize an agent to draw bills in its name, they will not be binding.[13]

§ 276. Authority to bind principal separately, strictly construed.—Authority to bind the principal as a party to a negotiable instrument is authority to bind him separately, and does not authorize

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8. Mann v. King, 6 Munf. 428.

9. Thompson on Bills, 147, 148; Marius, 104; Beawes, No. 86.

10. Hartford Fire Ins. Co. v. Wilcox, 57 Ill. 180.

11. Union Bank v. Beirne, 1 Gratt. 226.

12. Bank of United States v. Beirne, 1 Gratt. 234, 539. In the last case (Bank of United States v. Beirne, 1 Gratt. 539), nine persons had united in a power authorizing their attorney to indorse their names jointly on all bills, notes, or drafts drawn by J. B. S., to be discounted at certain specified banks for the accommodation of J. B. S., and the latter drew a bill payable to the order of one of the principals in the power, upon which the attorney indorsed the names of all his principals; and then the note was discounted at one of the specified banks for the accommodation of J. B. S. The bill being protested for nonpayment, and action being brought against the indorsers, it was held that the bill being made payable to one of the principals in the power, the indorsement by the attorney was not such a joint indorsement as the power authorized.

13. Du Carry v. Gill, 4 Car. & P. 121; Chitty on Bills [*28], 37.

the agent to bind him conjointly or as copartner with another.[14] Authority "for him and in his behalf to accept bills drawn on him by his agents and correspondents," has been held to apply only to the principal's individual, and not to his partnership, affairs; and also only to authorize acceptance of bills drawn by an agent in that capacity, and not to extend to a bill drawn by a copartner.[15]

§ 277. Agent cannot delegate authority involving judgment or discretion.—As the authority of an agent is not coupled with any interest, but he is a mere selected instrument to do certain things for another, he cannot delegate his powers to another unless authorized to do so.[16] But if he has power to delegate his authority, he may exercise it.[17] And merely employing another as amanuensis to write the name, he himself having determined upon the propriety of doing so, would be unobjectionable.[18] This principle was recently illustrated in Arkansas, where A. authorized B. to borrow money for him from C., and to execute his note therefor. B. borrowed the money, and in his presence, and by his request, D. signed the note, "A. by D.;" and the instrument was held to be the valid note of A., English, C. J., saying: "An agent cannot delegate any portion of his power requiring the exercise of judgment and discretion; otherwise, however, as to powers or duties merely mechanical in their nature." [19]

§ 278. General and special agents.—There are some positions of agency in which, in the usual course of business, the agent draws, indorses, or accepts negotiable instruments; and in all such cases the principal will be bound by the agent's acts, although positively against his instructions. For between general and special agents there is a vital distinction. Where the agency is specially given to do a particular thing, the agent is circumscribed within the limits of actual authority; [20] but where the agency is general—as that of a bank cashier, for instance—all acts within the scope of that general

14. Stainback v. Reed, 11 Gratt. 281; Bryan v. Berry, 6 Cal. 394.

15. Attwood v. Munnings, 7 B. & C. 278, 1 Man. & R. 66.

16. Brewster v. Hobart, 15 Pick. 302; Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Shankland v. Corporation of Washington, 5 Pet. 395.

17. Coles v. Trecothick, 9 Ves. 274.

18. Lord v. Hall, 8 C. B. 627; Commercial Bank v. Norton, 1 Hill, 501; Edwards on Bills, 88.

19. Weaver v. Carnall, 35 Ark. 198. See also Ellis v. Francis, 9 Ga. 327.

20. King v. Sparks, 77 Ga. 288; Story on Agency, § 17. See Evans, etc., Co. v. Holder, 16 Tex. Civ. App. 300, 41 S. W. 404.

authority are binding on the principal. And if he seeks to avoid liability, he must show not only a limitation of the general authority, but also that the party dealing with the agent had notice.[21] It is also to be observed that when the authority of the agent depends upon some fact outside the terms of his power, and which from its nature rests peculiarly within the agent's knowledge, the principal is bound by the representations of the agent, although false as to the existence of such fact.[22] Accordingly it has been held that where an agent was authorized to make drafts on his principal, as might be necessary in a certain business, it was an unconditional engagement to pay such drafts as the agent might deem necessary.[23]

§ 279. Express limitation of agent's authority; bona fide holder.— If the holder of a bill place it in the hands of an agent to be sold in the market, and expressly directs him not to indorse it, and the agent disobeys orders, and indorses his principal's name, the principal will not be bound, even to a *bona fide* holder.[24] But general authority to the agent to get the bill discounted, without restriction as to the mode, would imply authority to indorse it in the principal's name.[25] And a subsequent promise of the principal to pay the bill where he had not authorized the agent to indorse, would be *nudum pactum*.[26]

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21. See Fenn v. Harrison, 3 T. R. 757; Edwards on Bills, 85, 87. Following the doctrine stated in the text, it has been held in New York, that if the cashier of a savings bank receives for deposit a sum of money, and the cashier places the fund so received in a vault in the bank, and thereafterward embezzles the fund, the bank is liable, on the ground that the cashier is a general agent, and was in the actual discharge of his duties as such officer when the deposit was received and the pass-book issued. See Daniels v. Empire State Sav. Bank, 92 Hun, 450, 38 N. Y. Supp. 580. See authorities cited in notes to § 284, *post*. Following the principle stated in the text, it has been held that the principal is concluded by the representation of the agent as to any extrinsic fact, which rests peculiarly within his knowledge, although false, and which is not ascertainable by reference to the power in relation to the act so done by the agent. See Van Wagenen v. Genesse Falls Sav. Assn., 88 Hun, 43, 34 N. Y. Supp. 491; First Nat. Bank of Indianapolis v. New, 146 Ind. 411, 45 N. E. 597.

22. New York & New Haven R. Co. v. Schuyler, 34 N. Y. 61; Biddle on Stockbrokers, 399.

23. Merchants' Bank v. Griswold, 72 N. Y. 472.

24. Fenn v. Harrison, 3 T. R. 757. See Brown v. Rouse, 93 Cal. 237, 28 Pac. 1044.

25. See German-American Bank v. Carondelet Real Estate Co., 150 Mo. 570, 51 S. W. 691.

26. See German-American Bank v. Carondelet Real Estate Co., 150 Mo. 570, 51 S. W. 691.

§ 280. Authority under written instruments, and signatures "by procuration." The general principle that a principal is bound by act of an agent acting within the general scope of his authority, notwithstanding it is not in conformity to it, is subject to this limitation: that whenever an authority purports to be derived from a written instrument, or the agent signs the paper with the words "by procuration," in such a case the party dealing with him is bound to take notice that there is a written instrument of procuration, and he ought to call for and examine the instrument itself to see whether it justifies the act of the agent. Under such circumstances, he is chargeable with inquiry as to the extent of the agent's authority; and if, without examining into it when he knows of its existence—and especially if he has it in his possession—he ventures to deal with the agent, he acts at his peril, and must bear the loss if the agent transcended his authority.[27] But no such duty exists to make inquiry respecting private instructions to the agent from his principal, whether written or oral, for they may well be presumed to be of a secret and confidential nature.[28]

§ 281. Limitations of general authority.—If authority be vested in the agent in very general terms, but the instrument enumerates certain special objects and acts, this specification will be regarded as a limitation upon the general words; and the authority will be confined to action within the scope of the enumerated objects, unless there be some phraseology in the instrument, or some peculiar circumstance which impresses a different intention upon the instrument. Thus it was held, in New York, that a power of attorney to collect debts, to execute deeds of lands, to accomplish a complete adjustment of all concerns of the principal in a particular place, and to do all other acts which the principal could do in person, conferred no authority on the agent to sign a note in his principal's name, the

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27. Stainback v. Bank of Virginia, 11 Gratt. 259; Stainback v. Read, 11 Gratt. 281; North River Bank v. Aymar, 3 Hill, 262; Alexander v. Mackenzie, 6 C. B. 766; Attwood v. Munnings, 7 B. & C. 278. Action on acceptance purporting to be by procuration. Holroyd, J., said: "The word 'procuration' gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given." Edwards on Bills, 85; Story on Agency, § 72; Mount Morris v. Gorham, 169 Mass. 519, 48 N. E. 341; Bryant *et al.* v. La Banque, L. R., App. Cas. 170 (1893); Westinghouse v. German Nat. Bank, 188 Pa. St. 630, 44 Atl. 734.

28. North River Bank v. Aymar, 3 Hill, 262; Story on Agency, § 73.

general words being limited by the matters specially mentioned.[29] And so in England, where the agent was authorized to manage certain real estate, with general words extending his powers to all property of the principal of every description, and authorizing him "to do all lawful acts concerning all the principal's business and affairs of what nature or kind soever," it was held that the agent could not indorse bills in his principal's name.[30]

§ **282. Good faith in agencies.**—Perfect good faith is the essence of agency; and an agent has no right to execute negotiable paper in his principal's name, or use negotiable paper belonging to his principal, for his individual purposes; and if the party dealing with the agent have notice that he is thus acting in fraud of his principal's rights, he cannot hold the principal liable.[31] On the contrary the principal may recover paper belonging to him so transferred by the agent from the transferee.[32] A power of attorney to draw, indorse, or accept bills negotiable at a particular bank in the principal's name, would be construed as giving authority to act only in the separate individual business of the principal; and would carry no authority to draw and indorse a bill in his own name, or in the joint name of himself and his principal.[33] If an agent acting under such authority drew a bill in his own name, and indorsed it in his principal's, and caused it to be discounted, and the proceeds passed to his individual credit, that circumstance would show that he was acting for his own benefit, and the party so discounting the bill could not recover against the principal.[34] Agents cannot make contracts with themselves so as to bind their principals. The law will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity,[35] nor can a

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29. Rossiter v. Rossiter, 8 Wend. 494; Golinsky v. Allison, 114 Cal. 458, 46 Pac. 295.

30. Esdaile v. La Nauze, 1 Younge & C. 347. But see Lafourche Transportation Co. *et al.* v. Pugh, 52 La. Ann. 1517, 27 So. 958.

31. Stainback v. Bank of Virginia, 11 Gratt. 269; Treuttell v. Barnadon, 8 Taunt. 100; Haynes v. Foster, 2 Car. & M. 237; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115; Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115.

32. Treuttell v. Barnadon, 8 Taunt. 100.

33. Stainback v. Bank of Virginia, 11 Gratt. 281; Mechanics' Bank v. Schaumburg, 38 Mo. 228; First Nat. Bank v. Gay, 63 Mo. 33.

34. Stainback v. Bank of Virginia, 11 Gratt. 269; Englehart v. Peoria Plow Co., 21 Nebr. 41.

35. San Diego v. San Diego, etc., R. Co., 44 Cal. 112. See also vol. 2, § 1611.

person act as agent for both parties unless the fact is disclosed.[36] Therefore a note made by a corporation to its trustees is against public policy and void.[37] Courts which do not hold such a transaction absolutely void, regard it with great suspicion.[38]

§ 283. Illustrations.—So, where the plaintiff indorsed bills to A. B. specially as follows, "Pay A. B. or order, on account of plaintiff," and A. B. pledged the bills with defendant for his private debt, it was held that the form of indorsement was sufficient notice that the agent had no such power.[39] Nor will a power of attorney to draw, indorse, or accept bills authorize the agent to draw a bill in the principal's name upon any one not having fund of the principal;[40] nor to draw, accept, or indorse a bill for the accommodation of a third party, its true construction limiting the agent's authority to act for the principal, and in his name to draw, accept, and indorse bills in the usual course of the principal's business.[41] But the principal would be bound on such accommodation paper to a *bona fide* holder without notice.[42] And the fact that a party was general agent of a firm, and had been in the habit of drawing drafts, and making notes and indorsements for them, may go to the jury to show by inference that he had authority to bind his principal by an accommodation acceptance.[43] So may evidence that a clerk had previously given notes in similar transactions for his principal.[44]

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36. Shelton Implement Co. v. Schieck, 81 Nebr. 826, 116 N. W. 951, holding that when an agent for the sale of machinery took a note from a purchaser representing a commission or *bonus* on the sale, the amount of which he added to the purchase price, and also received from his principal "commission certificates" showing the amount of commission due from his principal and payable when the notes given by the purchaser of the machinery were paid, the commission or *bonus* note exacted by the agent from the purchaser was voidable at the option of the maker.

37. Wilbur v. Lynde, 49 Cal. 290.

38. Chouteau v. Allen, 70 Mo. 338.

39. Treuttell v. Barnadon, 8 Taunt. 100; Byles (Sharswood's ed.) [*34], 112; Gerard v. McCormick, 130 N. Y. 261, 29 N. E. 115.

40. Stainback v. Bank of Virginia, 11 Gratt. 269.

41. Wallace v. Branch Bank, 1 Ala. 565; North River Bank v. Aymar, 3 Hill, 262; Nichols v. State Bank, 3 Yerg. 107; Myers v. Walker Bros. & Co., 104 Ga. 316, 30 S. E. 842.

42. Edwards v. Thomas, 66 Mo. 469.

43. Commercial Bank v. Norton, 1 Hill (N. Y.), 501.

44. Valentine v. Packer, 5 Pa. St. 333; Garrison v. O'Donald, 73 Mo. App. 621; Bank of Ukiah v. Mohr, 130 Cal. 268, 62 Pac. 511.

§ **284. Notice of agent's mala fides.**—If, however, an agent authorized generally to "sell, indorse, and assign notes" by his principal, through a power of attorney, borrow money, and offer his principal's notes as security, indorsed by himself, it has been held that the principal would be bound, although the money was borrowed in the agent's name, and used by him in his private business, unless the party dealing with the agent knew of the intended misappropriation of the funds. And Lord Brougham said: "It is said that the indorsement was only to be made for the benefit of the principal, and not for the purposes of the agent. We do not see how this very materially affects the case, for it only refers to the use to be made of the funds obtained from the indorsement, not to the power; it relates to the purposes of the execution, not to the power itself; and though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power." [45] So, the principal will be bound in all cases where there is a misappropriation of funds obtained under a power exercised by the agent in conformity with his authority, unless the holder had notice.[46] And, however much an agent may betray his trust, a *bona fide* holder of the bill or note, without notice, may hold the principal liable.[47] The principal would, therefore, be bound on an accommodation indorsement made by the agent in his name, in the general scope of agency, to a *bona fide* holder without notice.[48]

An agent may be called as witness to prove his agency, but his

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45. Bank of Bengal v. McLeod, 7 Moore P. C. 35; Bank of Bengal v. Fagan, 7 Moore P. C. 61.

46. North River Bank v. Aymar, 3 Hill, 262; Mars v. Mars, 27 S. C. 135; Lederer v. Union Sav. Bank, 52 Nebr. 133, 71 N. W. 954; City Nat. Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895.

47. Exchange Bank v. Monteith, 17 Barb. 171. And it has been held that knowledge cannot be imputed to a bank of its cashier's intention to embezzle the proceeds of a promissory note when it should be discounted by him at the bank, and the fact that he did embezzle such proceeds is not a defense to an action on the note by the bank against the maker, who is an accommodation party—if an agent, while acting for his principal, is at same time committing an independent, fraudulent act upon his own account neither his fraud nor his knowledge of it is to be imputed to the principal. Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912. See also First Nat. Bank of Grafton v. Babbidge, 160 Mass. 563, 36 N. E. 462; Chase Nat. Bank v. Faurot, 149 N. Y. 532, 44 N. E. 164. Compare Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115.

48. Edwards v. Thomas, 66 Mo. 467.

declarations are not admissible evidence against the alleged principal until the fact of agency is established.[49]

The principle that the transferrer of a negotiable instrument warrants its genuineness extends to transfers by an agent, unless he discloses his agency, and also the name of the principal. Otherwise, if the bill or note which he transfers be forged, in which case he will be bound.[50]

§ 285. Infirmity of principal's title affects agent.—If a man hold a bill or note as agent of another, and the circumstances be such that the principal cannot recover, the infirmity of the principal's titles infects his also, and he cannot recover.[51] Thus M. & Co. remitted to the plaintiff in London a Bank of England note for £500, stating that they would at a future day draw for the amount. The plaintiff presented it for payment, but the bank detained it, on the ground that it had been obtained by means of a forged draft from a previous holder. In a suit by the plaintiff against the bank, it was held that the plaintiff was identified with his principals, and there being no evidence that they had given full value, he could not recover.[52]

§ 286. For what acts principal not bound.—A principal is not bound for the criminal acts of his agent, unless he participates in them, or has been guilty of gross negligence. Thus, where a bank clerk, or cashier, embezzles a special deposit in the bank, the bank is not liable, as this is not its act, unless it had complicity in the wrong, or was grossly negligent.[53]

§ 286a. Liability for special deposits.—Whether or not a bank

49. National Mechanics' Bank v. National Bank, 36 Md. 5; Streeter v. Poor, 4 Kan. 412; Poore v. Magruder, 24 Gratt. 200; 1 Phillips on Evidence [*515], note, 144; Murphy v. Gumaer, 12 Colo. App. 472, 55 Pac. 951. And the declarations of the agent are not admissible unless in respect to a transaction in which he is authorized to appear for his principal. See Merchants' Nat. Bank v. Clark, 139 N. Y. 315, 36 Am. St. Rep. 710, 34 N. E. 910; Holland v. Van Beil, 89 Ga. 223, 15 S. E. 302; Bank of New York v. American Dock & Trust Co., 143 N. Y. 559, 38 N. E. 713.

50. Lyons v. Miller, 6 Gratt. 440; Merriam v. Walcott, 3 Allen, 258. See § 740*a*.

51. Lee v. Zagury, 8 Taunt. 1144; Byles [*391].

52. Solomons v. Bank of England, 13 East. 235, 1 Rose, 99.

53. Sturges v. Keith, 57 Ill. 454; Exchange Nat. Bank v. Bank of Little Rock, 7 C. C. A. 111, 58 Fed. 140.

receiving bonds or other securities for keeping on special deposit is liable in trover to the owner in the event of their being stolen while in its possession, is a much debated question. Like other bailees, if the bailment be gratuitous, the bank will not be liable unless the loss be occasioned by its gross negligence. This is conceded.[54] But whether it is liable at all is a matter about which the decisions are in conflict. By some the view is taken that the receipt of securities, or valuables of any kind, on special deposit, is *ultra vires* of the ordinary business of banking, and that the bank will not be bound.[55] By others, that such transactions have become by usage part of the duty or business of a bank, and belongs to the very nature of such an institution.[56] In New York the latter view obtains, and has been recently applied to hold a national bank liable, it being considered that such a bank has the incidental power to receive special deposits gratuitously or otherwise, though it is not within the enumerated powers conferred by statute.[57] And as said by the United States Supreme Court, it may now be considered as settled that if a bank be accustomed to take such deposits, and the fact is known and acquiesced in by the directors, there is the same liability upon it for loss of the deposit occasioned by its gross negligence as if the deposit had been authorized by the terms of its charter.[58]

§ 287. Agent not liable for losses.—Losses occasioned by fraud or failure of third parties, to whom an agent has given credit, pur-

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54. Scott v. National Bank, 72 Pa. St. 471; Foster v. Essex Bank, 17 Mass. 479; Pattison v. Syracuse Nat. Bank, 80 N. Y. 83; Chattahoochee Nat. Bank v. Schley, 58 Ga. 369.

55. Wiley v. First Nat. Bank, 47 Vt. 546; Whitney v. First Nat. Bank, 50 Vt. 389; Third Nat. Bank v. Boyd, 44 Mo. 47; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278. This view was taken in a former edition of this work, but the decision of the United States Supreme Court cited below and concurring authorities have induced a change of the text.

56. Foster v. Essex Bank, 17 Mass. 479; Pattison v. Syracuse Nat. Bank, 80 N. Y. 82; Chattahoochee Nat. Bank v. Schley, 58 Ga. 369, where it is said: "By habitually receiving through its cashier special deposits to be kept gratuitously for mere accommodation, a national bank will incur liability for gross negligence in respect to any such deposits received in the usual way." Turner v. First Nat. Bank, 26 Iowa, 562; Smith v. First Nat. Bank, 99 Mass. 605; Lancaster County Nat. Bank v. Smith, 62 Pa. St. 47, distinguished from Scott v. National Bank, 72 Pa. St. 471, where no negligence was shown; First Nat. Bank v. Graham, 79 Pa. St. 106, no negligence shown.

57. Pattison v. Syracuse Nat. Bank, 80 N. Y. 83. See other cases *supra*.

58. National Bank v. Graham, 100 U. S. (10 Otto) 702.

suant to the regular and accustomed practice of trade, are not chargeable upon him.[59] And, therefore, where the receiver of Lord Plymouth's estate took bills in the country of persons who at the time were reputed to be of credit and substance, in order to return the rents in London, and the bills were dishonored and the money lost, the receiver was excused.[60] And where remittance is made by post, according to instructions,[61] in the usual way of business, the party making it is not liable for any resulting loss.[62]

A signature by an agent with authority satisfies the allegation of signature by the party's own hand.[63]

§ 288. Presumed continuance of general authority.—A general authority to an agent is presumed to continue until its revocation is generally known. Therefore (to use the language of Chitty), after the discharge of a clerk or agent usually employed to draw, accept, or indorse bills or notes, the employer will be bound by his signature, made after the determination of his authority, until the discharge be generally known.[64] And if A. permit B. to draw bills in his name, he will be liable as drawer to ignorant indorsees, although he had no interest, nor knew of the particular bills drawn in fraud of him by B., though he will not be liable to a payee, who had knowledge of the impropriety of the transaction.[65]

§ 288a. Revocation of authority and limitation.—When, therefore, the authority of such an agent has been determined, or he has been discharged by his employer, and there is reason to apprehend that he will circulate bills in his employer's name, it is advisable for the latter to give notice of the determination of the agent's authority through the public press, and also to all his correspondents individually—notice in the public press not being in general sufficient to affect a former customer, unless he has had express notice thereof.[66]

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59. Chitty on Bills [*36], 49.

60. Knight v. Lord Plymouth, 2 Atk. 480.

61. National Bank of Bellefonte v. McManigle, 69 Pa. St. 156.

62. Warwick v. Noakes, Peake N. P. 68.

63. Porter v. Cumings, 7 Wend. 172; Pease v. Morgan, 7 Johns. 468; Booth v. Grove, Moody & M. 182, 3 Car. & P. 335; Helmsley v. Loader, 2 Campb. 450; Jones v. Mars, 2 Campb. 306 (overruling Levy v. Wilson, 5 Esp. 180).

64. Chitty on Bills (13th Am. ed.) [*32], 42; Story on Agency, §§ 470, 473; Anon. v. Harrison, 12 Mod. 346.

65. Smith v. Stranger, Peake Add. 116; Chitty [*32], 42.

66. Chitty [*32], 42.

A different rule applies as to special and limited agencies. When their authority terminates by its own limitation the agents can no longer bind their principals. Thus, where plaintiff, being about to leave home, deposited a power of attorney with his bank, authorizing his clerk to draw checks on his account for fifteen days, and after that time the clerk continued to draw checks, and used the money for his own purposes, it was held that the loss should fall on the bank, and that the principal was not bound after the fifteen days, as to checks so drawn. The fact that the checks had been returned in the principal's bank-book did not bind him by acquiescence, or estoppel, because the check drawer was his cashier, and the fact that he had drawn the checks after expiration of his authority was not discovered by the principal.[67]

Death operates as revocation of all agencies not coupled with an interest vested in the agent;[68] but war between the countries of the principal and the agent does not.[69]

SECTION II

IMPLIED AUTHORITY OF AGENT

§ 289. In the second place, as to the implied authority of an agent to bind his principal: such authority may frequently be inferred from the circumstances of the case. Thus if the principal stand by and tacitly concur in the act of the agent signing his name, he would be as strictly bound as if he had expressly authorized the agent so to do. So authority may be implied from the course of business, and employment, or from repeated recognitions by the principal of the agent's authority.[70] The circumstances which give rise to the im-

67. Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69. See Weiser v. Denison, 10 N. Y. 68.

68. 1 Parsons on Contracts, 71. It has been held that agency is revoked where principal is *in articulo mortis*. Matter of James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774.

69. See *ante*, chapter VIII, section II, § 222.

70. Lake Shore Nat. Bank v. Colliery Co., 51 Hun, 63; Kansas City, etc., R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 So. 395; May v. Jarvis-Conklin Mortgage & Trust Co., 138 Mo. 275, 39 S. W. 792; Garrison v. O'Donald, 73 Mo. App. 621; Gilden, etc., Co. v. National Bank, 16 C. C. A. 534, 69 Fed. 912. And where an entire business is placed under the management of an agent, the authority of the agent is presumed to be commensurate with the necessities of the situation. Whitten v. Bank of Fincastle, 100 Va. 546, 42 S. E. 309.

plication of authority are for the jury to consider; and the jury will be warranted in holding the principal liable if they produce a strong and reasonable belief that the authority existed. And where a principal, after full knowledge of all circumstances of the drawing of checks by his agent upon his bank account retained the fruits of the transactions sought to be evaded as unauthorized, he cannot be heard to exclude from the plenary power he conferred the conduct of the agent in drawing unpaid checks in the hands of an innocent holder for value.[71]

§ 290. Construction of authority to bind principal in a certain character.—The authority to bind the principal in a certain character on a negotiable instrument cannot be construed as an authority to make the principal a party in any other character. Thus authority to draw a bill is not of itself authority to indorse one; [72] nor to accept one; [73] nor does authority to indorse imply authority to accept a bill; [74] nor to make a several or joint note.[75] So it has been considered that authority to draw a bill upon the principal does not imply authority to the agent to draw in his own name; and that the principal would not be estopped from refusing payment by having paid previously a bill so drawn.[76]

But under certain circumstances authority to bind the principal in one form might be evidence throwing light on the question of authority to bind him in another. "It may be admitted," said Tindal, C. J., in a case quoted elsewhere in the text, "that an authority to draw does not import in itself an authority to indorse bills; but still the evidence of such authority to draw is not to be withheld from the jury, where they are to determine upon the whole of the evidence whether an authority to indorse existed or not." [77] Authority to sell

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71. Stotts City Bank v. T. A. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472.

72. Robinson v. Yarrow, 7 Taunt. 455; Murray v. East India Co., 5 B. & Ald. 204. Power to school directors to issue bonds does not authorize issue of notes. School District v. Sippy, 54 Ill. 287; Bank of Deer Lodge v. Hope Mining Co., 3 Mont. 146; Dobson v. More, 164 Ill. 110, 45 N. E. 243; State v. Hodges, 144 Mo. 50, 45 S. W. 1093.

73. Attwood v. Munnings, 7 B. & C. 278; Sewanee Mining Co. v. McCall, 3 Head, 621; Bank of Deer Lodge v. Hope Mining Co., 3 Mont. 146.

74. Attwood v. Munnings, 7 B. & C. 278.

75. Cuyler v. Merrifield, 5 Hun, 559.

76. Bank of Deer Lodge v. Hope Mining Co., 3 Mont. 146.

77. Prescott v. Flinn, 9 Bing. 19. See also Commercial Bank v. Norton, 1 Hill (N. Y.), 502.

a note would not authorize the agent to bind his principal by a guarantee of payment;[78] nor would authority to collect a bill imply authority to sell it.[79] And a party may be agent to transfer a bill or note, and yet not to bind his principal by an indorsement.[80]

§ **291.** So authority to execute certain notes will not extend to authorize an agent to renew them;[81] and if the authority be to sign and indorse paper payable at a particular bank, the agent cannot under it sign or indorse paper payable at any other bank;[82] nor will authority to sign a note or bill for a particular purpose be valid in respect to any other purpose.[83] And if the authority specify the time at which the paper is to be made payable—as, for instance, in six months—it will not be binding on the principal if made payable at a different time—as, for instance, in sixty days.[84] But where a party gave verbal authority to agent to sign a twenty-days' note, but did not intend to limit his authority to that time, and the note was made payable at thirty days, it was held that the jury should consider all the circumstances, and if they regarded the difference in time as immaterial, the principal should be held liable.[85] And authority to renew a note at sixty or ninety days has been held to authorize its renewal at eighty days, there being no violation of the object and intention of the parties.[86]

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78. Graul v. Strutzel, 53 Iowa, 712.

79. Smith v. Johnson, 71 Mo. 382; Goodfellow v. Landis, 36 Mo. 168; Ryhiner v. Feickert, 92 Ill. 305; Feiner v. Puetz, 77 Mo. App. 405.

80. Brown v. Donnell, 49 Me. 421; Security Bank v. Kingsland, 5 N. Dak. 263, 65 N. W. 697.

81. Ward v. Bank of Kentucky, 7 Mon. 93.

82. Morrison v. Taylor, 6 Mon. 82; Craighead v. Peterson, 72 N. Y. 279.

83. Nixon v. Palmer, 8 N. Y. 389; Hortons v. Townes, 6 Leigh, 59, Tucker, P., saying: "The authority was to execute a note for the purpose of raising money; the note executed was not of purpose to raise money for the agent, James Townes, but to pay a debt contracted at that time with the plaintiffs for groceries, with an agreement that if it could not be discounted, the plaintiffs were to hold the note as their own property, and as a note binding on the defendants, according to the usual effect of such notes. Thus, the defendants, who had only authorized themselves to be made debtors to one of the banks, are made debtors to an individual. Here, it must be confessed, is a clear and obvious difference in form, between the authority given and the contract made. Is there no difference in substance? Very great, I apprehend."

84. Batley v. Carswell, 2 Johns. 48; Edwards on Bills, 84.

85. Adams v. Flannagan, 35 Vt. 410.

86. Bank of South Carolina v. M'Willie, 4 McCord, 438.

§ 292. Authority implied by agency to do certain acts.—When the authority to execute or indorse a negotiable instrument is sought to be deduced from an agency to do certain other acts it must be made to appear affirmatively that the signing or indorsement of such an instrument was within the general objects and purposes of the authority which was actually conferred. And in interpreting the authority of the agent, it is to be strictly construed.[87] Thus a general authority to transact business for the principal, will not authorize the agent to bind him as a party to negotiable paper, according to many authorities, and the general principles of the law of agency.[88] It has been held that authority to transact all business for the principal, would empower the agent to transfer a negotiable instrument in his principal's name;[89] but there is authority to the con-

87. Byles on Bills (Sharswood's ed.) [*32], 108; Sewanee Mining Co. v. McCall, 3 Head, 619; Connel v. McLoughlin, 28 Oreg. 230, 42 Pac. 218, citing and approving text; Helena Nat. Bank v. Rocky Mountain Telegraph Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628; State v. Hodges, 144 Mo. 50, 45 S. W. 1093; Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113, quoting text, and holding that a superintendent of a manufacturing corporation has no authority to indorse check. See also Bank of Commerce v. Baird Min. Co., 13 N. Mex. 424, 85 Pac. 970, holding that the managing agent of a mining corporation has no implied authority to draw and cash bills of exchange. That an agent is authorized to indorse check with a stamp reading "Pay to the order of the Third National Bank for deposit. James T. Prince, Manager, by ——— Cashier," and fill the blank therein with his own name, does not empower such cashier to indorse checks and drafts in blank, so as to collect the money thereon. Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316.

88. Sewanee Mining Co. v. McCall, 3 Head, 619. Held, that authority to general agent to transact business, and to draw on president of company, did not authorize him to accept a bill, even to avoid suspension of work of great importance to principal. Byles [*32], 108; Chitty on Bills [*29, 30], 39. Text cited and approved, Boord v. M. Ferst's Sons & Co., 39 Fla. 381; Fairly v. Nash, 70 Miss. 193, 12 So. 149.

89. Bailey v. Rawley, 1 Swan, 205. To same effect, see Frost v. Wood, 2 Conn. 23. Where a person signed a note as surety and subsequently executed renewal notes, a further renewal note made by his agent, for his benefit and in the course of his business, was chargeable against his estate, when the agent was authorized by a power of attorney to execute and deliver any and all papers for him and in his name that he himself could execute relating to his personal business. McClure v. Corydon Deposit Bank (Ky.), 106 S. W. 1177. Where an agent is put in charge of the business of a principal, with power to sell its goods, collect for the same, and make purchases of other dealers when it is necessary to fill orders calling for goods that may not be in the stock of which he has charge, it cannot be said, as a matter of law, that the agent did not have apparent authority to pay for the goods so purchased even by indorsing the checks of his principal

trary.[90] Authority to conduct in one's place and stead, his commercial business, and sign the principal's name whenever requisite or expedient in the attorney's good discretion, would, however, be broad enough to cover cases of drawing bills of exchange,[91] and so likewise authority to act "as lawful cashier and financial agent." [92]

§ **293. Illustrations.**—Authority to collect debts and give discharges carries no implication of authority to indorse a negotiable bill, note or check.[93] According to these principles, full authority to an attorney to ask, demand, and receive all money that may become due the principal, and to "transact all business," will not authorize the attorney to indorse bills received in payment.[94] So authority to

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for that purpose. Graton & Knight Mfg. Co. v. Redelsheimer, 28 Wash. 370, 68 Pac. 879. A power of attorney to take control of the donor's affairs, business and property, and to do everything which the nature of the business shall require, including the execution, indorsing, and paying of promissory notes, the power to execute, indorse and pay promissory notes is restricted to the scope of the general power conferred to do all acts required for the control and management of the donor's affairs, business and property. First Nat. Bank v. Winnebago County Aggr. &c. Assoc., 141 Wis. 476, 124 N. W. 656, 135 Am. St. Rep. 50. A principal who permits his agent to do business apparently independently under a firm name and holds him out to the world as such firm, cannot question the validity of his acts in indorsing notes payable to such firm as if he were the one to whom they are payable. Gardner v. Wiley, 46 Or. 96, 79 Pac. 341.

90. Kilgour v. Finlyson, 1 H. Bl. 155; Hogg v. Snaith, 1 Taunt. 347; Hay v. Goldsmidt, 2 J. P. Smith, 79; Esdaile v. La Nauze, 1 Younge & C. 394; Lafourche Transportation Co. *et al.* v. Pugh, 52 La. Ann. 1517, 27 So. 958; Helena Nat. Bank v. Rocky Mountain Telegraph Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

91. Dollfus v. Frosch, 1 Den. 368; Wimberly *et al.* v. Windham, 104 Ala. 409, 16 So. 23, 53 Am. St. Rep. 70.

92. Edwards v. Thomas, 66 Mo. 482. Indorsement under such authority held valid. Bank v. Hughlett, 84 Mo. App. 268.

93. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113; Goodell v. T. M. Sinclair & Co., 112 Ill. App. 594; Hamilton Nat. Bank v. Nye, 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Lonier v. Ann Arbor Savings Bank, 162 Mich. 541, 127 N. W. 685; Dispatch Printing Co. v. National Bank of Commerce, 107 Minn. 440, 124 N. W. 236. Where a contract of agency stipulated that the principal agreed to take notes for goods sold when the makers were quoted good by a local bank, this implied that the agent was to transmit the notes taken to his principal, and no power was thereby conferred on the agent to bind his principal by the indorsements of notes taken by him for goods sold. National Fence Mach. Co. v. Highleyman, 71 Kan. 347, 80 Pac. 568.

94. Hogg v. Snaith, 1 Taunt. 347. See also Robinson v. Chemical Nat. Bank, 86 N. Y. 407; Thomson v. Bank of British North America, 82 N. Y. 1; Jacoby

demand and receive all moneys due on any account, to use all means for their recovery, to appoint attorneys to bring actions, and "*to do all other business*," would not authorize the agent to indorse a bill, for the words italicised would be construed with reference to the former, as meaning all business pertaining thereto.[95]

§ 294. Further illustrations.—An agent who is authorized to advance a sum of money to a person would exceed his authority by giving a note for the amount in his principal's name.[96] And an agent to make purchases of goods or supplies, and pay for them,[97] or to buy and sell goods for a trading company,[98] is not thereby authorized to give a note or accept a bill for the amount; nor could an agent, to make sales, indorse his principal's name on the purchaser's bill to be discounted to raise funds for payment;[99] nor could authority to accept bills, which would be a pledge of the principal's credit, be inferred from payment by the agent of unaccepted drafts on former occasions.[1] The position of an ordinary merchant's clerk is not one which implies authority to bind the employer by signing a bill or note in his name;[2] nor has a commercial traveler implied authority to draw drafts upon his principal for traveling expense;[3] nor is an employee of a state insurance agent, who is given the title "cashier," thereby impliedly authorized to indorse and discount drafts in the name of the princi-

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& Co. v. Payson, 91 Hun, 480, 36 N. Y. Supp. 240; Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252; Hitchings v. St. Louis, etc., Co., 68 Hun, 33, 22 N. Y. Supp. 719. But it has been held that authority to collect implies authority to bring suit for the purpose of collection. Watkins v. Plummer, 93 Mich. 215, 53 N. W. 165.

95. Hay v. Goldsmidt, 2 J. P. Smith, 79; Heath v. Paul, 81 Wis. 532, 51 N. W. 876; Helena Nat. Bank v. Rocky Mountain Telegraph Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

96. Webber v. Williams College, 23 Pick. 302; Lippman v. First Nat. Bank of Anniston, 120 Ala. 123, 24 So. 581, 74 Am. St. Rep. 28.

97. Brown v. Parker, 7 Allen, 339; Taber v. Cannon, 8 Metc. (Mass.) 456; Webber v. Williams College, 23 Pick. 302; Gould v. Norfolk Lead Co., 9 Cush. 338.

98. Emerson v. Providence Hat Mfg. Co., 12 Mass. 237.

99. Bank of Hamburg v. Johnson, 3 Rich. 42. Nor can agent pledge paper placed in his hands for purpose of sale and raising funds. Shaw, Trustee, v. Saranac Horse Nail Co., 144 N. Y. 221, 39 N. E. 73.

1. Gould v. Norfolk Lead Co., 9 Cush. 338.

2. Terry v. Fargo, 10 Johns. 114; Miller v. House, 67 Iowa, 737.

3. Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

pal;[4] nor does the position of agent to attend and manage a grocery and provision store,[5] nor that of an agent employed in the manufacture of carriages;[6] nor does that of an attorney-at-law, to whom a note is sent for collection, authorize him to transfer it to a third person;[7] nor does that of a collecting agent, who takes checks in payment, authorize him to indorse them to the bank on which they are drawn;[8] nor has an agent, who is authorized to make a deposit in a bank, implied authority to draw it out;[9] nor that of manager of a farm through whose hands all payments and receipts pass, authorize him to sign a negotiable instrument in his principal's name.[10]

§ **295.** Masters of ships,[11] and steamboats,[12] and supercargoes,[13] cannot bind their principals by drawing a bill upon them and accepting it in their name, without special authority to do so.

§ **296. Implications from customary acts.**—If a person has upon a former occasion, in the principal's absence, usually accepted bills for him, and the latter, on his return, approved thereof, he would be bound in a similar situation on a second absence from home,[14] and where it was proved that the defendant had been accustomed to assume the liability as indorser on notes on which his name had been

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4. Exchange Bank v. Thrower, 118 Ga. 433, 45 S. E. 316.

5. Smith v. Gibson, 6 Blackf. 369.

6. Paige v. Stone, 10 Metc. (Mass.) 160.

7. Russell v. Drummond, 6 Ind. 216.

8. Graham v. United States Sav. Inst., 46 Mo. 187; Jackson v. Bank, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81, citing and approving. But it has been held in New York, that where a person makes settlement, and payments to the authorized agent of another, of all claims existing in favor of the principal against him, the giving of a check to such agent, and the subsequent indorsement by the agent of the principal's name thereon, constitutes a payment by the debtor, is binding on the principal, and discharges him from liability to the principal. See Sage v. Burton, 84 Hun, 267, 32 N. Y. Supp. 1122. Nor will authority to receive and make deposits authorize the issuance of checks thereon. See Schmidt v. Garfield Nat. Bank, 64 Hun, 298, 19 N. Y. Supp. 252.

9. Second Nat. Bank v. Gibboney, 43 Ind. App. 492, 87 N. E. 1064; Heath v. New Bedford Safe Deposit &c. Co., 184 Mass. 481, 69 N. E. 215; Walker v. The State Trust Co., 57 N. Y. S. 525, 40 App. Div. 55.

10. Davidson v. Stanley, 2 M. & G. 721; Lafourche Transportation Co. *et al.* v. Pugh, 52 La. Ann. 1517, 27 So. 958.

11. Bowen v. Stoddard, 10 Metc. (Mass.) 375.

12. May v. Kelly, 27 Ala. 497.

13. Scott v. M'Lellan, 2 Greenl. 199.

14. Beawes' Pleading, 86; Chitty on Bills (13th Am. ed.) [*31], 41.

indorsed by his son, and that he did not deny the particular indorsement until his son had absconded, but impliedly admitted his liability, it was held that these acts, unexplained, established his liability as indorser.[15] So, the acceptance by a principal of three drafts drawn on him by his agent, though drawn without authority, is a holding out of the agent as having authority to draw a fourth draft, for if the principal, after having accepted and paid the third draft, did not want to be bound by a fourth, he should have given the payee notice to that effect.[16] Although an authority to draw does not import in itself an authority to indorse, it has been held that a jury was warranted in inferring a general authority of a clerk to indorse his employers' names upon evidence that he had been accustomed to draw checks for them—in one instance had been authorized to indorse—and in two instances that they had received the money obtained upon his indorsements of their names.[17] So, where a drawee had previously paid several bills accepted in his name by a third person, with whom he had connections in trade, he would be liable to an indorsee, although the bill accepted in like manner had been so accepted without his authority.[18] And it has been held that if a person usually sub-

15. Abeel v. Seymour, 6 Hun, 656.

16. Valiquette v. Clark Bros. Coal Mining Co., 83 Vt. 538, 77 Atl. 869, 138 Am. St. Rep. 1104. The fact that an agent had indorsed the name of his principal on and had collected checks previously does not show authority to indorse and collect checks in suit, when it does not appear that the principal knew of the agent's course of conduct. Sinclair & Co. v. Goodell, 93 Ill. App. 592.

17. Prescott v. Flinn, 2 Moore & S. 18, 9 Bing. 19.

18. Barber v. Gingell, 3 Esp. 61. See Stroh v. Hinchman, 37 Mich. 490, where the cases are reviewed by Cooley, J.; Gambrill v. Brown Hotel Co., 11 Colo. App. 529, 54 Pac. 1025. In this case held: "Where an agent, a short time before drawing the draft in question, telegraphed his principals, that he had drawn on them, giving amount of draft and they answered that they would pay the draft, but in the future they must be less, it was a recognition of the agent's authority to draw in the future as well as the past, the only condition being that in future the amount must be less." But person thus sought to be charged "must actually have known of the acts of the agent conveying to the public the impression that his authority was greater than it was in fact, before drawee's silence could be held to sanction the agent's course and to give him ostensible authority to continue it." Mount Morris Bank v. Gorham, 169 Mass. 519, 48 N. E. 341. Under the principle that of two innocent persons the one whose negligence caused the loss must suffer, it was held in Bartlett v. First Nat. Bank, 247 Ill. 490, 93 N. E. 337, that where a purchasing agent has been drawing drafts on his principal to the order of the sellers and has been forging their indorsements, the principal is liable on such drafts, notwithstanding he had instructed the agent not to do so, when he had not notified the bank to stop paying drafts indorsed by such agent.

scribes a negotiable instrument with the name of another, proof of his having done so in many instances is sufficient to charge the party whose name is subscribed, without producing any power of attorney, or other proof of agency.[19] But the authority of a collecting agent to indorse his principal's name upon a check and collect cash upon it cannot be inferred from the fact that the agent had frequently indorsed such checks and obtained the cash when the principal had no knowledge of such facts.[20]

§ 297. Bill or note must have been taken upon the faith of prior customary acts.—But when it is sought to bind the principal on the ground of prior similar transactions, or recognition of such acts by the principal, it must be shown that the bill or note was taken upon the faith of them; [21] and, therefore, the holder of a bill purporting to be, but not in fact accepted by, the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact subsequently discovered, that on a former occasion the defendant had given a general authority to the person who accepted in his name to accept bills for them. Unless it can be shown that the previous authority had never been revoked, or that the bill was taken on the faith of such authority, the holder cannot hold the principal liable.[22]

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19. Neal v. Irving, 1 Esp. 61; Haughton v. Ewbank, 4 Campb. 188. Where an agent was employed for the express purpose of collecting accounts and selling goods, and in practice he indorsed checks payable to the order of his principal and purchased goods for the house, it was held that the evidence as to such course of selling was sufficient to sustain the conclusion that the agent was authorized to indorse the check upon which the action was founded. Best v. Krey, 83 Minn. 81, 85 N. W. 822. An agent who had authority to obtain money by issuing drafts, for the purchase of grain for his principal, had authority to draw drafts in payment for money received as agent in another business and which money was used in the purchase of grain. Great Western Elevator Co. v. White, 118 Fed. Rep. 406. When an agent was authorized to receive, count, and mark ties which he bought, and then to give a draft for the ties which were thus delivered to him, it cannot be inferred that he had authority to make drafts for ties which he had not received, and which were in fact not in existence. Gray Tie & Lumber Co. v. Farmers' Bank (Ky.), 78 S. W. 207, 74 S. W. 174.

20. Goodell v. T. M. Sinclair & Co., 112 Ill. App. 594.

21. St. John v. Redmond, 9 Port. 428; Edwards on Bills, 89; Thompson on Bills, 148; Sanders v. Chartrand, 158 Mo. 352, 59 S. W. 95.

22. Cash v. Taylor, 8 L. J. 262, K. B. E. T., cited in Chitty on Bills (13th Am. ed.) [*32], 41; Byles on Bills (Sharswood's ed.) [*33], 110; 1 Parsons on Notes and Bills, 92, 101; Lloyd & W. Merc. Cas. 178; Helena Nat. Bank v. Rocky Mountain Telegraph Co., 20 Mont. 379, 51 Pac. 829, 63 Am. St. Rep. 628.

SECTION III

HOW AGENT SHOULD SIGN; AND HOW INSTRUMENT CONSTRUED AND PARTIES' LIABILITIES DETERMINED

§ 298. Proper method of signature by agent.—The best mode for an agent to sign or indorse a bill or note for his principal, so that it may clearly appear that he is "the mere scribe" who applies the executive hand as the instrument of another, is as follows: "A. B., by his attorney or agent, C. D." This style is unequivocal, being clearly intended to bind the principal only. "A. B. by C. D." is equally so—and in one way or the other the instrument should be always executed.[23] Very frequently the form is adopted: "C. D. for A. B.," or "C. D., agent for A. B.," and this form is now generally regarded as sufficient to indicate that the agent acts ministerially only and without intent to bind himself.[24] And this is, we think, the

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23. Bradlee v. Boston Glass Co., 16 Pick. 347; Weaver v. Carnall, 35 Ark. 198; Edwards on Bills, 83. See on this subject chapter on Private Corporations, and § 398; Exchange Bank v. County of Lewis, 28 W. Va. 292, citing the text.

24. See American Leading Cases, vol. I, pp. 625, 634; Story on Agency, §§ 274, 278; 1 Parsons on Notes and Bills, 91; Story on Notes, § 68; Edwards, 83; Bank of Genesee v. Patchin Bank, 19 N. Y. 315; Long v. Colburn, 11 Mass. 97; Tiller v. Spradley, 39 Ga. 35; Raney v. Winter, 37 Ala. 277; Dubois v. Delaware, etc., Canal Co., 4 Wend. 285. In Early v. Wilkinson & Hunt, 9 Gratt. 68, the promissory note sued on was signed "Robert H. Early [per Sam'l H. Early]." "The note in this case," said Moncure, J., "is in the perfect form of a negotiable promissory note of Robert H. Early, except that under his signature are the words '[per Samuel H. Early],' in brackets. Without the addition of these words, it is certain that R. H. Early would alone have been bound on the note, even though he has given it as the known agent of Samuel H. Early. On the other hand, it may be said, that if these words had been added without being inclosed in brackets, and R. H. Early had authority to sign the note for Samuel H. Early, the latter would alone have been bound by the note, though the mode of executing the note by procuration would not, in that case, have been strictly formal. The question, then, depends alone upon the import of the brackets; and though it may seem strange that we should give so much import to a circumstance apparently so light, yet we are of opinion that it is sufficient to turn the scale, and indicate an intention on the part of Robert H. Early not to do a mere ministerial act in giving effect and authenticity to the promise of another; but to indicate the capacity or trust in which he acted, or the person for whose account the promise was made. * * * If Robert H. Early had intended to bind Samuel H. Early, and not himself, he would have given more prominence to the name of the latter, which then would have been the important name. He would not have inclosed it in brackets, so that it might be taken from the note without injuring the sense of the balance.

correct view, whether the phrase be used in the body of the instrument, or so signed at its foot; though the cases are by no means harmonious, and "C. D. for A. B.," or the like words, are regarded by some as indicating that C. D. was the promisor at the request of, or for the benefit of, A. B.[25] And there are cases which hold that if used in the body of the instrument, the words will be construed as binding the agent; while if at the foot, the principal.[26] This distinction is very refined.

§ 299. Extraneous evidence of agent's authority to sign principal's name.—It is competent and proper also for the agent to sign simply the principal's name, and to show his authority to do so by extraneous evidence;[27] for, as said by the United States Supreme Court, per Johnson, J.: "It is by no means true that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency."[28] But this style is not favored, as it increases the difficulties of proof, and at one time was questioned.[29]

In England, it is not unusual for an agent to sign "C. D., by procuration of A. B.," A. B. being the principal; but this is ambiguous, as it might import that A. B. was the agent signing by procuration for C. D., and it is advisable not to adopt this style.[30]

The words "per procuration" are an express intimation of a special

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He would rather have inclosed his own name in brackets, as the name of the mere agent by whom it was signed. They were worse than useless on the supposition that S. H. Early was intended to be bound." Devendorf v. West Virginia, O. & O. L. Co., 17 W. Va. 152; Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964; Citizens' Nat. Bank of Los Angeles, Cal. v. Ariss (Wash.), 123 Pac. 593.

25. 1 Parsons on Notes and Bills, 91; Tannant v. Rocky Mountain Nat. Bank, 1 Colo. 278.

26. Barlow v. Congregational Society, 8 Allen, 463; Bradlee v. Boston Glass Co., 16 Pick. 347; Tanner v. Christian, 4 El. & Bl. 591; Penkwil v. Connell, 5 Exch. 381.

27. §§ 74, 274; First Nat. Bank v. Gay, 63 Mo. 33; Cravens v. Gillilan, 63 Mo. 28; Morse v. Green, 13 N. H. 32; Haven v. Hobbs, 1 Vt. 238; Brigham v. Peters, 1 Gray, 139; Woodbury v. Moulton, 47 N. H. 11; Davidson v. Stanley, 2 M. & G. 721; Llewellyn v. Winckworth, 13 M. & W. 598; Neal v. Irving, 1 Esp. 61; Barber v. Gingell, 3 Esp. 60; Odd Fellows v. First Nat. Bank, 42 Mich. 463; Scotland County Nat. Bank v. Hohn, 146 Mo. App. 699, 125 S. W. 539; Chitty on Bills (13th Am. ed.) [*33], 44.

28. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326; First Nat. Bank v. Loyhed, 28 Minn. 398, citing the text.

29. 1 Parsons on Notes and Bills, 91, 92.

30. 1 Parsons on Notes and Bills, 91, 92.

and limited authority. And a person who takes a bill or note so drawn, accepted, or indorsed is bound to inquire into the extent of the authority.[31]

§ 300. General principles of construction of the instrument, and of liability of the parties.—It is a general principle of commercial law that a negotiable instrument must wear no mask, but must reveal its character upon its face. And it extends to the liability of parties thereto, who must appear as distinctly as the terms of the instrument itself, in order to be bound by those terms. The following rules are deductions from this general principle: *First.* That when the names of both principal and agent appear upon the instrument, it is to be taken to be the bill or note of the signer, unless there are distinct indications that he signed in a mere ministerial character, intending to bind another. The actual signer will be bound, "unless," as said by Lord Ellenborough, "he states upon the face of the bill that he subscribes it for another; unless he says plainly, 'I am the mere scribe.'" [32] It is true that it is a question as to the intention of the party signing the instrument; but that intention must, as a general rule, be collected from the instrument itself. Chief Justice Shaw, in a well-known case, has said: [33] "As the forms of words in which contracts may be made and executed are almost infinitely various, the test question is, whether the person signing professes and intends to bind himself, and adds the name of another to indicate the capacity in which he acts, or the person for whose account the promise is made; or whether the words referring to a principal are intended to indicate that he does a mere ministerial act in giving effect and authenticity to the act and contract of another. Does the person signing apply

31. Alexander v. McKenzie, 6 C. B. 766 (60 Eng. C. L.); Attwood v. Munnings, 7 B. & C. 278 (14 Eng. C. L.); Byles (Sharswood's ed.) [*33], 110; Thompson on Bills, 152.

32. Leadbetter v. Farrow, 5 Maule & S. 345; Sowerby v. Butcher, 2 Car. & M. 368. This is the general principle. Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964; Richmond Locomotive & Machine Works v. Moragne, 119 Ala. 80, 24 So. 834.

33. Bradlee v. Boston Glass Co., 16 Pick. 347. See also Early v. Wilkinson, 9 Gratt. 68; Commercial Bank v. Waters, 45 App. Div. 441, 60 N. Y. Supp. 981. "This court is fully committed to the doctrine that in order to exempt an agent from liability upon a negotiable note executed by him within the scope of his agency, he must not only name his principal, but he must express by some form of words that the writing is the act of the principal, though done by the hand of the agent." Western Wheeled Scraper Co. v. McMillen, 71 Nebr. 686, 99 N. W. 512.

the executive hand as the instrument of another, or the promising and engaging mind of a contracting party?"

In Rhode Island the signature "D. T. L." with the added words "correspondent for E. J. K. & Co.," was held to bind the signer, the additional words being regarded as mere *descriptio personæ.*[34]

§ 301. As to indorsements by agents.—If a bill be payable to A. B., describing him as "agent," it is generally considered mere *descriptio personæ;* [35] and if he should indorse it in like manner, we should say he was personally liable. And we can see no difference between such a case and those in which it is held that where the maker of a negotiable note adds the word "agent," he, and he alone, is bound, the term being regarded as descriptive merely.[36] If the indorsement restricted the negotiability of the instrument, it might be different, for it might then be considered as standing on the footing of a nonnegotiable instrument in respect to him.[37] In Georgia, where a bill payable to "S. C., agent," was similarly indorsed, and then discounted at the indorser's instance for the benefit of his principal, parol evidence was admitted to charge him; [38] but this is a departure from the general principle of the law merchant.

§ 302. Illustration.—A peculiar case was decided in New York. The note was payable to "Israel Horsefield or order" simply. It was indorsed "Israel Horsefield, agent," and by him delivered for a debt due by a company of which he was agent. It was held that the form of the indorsement, under the circumstances (which might be shown), indicated to the plaintiff that it was merely intended by the payee to transfer title to the paper, without recourse, though as to a third party it might be different.[39] Chief Justice Savage dissented.[40]

34. Phillips v. Knight & Co., 20 R. I. 624, 40 Atl. 762.

35. Toledo Agricultural Works v. Heisser, 51 Mo. 128. In Bishop v. Rowe, 71 Me. 263, the note was payable to order of "C. B. M., agent," and was indorsed "C. B. M., Agent Granite Agricultural Works." Held to be individual indorsement of C. B. M.

36. See *post*, § 305; Robinson v. Kanawha Valley Bank, 44 Ohio St. 441; Cortland Wagon Co. v. Lynch, 82 Hun, 173, 31 N. Y. Supp. 325; Bank of Stratton v. Dixon, 105 Iowa, 148, 74 N. W. 919, citing text.

37. See *post*, § 303.

38. Merchants' Bank v. Central Bank, 1 Kelly, 429, Nisbet, J.: "A party cannot be discharged who is apparently liable on the contract, but a new party may be introduced by parol."

39. Mott v. Hicks, 1 Cow. 533, Woodworth, J.

40. Mott v. Hicks, 1 Cow. 540. "Horsefield, it is true," he said, "signed the

The case has been quoted as holding that such an indorsement is equivalent to an indorsement without recourse, and it has been so construed by the courts; [41] but we think that it only determines that under the peculiar circumstances it had that effect. In the absence of evidence as to the circumstances of the transaction, it has been held in New York that a draft drawn on "D., Agt. C. B. Co.," and accepted in like manner, would not bind the company. [42]

§ 303. Second: That no party can be charged as principal upon a negotiable instrument unless his name is thereon disclosed.—The reason of this rule is that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment; it is "a courier without luggage," whose countenance is its passport; and in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal party thereto, unless his name in some way is disclosed upon the instrument itself; [43] although upon other written contracts, not negotiable, it is

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indorsement 'Israel Horsefield, agent.' But why agent? Agent for whom? He is the payee of the note individually, and it does not appear, except from his own testimony, that he was agent for the company. They cannot be sued upon this indorsement; and no judgment could be rendered against Horsefield which would bind their property. He is, therefore, liable personally, or there is no liability attached to this indorsement."

41. Hicks v. Hinde, 9 Barb. 531; Babcock v. Beman, 11 N. Y. 200; 1 Parsons on Notes and Bills, 96. See Hager v. Rice, 4 Colo. 90.

42. Haight v. Naylor, 5 Daly, 219.

43. Cragin v. Lovell, 109 U. S. 194; Heaton v. Myers, 4 Colo. 62; Pease v. Pease, 35 Conn. 131; Burkhalter v. Perry & Brown, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343, citing text; Kenyon v. Williams, 19 Ind. 45; Thurston v. Munn, 1 Greene (Iowa), 231; Brown v. Baker, 7 Allen, 339; Slawson v. Loring, 5 Allen, 340; Arnold v. Stackpole, 11 Mass. 27; Bass v. O'Brien, 12 Gray, 477; Williams v. Robbins, 16 Gray, 77; Duncan v. Kirtley, 24 Mo. App. 655, citing text; Keck v. Sedalia Brewing Co., 22 Mo. App. 188, citing the text; Lewis v. First Nat. Bank of Cambridge, 1 Nebr. (Unof.) 177, 95 N. W. 355; Webster v. Wray, 19 Nebr. 558; Pentz v. Stanton, 10 Wend. 271; Hyde v. Page, 9 Barb. 150; Manufacturers & Traders' Bank v. Love, 13 App. Div. 561, 43 N. Y. Supp. 812; Cortland Wagon Co. v. Lynch, 82 Hun, 173, 31 N. Y. Supp. 325, citing the text; Texas Land Co. v. Carroll, 63 Tex. 51, citing the text; Arnold v. Sprague, 34 Vt. 409; Byles (Sharswood's ed.) [*37], 116; Story on Bills, § 76. In May v. Hewitt, 33 Ala. 161, where a bill signed C. D., clerk, was drawn by the owners of steamboat Messenger, and was accepted by "B. Bell, captain," parol evidence was admitted to show who was bound by the acceptance. A person whose name does not appear upon a promissory note cannot be charged as an indorser thereof by parol proof that the nominal payee in accepting and indorsing it was acting as his authorized agent, where nothing upon the face of the note suggests the exist-

often competent to show that, although signed in the name of the agent only, they were executed in the business of the principal, and with the intent that he should be bound. And in such cases he is bound upon them accordingly.[44] The rule excluding parol evidence to charge an unnamed principal as a party to negotiable paper is derived from the nature of such paper, which being made for the purpose of being transferred from hand to hand, and of giving to every successive holder as strong a claim upon the original party as the payee himself has, must indicate on its face who is bound for its payment; for any additional liability not expressed in the paper would not be negotiable.[45] But this exception in favor of negotiable instruments itself contains an exception; and that is, as between the immediate parties to a bill or note, it may be shown by parol that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal, and not of the agent, and that it was given and accepted as such.[46] The rule as to public agents is hereinafter considered.[47]

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ence of an agency. New York Life Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559, 121 Am. St. Rep. 362. This view does not obtain now in New York. In Green v. Skeel, 2 Hun, 486, the indorsee sued indorser of a note made by William Skeel. The word "agent" had been added to his name. The court said, per Mullin, P. J.: "It is difficult to reconcile the cases so as to ascertain with certainty when a principal is bound by a writing executed by a person who signs the same as agent. But it seems to be pretty well settled that when the person signing his name with the word 'agent' added, is, in fact, the agent of the principal, and the writing is executed in the course of the business of such agency, the principal is bound by a contract signed with the agent's name with the word 'agent' added. This case is at war with the ruling in DeWitt v. Walton, 9 N. Y. 571; but that case has not been followed, if it is to be understood as deciding that the principal is not bound in any case by writing signed by the agent in his own name with the word 'agent' added." See *post* § 305, notes.

44. Lerned v. Johns, 9 Allen, 419. In this case the contract was signed B. by C., and parol evidence was admitted to show that B. was only agent of A., although there was no intimation of it on the contract, Hoar, J., saying: "The doctrine is well settled in England, that when a written contract, not under seal, is made by or with an agent, the principal, although undisclosed, may sue or be sued upon it, except in the case of commercial paper." Kenworth v. Schofield, 2 B. & C. 945; Higgins v. Senior, 8 M. & W. 834. See also Williams v. Bacon, 2 Gray, 387; Dykers v. Townsend, 25 N. Y. 57; Leavens v. Thompson, 48 Hun, 391; Porter v. Woods, 138 Mo. 539, 39 S. W. 794.

45. See article in Alb. L. J., vol. XIII, No. 19, May 6, 1876, p. 323; Webster v. Wray, 19 Nebr. 558, citing the text; Heaton v. Myers, 4 Colo. 62, citing the text.

46. Burkhalter v. Perry & Brown, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343.

47. § 443 *et seq.*; Salomon v. Hopkins, 61 Conn. 49, 23 Atl. 716.

Under Negotiable Instrument statute.—And under the statute, the maker of a note cannot be allowed to plead that he signed the note as agent for a third person, and have such person brought in as defendant.[48]

§ 304. Third: It is not absolutely necessary that the principal's peculiar name should be used; but he may, by adoption, use that of his agent; or his agent, by his authority, may use his own name for his principal's.—Individuals, as well as corporations, may sometimes be held liable upon negotiable and other contracts, executed and entered into under a name or style different from that which usually belongs to and is used by them, and in which their own proper names or signatures do not appear at all. But such liability exists only where it is affirmatively and satisfactorily proved that the name or signature thus used is one which has been assumed and sanctioned as indicative of their contracts, and has been, with their knowledge and consent, adopted as a substitute for their own names and signatures in signing bills and notes, or executing other written contracts. In such cases the adopted name is in law equivalent to the actual name of the party.[49]

§ 305. Fourth: If the agent sign a note with his own name, and discloses no principal, he is personally bound.—The party so signing must have intended to bind somebody upon the instrument, and no promisor but himself thereon appearing, it must be construed as his note or as a nullity.[50] And though he term himself "agent," such suffix to his name will be regarded as a mere *descriptio personæ*,

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48. Appendix, sec. 18. Kohrs v. Smith, 45 Mont. 467, 124 Pac. 275.

49. Brown v. Parker, 7 Allen, 337. See also Bank of Rochester v. Mintent, 1 Den. 405; Bartlett v. Tucker, 104 Mass. 338. And see especially Minor v. Mechanics' Bank of Alexandria, 1 Pet. 46, and chapter XIII, on Corporations, section III, § 399 *et seq.*, 363; Manufacturers & Traders' Bank v. Love, 13 App. Div. 561, 43 N. Y. Supp. 812, quoting with approval the text; Conroe v. Case, 79 Wis. 338, 48 N. W. 480, citing the text; Salomon v. Hopkins, 61 Conn. 49, 23 Atl. 716.

50. Arnold v. Stackpole, 11 Mass. 27; Sharpe v. Bellis, 61 Pa. St. 71; Bedford, Conn., Ins. Co. v. Covell, 8 Metc. (Mass.) 442; 1 Parsons on Notes and Bills, 93; Story on Notes, § 68. See Lyons v. Miller, 6 Gratt. 440; Poole v. Rice, 9 W. Va. 73; Bedell v. Scarlett, 76 Ga. 59; Brent v. Miller, 81 Ala. 317; Wood v. Brewer, 73 Ala. 259; Wharton on Agency, §§ 490, 496, 497; Finan v. Babcock, 58 Mich. 305; Phelps v. Borland, 30 Hun, 364; Stinson v. Lee (Miss.), 8 So. 272, citing the text.

or as an earmark of the transaction, and may be rejected as surplusage.[51]

And this principle has been generally held to apply although it could be proved that the payee knew of the agency when the note was made, and it was understood that the principal, and not the agent, should be bound, for such evidence would vary the terms of the written note,[52] though it has been held that, as between the parties, parol evidence may be received to show the real transaction.[53] But under such circumstances, if the note were not paid, the principal might be sued upon the original consideration.[54] However, if the payee, with full knowledge of the agency and of the principal's liability, and relying solely on the agent's credit, took his individual note, the principal cannot be resorted to at all.[55] In a late case in New York the note

51. Richmond Locomotive Machine Works v. Moragne, 119 Ala. 80, 24 So. 834; Hall v. Bradbury, 40 Conn. 32; Burkhalter v. Perry & Brown, 127 Ga. 438, 56 S. E. 631, 119 Am. St. Rep. 343; Graham v. Campbell, 56 Ga. 258; Kenyon v. Williams, 19 Ind. 45; Dayries v. Luidsly (La.), 54 So. 791; Williams v. Robbins, 16 Gray, 77; Stinson & Co. v. Lee, 68 Miss. 113, 8 So. 272, 24 Am. St. Rep. 257; Toledo Iron Works v. Heisser, 51 Mo. 128; Cortland Wagon Co. v. Lynch, 82 Hun, 173, 31 N. Y. Supp. 325, citing the text; Bryson v. Lucas, 84 N. C. 680; Collins v. Buckeye State Ins. Co., 17 Ohio St. 215; Anderson v. Shoup, 1 Ohio (N. S.), 125; Arnold v. Sprague, 34 Vt. 409. Text cited with approval in Anderson v. Pearce, 36 Ark. 293 in which case the note was expressed on its face to be for "balance due P. & S. for work done on Hazel School House," and was signed "O. I. A. and S. J. H., committee." See *post*, §§ 398, 419; *Contra*, Keidan v. Winegar, 95 Mich. 430, 54 N. W. 901.

52. 1 Parsons on Notes and Bills, 93; Story on Notes, § 68; Rawlings v. Robson, 70 Ga. 596; Robinson v. Kanawha Bank, 44 Ohio St. 447, citing the text; Bank v. Cook, 38 Ohio St. 444; McClellan v. Robe, 93 Ind. 298. The words, "Trustees Estate of A.," where such trustees indorsed a note under a power given by the will, were held to be merely *descriptio personæ*, and that the trustees were personally liable. Roger Williams Bank v. Groton Mfg. Co. (R. I.), 17 Atl. 170; Pugh v. Moore, Hyams & Co., 44 La. Ann. 209, 10 So. 710; Penn Mutual Life Ins. Co. v. Conoughy, 54 Nebr. 124, 74 N. W. 422; Insurance Co. v. Burkett, 72 Mo. App. 1.

53. Keidan v. Winegar, 95 Mich. 430. In Crandall v. Rollins, 82 N. Y. S. 317, 83 App. Div. 618, it was held that where a note was signed "Agt.," and the payees were informed before the note was given that the person signing was acting as agent for another, with authority from his principal to so act, and such fact was well understood by the payees when they accepted the note, the person who signed the note cannot be held individually liable.

54. Pentz v. Stanton, 10 Wend. 271, the court saying: "It was a question for the jury to decide whether the goods were sold exclusively upon the credit of West (the agent) and of the bill, or not." Query, see Paige v. Stone, 10 Metc. (Mass.) 169; Fairly v. Nash, 70 Mass. 193, 14 So. 149.

55. Hyde v. Page, 9 Barb. 151 (1850); Paige v. Stone, 10 Metc. (Mass.) 169.

was signed simply, "J. S. M., agent." It was alleged to have been given for goods sold by the defendant, a lady, probably the agent's wife, and recovery against the alleged principal was sustained.[56] This decision is in conflict with the general current of authority.[57] The true principle has been thus stated by the United States Supreme Court: "Parol evidence can never be admitted to exonerate an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed his agency, and mentioned the name of his principal at the time the contract was executed." [58]

Under Negotiable Instrument statute.—Under the statute, a note signed by the secretary of a corporation is signed without disclosing a principal, though it is made on a blank form of receipt with the name of the corporation lithographed at the top, and what purports to be the seal is impressed upon the paper but no reference is made to it in the note.[59]

§ 306. Fifth: If the agent exceed his authority in signing his principal's name, or signs his own professedly as binding his principal, who is named, he is not bound as a party to the paper itself, but only in an action of tort for falsely assuming authority to bind another.—Upon this proposition the authorities are not uniform, but the weight of reason, if not of authority, is, we think, clearly in its favor, both in England and in the United States. Where simply the principal's name is signed, without any profession of agency, it is patent that there is nothing in the instrument which could possibly import a liability upon the agent; [60] but where both the agent's and

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56. Moore v. McClure, 8 Hun, 558, Talcott, J.: "The fact that the name of the principal does not appear on the face of the note is not, under the modern decisions in this State, at all conclusive. If it was intended to be given in the business of the principal, was in fact so given, and with due authority, it is binding on the principal, and all this is matter of evidence, all covered by the averment that it is the note of the principal." See *ante*, § 303, note.

57. See *ante*, § 303.

58. Nash v. Towne, 5 Wall. 689. See also Magee v. Atkinson, 2 M. & W. 440; Hypes v. Griffin, 89 Ill. 134. But see Metcalf v. Williams, 104 U. S. 93; Junge v. Bowman, 72 Iowa, 648. Parol evidence is admitted to charge principal in Minnesota. Derring v. Thom, 29 Minn. 120; Pratt v. Beaupre, 13 Minn. 187; Bingham v. Stewart, 14 Minn. 214; Peterson v. Homan, 46 N. W. 303; Brunswick v. Boutelle, 47 N. W. 261.

59. Appendix, sec. 20. Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811.

60. Wilson v. Barthrop, 2 M. & W. 863; Grafton Nat. Bank v. Wing, 172 Mass. 515, 52 N. E. 1067, citing text. In this case indorsement was as follows:

the principal's names appear, there is more room for division of opinion. By some authorities it is contended that as both names are on the paper, and the principal's is not rightfully there, the agent should be bound.[61]

§ 307. But, on the other hand, it is answered, that while the agent's name is on the paper, it is there in a form which expressly negatives any obligation upon him, and professes to assert the obligation of another. And it is only for such wrongful profession that an action may be maintained. This is the philosophical and correct view, as we think. The agent cannot be estopped to deny personal obligation as a party to the instrument, since he never held himself out as such.[62]

"Estate of Jona D. Wheeler, Henry F. Wing, Executor." Court held that these words meant "estate of Wheeler by Wing" and that was not bound individually.

61. Edwards on Bills, 80, 90; Chitty [*35], 47; Pitman v. Kintner, 5 Blackf. 251; McClure v. Bennett, 1 Blackf. 189; Byars v. Doore, 20 Mo. 284. See also note to Thomas v. Hewes, 2 Car. & M. 530. In Ormsby v. Kendall, 2 Ark. 338, the note began, "Steamer Tecumseh and owners promise," and was signed "F. C. Kendall." Held, he was bound unless he had authority to bind owners. In Dusenbury v. Ellis, 3 Johns. Cas. 70, the note began, "I promise," and was signed "For P. S.—G. D., attorney." Held, G. D. was bound, the court saying: "If a person, under pretense of authority from another, executes a note in his name, he is bound; and the name of the person for whom he assumed to act will be rejected as surplusage." In Rossiter v. Rossiter, 8 Wend. 494, where the agent, exceeding his authority, signed a note "H. R. P., by his attorney, W. S. Rossiter," he was held bound. To same effect is Palmer v. Stephens, 1 Den. 480. "These cases," it is said in American Leading Cases, vol. 1 [*637], "may fairly be considered as overruling Ballou v. Talbot, 16 Mass. 461." But that case seems to stand quite firm as a precedent, notwithstanding; Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

62. West London Commercial Bank v. Kitson, 12 Q. B. Div. 157, 37 Eng. Rep. 616; *post*, § 412; Simpson v. Garland, 76 Me. 203; Bean v. Pioneer Mining Co., 66 Cal. 451; Bartlett v. Tucker, 104 Mass. 338 (1870); Draper v. Massachusetts Steam, etc., Co., 5 Allen, 338; Abbey v. Chase, 6 Cush. 54; Jefts v. York, 10 Cush. 392; Ballou v. Talbot, 16 Mass. 461; Sheffield v. Larue, 16 Minn. 388; Hall v. Crandall, 29 Cal. 572; Duncan v. Nells, 32 Ill. 542; McHenry v. Duffield, 17 Blackf. 41; Johnson v. Smith, 21 Conn. 627; Taylor v. Shelton, 30 Conn. 122 (agent can only be bound on instrument where there are apt words to express his liability); Hopkins v. Nehafy, 11 Serg. & R. 129; Polhill v. Walter, 3 B. & Ad. 114, special action sustained; Jenkins v. Hutchinson, 18 L. J. Q. B. 276 (1849), Lord Denman, C. J., said: "In the absence of any direct authority, we think that a party who executes an instrument in the name of another, whose name he puts to the instrument, and adds his own name only as agent for that other, cannot be treated as a party to that instrument, and be sued upon it, unless it be shown that he was the real principal." 1 Parsons on Notes and Bills, 121, 122; Chitty on Bills (13th Am. ed.) [*35], 47; Thompson on Bills, 155. The con-

So, if a party sign a fictitious name, and it is not one which he adopts as his, he is only liable in a special action on the case.[63] It results from these principles, that if the agent had no authority to bind the principal, and there are no apt words to charge him personally, the instrument is void, as neither he personally, nor the assumed principal, is a party to it.[64]

§ 308. Still, there are some cases in which the authority of the agent to bind the principal may enter into the inquiry as to the agent's liability; for if there be an ambiguity in the phraseology of the note, so that it cannot be definitely determined from its face whether it be that of principal or agent, in that case, as the principal could not be bound, an intention of the agent to bind himself might be inferred. If the principal ratify the agent's act, an action against the agent in tort cannot be maintained, his previous want of authority

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trary doctrine that once prevailed in New York (see note, *ante*) is now doubted. See White v. Madison, 26 N. Y. 116; Walker v. Bank, 9 N. Y. 582. One who signs a promissory note in the name of another, by himself as attorney in fact, but who, to the knowledge of the payee and a subsequent indorsee, had no authority to use the other's name, and who refuses their solicitation to sign his own name and bind himself personally, is not liable upon the note as his contract, notwithstanding the fact that it was given in a transaction of his own, and that he was generally using the name signed to the note as a trade-name. Kansas Nat. Bank v. Bay, 62 Kan. 692, 64 Pac. 596, 54 L. R. A. 408, 84 Am. St. Rep. 417.

63. Bartlett v. Tucker, 104 Mass. 339, Gray, J.: "In Long v. Colburn, 11 Mass. 97, it was held that upon a promissory note beginning, 'For value received, I promise to pay,' and signed '*Pro* William Gill, J. S. Colburn,' no action would lie against Colburn; and the court said: 'The plaintiff's remedy is against Gill, if Colburn had authority to make the promise for him; and if he had not, a special action on the case might make Colburn answerable.' In Ballou v. Talbot, 16 Mass. 461, the same point was adjudged; and it was held that upon a note signed 'Joseph Talbot, 2d, agent for David Perry,' no action would lie against Talbot, although the jury found that he was not authorized to sign the note as agent for Perry. So where a note, purporting on its face to be the note of the pastor and deacons of the First Freewill Baptist Church in Lowell, was signed 'S. D. York, agent for the First Freewill Baptist Church in Lowell,' it was held that no action could be maintained on the note against York. Jefts v. York, 4 Cush. 371." Miller v. Reynolds, 92 Hun, 400, 36 N. Y. Supp. 660—in this case held, that a person making a promissory note in the name of a corporation, impliedly warrants that he has authority to do so, and if he does not have such authority, he is liable upon the implied warranty for damages which have resulted from the breach.

64. See McClure v. Bennett, 1 Blackf. 190; Taft v. Brewster, 9 Johns. 334; Delins v. Cawthorne, 2 Dev. 90; Bryson v. Lucas, 84 N. C. 680. Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480, 27 Am. St. Rep. 234, *contra*.

being thereby entirely cured.[65] The doctrines applicable to public agents are elsewhere considered.[66]

§ 308a. Liability of undisclosed principal.—An undisclosed principal, as we have seen, cannot be held as a party to a bill or note. But there is a principle of the law of principal and agent important to be remembered in this connection: that when an agent acts without disclosing that he is an agent, or when acting as a known agent does not disclose the name of his principal, then, although credit is given to the agent, it is not an exclusive credit. And when the principal is discovered, he may be held for the debt, provided that nothing has in the meantime passed between the principal and agent to alter the state of their accounts or otherwise to operate injuriously to the principal if he has acted in the confidence that exclusive credit was given to the agent; and provided also that there was no laches on the part of the creditor.[67]

SECTION IV

LIABILITY OF AGENT WHO DRAWS ON ACCOUNT OF HIS PRINCIPAL, OR INDORSES TO HIM

§ 309. In respect to bills of exchange drawn or indorsed by a party as agent, there are three cases in which an interesting question as to the drawer's or indorser's liability arises. *First.* When the drawer, who is known to be agent of the drawee, draws in favor of the drawee's creditor—whether or not he is liable to such creditor. *Second.* When an agent, selling goods for the owner, draws on the buyer for the amount—whether or not he is liable to the owner. And *Third.* Whether or not an agent, to whom a bill or note is made payable, is liable on an indorsement thereof to his principal.

§ 310. Drawer on principal.—As to the first question, it is said by Story, in his treatise on Agency, "If an agent should, in his own

65. Sheffield v. Larue, 16 Minn. 388. But see *contra*, Rossiter v. Rossiter, 8 Wend. 494.

66. §§ 443, 445.

67. See on this subject, Story on Agency (9th ed.), §§ 291, 292, and notes; Abbott's Trial Evidence, 300; Wharton on Evidence, §§ 950, 951; Smith on Mercantile Law, 65, 66, 78; 2 Kent. Com., Lect. 41, p. 630 (4th ed.); Lovell v. Williams, 125 Mass. 439; Hypes v. Griffin, 89 Ill. 134; Thomas v. Davenport, 9 B. & C. 78; Harper v. Nat. Bank, 54 Ohio St. 425, 44 N. E. 97.

name, draw a bill of exchange on his principal for the debt of the latter, he would be personally responsible as drawer in case of the dishonor of the bill, although upon the face of it the bill was drawn on account of his principal.[68]

And it is stated in the American Leading Cases to be the general rule, that "whenever an agent puts his name to a negotiable instrument as a party to it, he is legally liable to the promisee and to indorsees upon it." [69]

§ 311. The English cases clearly bear out these views.[70] But the weight of authority in the United States is otherwise,[71] though the

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68. Story on Agency, § 269.

69. Vol. I [*635].

70. Leadbetter v. Farrow, 5 Maule & S. 345 (1816). Agent of a country bank to whom plaintiff sent a sum of money in order to procure a bill on London, drew in his own name upon the London firm. Held, defendant was liable as drawer, though plaintiff knew he was agent. Perhaps this case is distinguishable from the American cases in this, that the plaintiff wanted a bill drawn on London. That was the very object of his negotiation. But no such distinction seems to have been taken.

71. Krumbaar v. Ludeling, 3 Mart. (O. S.) [*640], 700. The agent drew on his principal for a debt due the payee, without describing himself as agent. The court said, per Mathews, J.: "The attempt of Ludeling to show that he acted merely as agent for the Amelungs, in drawing the bill on which this suit is commenced, can be considered properly in no other light than an offer of evidence to show a want of consideration in the written agreement, and that, for this reason, he is not bound to fulfil any obligation which might otherwise have resulted from it. There is no doubt of the personal liability of the drawer of a bill of exchange, who signs it without expressing his agency, when it passes into the hands of third persons having no knowledge of the circumstances under which it was drawn, and between whom and the drawer the law will not allow the consideration to be inquired into. The appellee having signed, without expressing for whom he signed, is clearly liable on the face of it; but he is at liberty to show a want of consideration, and any circumstances of fraud or violation of good faith on the part of the appellant, which may be sufficient to exonerate him from this apparent liability, the suit against him being brought by a person 'with whom he was immediately concerned in the negotiation of the instrument.'" Wolfe v. Jewett, 10 La. (O. S.) 614 (1835); Lincoln v. Smith, 11 La. (O. S.) 11 (1837). In these cases there was no intimation of agency on the face of the bill. Hicks v. Hinde, 9 Barb. 528 (1850). In this case the drawer signed the bill "John Hinde, agent." Held not bound, Paige, J., saying: "This case may be distinguished from the case of Pentz v. Stanton. In that case the name of the principal was not disclosed to the vendor by the agent at the time of the purchase of the goods and giving of the draft for the price of the goods. The nondisclosure of the principal made the agent liable for the goods. And being so liable, it was proper he should be held personally liable on the draft."

cases are not uniform.[72] If the drawer signs himself "A. B., agent," and the payee takes the bill so drawn on his principal debtor, to whom he has given credit, and to whom he looks for payment, it has been said there is really no valuable consideration for his liability.[73] But the debt of another is a valuable consideration, and if the agent intended to be bound upon the draft, no other consideration would be necessary. Bills are constantly drawn for accommodation, and the transaction might be construed as intended to be of this character. We think, however, that a bill drawn by "A. B., agent," might well be distinguished from a note so signed; for the language is not inconsistent with the idea that the drawer signs as agent of the drawee whose name is disclosed upon the face of the instrument;[74] while in a note none but the maker's name is disclosed, therefore parol evidence might well be admitted to show the real circumstances of the case, from which might be inferred the understanding of the parties. When there is no intimation of agency accompanying the drawer's name, the case presented is more difficult. This view, however, may be presented when the buyer has parted with his goods upon faith of the principal's credit; but dealing with his agent, he then has funds in the principal's hands; and it is his draft that the principal would honor, provided he knew the fact that he was indebted to the drawer.

The agent's draft serves as a voucher of that fact. And although if there be no evidence to contradict the presumption that the agent intended to go security for his principal in the form pursued, he might well be held liable as drawer, there may be circumstances which would render it unjust so to hold him. Thus, suppose he was requested by the creditor to draw on his principal for the amount which, according to the agreement, only the principal owed; in that case, it

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72. Mayhew v. Prince, 11 Mass. 55 (1814), Parker, J.: "The agency under which he acted is a matter between him and his employer, but cannot protect him from the claim of the payees of the bill, who have a right to consider him as an independent drawer, notwithstanding they may have known, either from the terms of the bills themselves, or from extraneous evidence, that the defendant was acting as servant to one of the house on which the bill was drawn." To same effect, see Newhall v. Dunlop, 14 Me. 180 (1837); Conant v. Alvord, 166 Mass. 311, 44 N. E. 250. In this case, "A. represented that he was the duly authorized agent of B. to accept a draft, and C. relying on such representation, which was untrue, gave up a prior security against the drawer and received in its place, a draft on B., accepted by A. Held, that A. was liable irrespective of the question of fraud."

73. See 1 Parsons on Notes and Bills, 94.

74. Hicks v. Hinde, 9 Barb. 529

seems to us, he would be a drawer for the accommodation of the creditor; and if this be what is meant by the authority which calls him a drawer "without consideration," it would seem clearly correct, though not so in any other light. We conclude, therefore, that presumptively the agent drawing on his principal is bound to the creditor; but if there were an express understanding that he was not to be bound, or circumstances from which it might be inferred that such was the understanding, he would be regarded as having drawn for the creditor's accommodation—not, indeed, to enable him to raise money, necessarily, but to enable him, in the most succinct form, to vouch to his debtor the amount and authenticity of the debt, and call for payment at the same time.

§ 312. Drawer on purchaser in favor of principal.—As to the second question, whether or not the drawer of a bill on a purchaser of goods from him as agent, in favor of his principal, is liable to him (the principal) upon the bill, the authorities are divided. In England his liability is affirmed,[75] but not without meeting with dissent and criticism from high authority.[76] In the United States the contrary doctrine has found favor with the courts,[77] though in turn receiving criticism from discriminating authors.[78]

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75. Le Fevre v. Lloyd, 5 Taunt. 749 (1813). A broker being employed to sell goods, sold them for a bill at two months, in accordance with instructions, and himself drew a bill on the buyer for the amount, and was held liable. The court said: "The broker, by giving this bill, put an end to all doubt."

76. 1 Parsons on Notes and Bills, 104; Chitty on Bills (9th ed.), 34, citing *Ex parte* Robinson, 1 Buck, 113; Kedson v. Dilworth, 5 Price, 564. Chitty says "These decisions, subjecting an agent to personal liability as regards third persons ignorant of the circumstances under which the agent became a party, are consistent with the other principles of law applicable to these instruments. But it seems questionable whether even at law it is correct to allow an employer to recover from his agent under such circumstances, because, in general, between original parties it may be shown, as a good defense at law, that the bill was drawn, accepted, or indorsed for the plantiff's accommodation, or for a purpose or consideration which has failed or been satisfied; and to allow such a principal to recover at law against his agent, is only to compel the latter to resort to a court of equity for relief, which might just as well be afforded at law, and a court of equity will certainly afford relief."

77. Jones v. Lathrop, 44 Ga. 398 (1871), the court saying the bills were not drawn "in favor of the plaintiff for any valuable consideration received by the drawers from him therefor." Roberts v. Austin, 5 Whart. 313 (1839); Mechanics' Bank v. Earp, 4 Rawle, 390 (1834).

78. 1 American Leading Cases [*635], where it is said: "The case of Roberts v.

§ 313. The whole question seems to us to turn on the inquiry whether or not the agent, by customary course of dealing, or express authority, was authorized by the principal to draw bills on the purchaser in his favor. If so, he should be considered as really using his own name as the principal's, and the latter could not hold him liable, as there would be no consideration, but, instead, a trust reposed. If, on the other hand, there was no such express or implied authority, the agent should be regarded as assuming in the form of drawer to assure the debt.

§ 314. Indorsement of agent to principal—Commission del credere.—As to the third question, whether or not an agent taking a bill payable to his own order, and indorsing it to his principal, is liable thereon, is the subject of opposing opinions. In England it has been held that an agent, purchasing bills for his principal and indorsing them to his principal, is liable on his indorsement, unless it be qualified by appropriate words, however small the commission he gets upon the purchase, the Court of Common Pleas saying he might have specially indorsed the bills *sans recours*, but did not do it.[79] Clearly, if the agent indorsed for the principal's accommodation,[80] or merely indorsed according to the principal's instructions, in order to remit him money which he has collected, he is not bound.[81] In the case of a factor who sells goods on account of his principal under a *del credere* commission—by which is meant an agreement to guarantee in consideration of a premium—it has been held in Pennsylvania that the agent, under such a commission, guarantees only the solvency of the debtor, and is not bound as a party to the bill which he indorses to his principal by way of remitting the money.[82] But this view of the liability of a factor under a *del credere* commission is against the view which has obtained in England and in the United States, which is to the effect that such a factor is liable to his principal for the amount of the debt immediately on its falling due,[83] and is, there-

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Austin, 5 Whart. 313, is believed to have been an oversight on the part of the learned court in which it was decided."

79. Goupy v. Harden, 7 Taunt. 159 (1816).

80. See Chitty [*34], 46; *Ex parte* Robinson, Buck Cases, 113 (1817).

81. Warwick v. Noakes, Peake N. P. 68 (1781); Lewis v. Brehme, 33 Md. 431 (1870); Kimball v. Bittner, 62 Pa. St. 205.

82. Sharp v. Emmett, 5 Whart. 290 (1839); followed in Byers v. Harris, 9 Heisk. 652.

83. McKenzie v. Scott, 9 Bro. P. C. 280 (1796); Morris v. Cleasley, 4 Maule & S. 566 (1816), takes a different view as to the factor's liability, and so also do

fore, bound on his indorsement of a bill which he remits in discharge thereof.[84]

§ **315.** When there is no *del credere* commission under which the agent sells goods, the question whether he, *ipso facto*, binds himself by indorsing a bill or note taken payable to himself in payment, is more difficult. High authority has considered him bound.[85] If he takes the bill without authority to do so, he acts at his peril. But if he is authorized to give credit, and takes a bill or note payable at its termination to his own order, and acts without negligence in the matter, it seems unreasonable to hold him; for his own name as the payee might well be regarded as being used simply in the place of, and as his principal's. To exonerate himself from liability, however, the circumstances from which an intention not to be bound might be inferred, should be shown. There is really no consideration for his liability when he has made the indorsement without commission or compensation, and without departing from express or implied instructions; and in such cases no intention to bind himself could be inferred.[86]

SECTION V

RATIFICATION BY PRINCIPAL OF UNAUTHORIZED ACTS

§ **316.** When the party ostensibly the principal, and who is competent to make the contract, with a full knowledge of all the circumstances, deliberately ratifies the lawful acts, doings, or omissions of another assuming to act as his agent, he will be bound thereby to all intents and purposes, to the full extent of such acts, doings, or omis-

the cases of Thompson v. Perkins, 3 Mason C. C. 232 (1823), before Story, J.; Peele v. Northcote, 7 Taunt. 48. But the weight of authority is in accordance with McKenzie v. Scott; and sustaining the text are the cases of Wolf v. Koppel, 5 Hill, 558, 2 Den. 368; Sherwood v. Stone, 14 N. Y. 267 (1856); Swan v. Nesmith, 7 Pick. 220; Lewis v. Brehme, 33 Md. 412 (1870); Wickham v. Wickham, 2 Kay & Johns. 475; Centourier v. Hastie, 8 Exch. 39.

84. Lewis v. Brehme, 33 Md. 412 (1870); McKenzie v. Scott, 6 Bro. P. C. 280 (1769); Chitty on Bills (13th Am. ed.) [*34], 46.

85. Story on Agency, § 157.

86. Lewis v. Brehme, 33 Md. 432, Alvey, J.: "For, in such a case, although he is a known agent, the making, or accepting, or indorsing of the instrument, is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal."

sions, as if they had been originally done by his authority.[87] But this very statement of the rule implies its limitations: (1) The party must have capacity to make the contract. (2) He must ratify it with a full knowledge of the facts attending it. (3) The contract must have been originally lawful. The true rule is, that he who may authorize in the beginning may ratify in the end.[88]

§ 317. A corporation, as well as an individual, may ratify its agent's acts;[89] and the ratification may be by express consent, or by acts and conduct of the principal inconsistent with any other hypothesis than that he approved and intended to adopt what had been done in his name.[90] Intelligent acquiescence amounts to a binding ratification.[91]

§ 318. Firstly: The party must have capacity to have made the

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87. Trustees of Schools v. McCormick, 41 Ill. 323; Craighead v. Peterson, 72 N. Y. 279. The act must have been done in the principal's name, or as his act. Ellison v. Jackson Water Co., 12 Cal. 550; Coykendall v. Constable, 9 N. Y. 313; Riggan v. Crain, 86 Ky. 252; Crowder v. Reed, 80 Ind. 1, where it was held that the act must be that of a person professedly acting as the agent of the party sought to be charged as principal, and not the officious act of a friend. Matter of Petrie, 82 Hun, 62, 31 N. Y. Supp. 65; Brown v. Wilson, 45 S. C. 519, 23 S. E. 630, 55 Am. St. Rep. 779; Sanders v. Chartrand, 158 Mo. 352; Central Nat. Bank v. Copp, 184 Mass. 328, 68 N. E. 334; Wickersham Banking Co. v. Nicholas, 2 Cal. App. 18, 82 Pac. 1124. Where an agent had possession of money for the purpose of loaning it on real estate security, but loaned it on notes without such security without authority, a demand for the possession of securities for the money was not a ratification. Morris v. Butler, 138 Mo. App. 378, 122 S. W. 377.

88. First Nat. Bank v. Gay, 63 Mo. 33; Chouteau v. Allen, 70 Mo. 335; Goodwin v. East Hartford, 70 Conn. 18, 38 Atl. 876.

89. Hoyt v. Thompson, 19 N. Y. 218; Supervisors v. Schenck, 5 Wall. 782; Peterson v. Mayor of N. Y., 17 N. Y. 453; Johnson v. Stark County, 24 Ill. 90; Keithsbury v. Frick, 34 Ill. 421; Knox County v. Aspinwall, 21 How. 544; Trundy v. Farrar, 32 Me. 225. The fact that an agent took a draft in the name of the company for part of the money due on a note, and that the company collected the draft, does not necessarily imply that the company had full knowledge of the transaction. Wickersham Banking Co. v. Nicholas, 2 Cal. App. 18, 82 Pac. 1124, the court saying that the rule of the text cannot be applied when the corporation did not know until presentation of the note for payment of the action of its agent in indorsing the note in its name.

90. Supervisors v. Schenck, 5 Wall. 782; Knox County v. Aspinwall, 21 How. 544; Bissel v. Jeffersonville, 24 How. 299; Moran v. Miami County, 2 Blackf. 725; Warder v. Pattee, 57 Iowa, 516; Sanders v. Chartrand, 158 Mo. 352.

91. Creswell v. Lanahan, 101 U. S. (11 Otto) 347; McNeely v. Fort, 103 Iowa, 508, 72 N. W. 672, 64 Am. St. Rep. 195.

contract in the particular mode adopted.—If a contract can only be made in a prescribed mode, it cannot be ratified in disregard of that mode by any subsequent action of the impelled principal. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had originally existed.[92] The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and the power to ratify in a given mode supposes the power to contract in the same way.[93] Therefore, where the charter of a city authorizes a sale of city property only at public auction, a sale not thus made is from its very nature incapable of ratification, because it could not have been otherwise made originally. So, where the charter authorizes a contract for work to be given only to the lowest bidder, after notice of the contemplated work in the public journals, a contract made in any other way—that is, given to any other person than such lowest bidder—cannot be subsequently affirmed. Were this not so, the corporate authorities would be able to do retroactively what they are prohibited from doing originally.[94]

§ 319. Secondly: The principal will not be bound unless he knew the facts attending the transaction.[95]—Thus, ordinarily, payment or part payment of a bill or note is a ratification of its terms; but where a note has been altered without knowledge of the surety, and he being ignorant of the alteration, made a payment upon it, it was held not a ratification;[96] and where an agent, without authority, executed a note, the principal does not ratify such note by making payments on a collateral note without any knowledge of the original

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92. Paul v. Berry, 78 Ill. 158; Eadie v. Ashbaugh, 44 Iowa, 521; Darst v. Gale, 83 Ill. 137.

93. Ainsworth v. Creke, L. R., 4 C. P. 483; Bird v. Brown, 4 Exch. 786.

94. Zollman v. San Francisco, 20 Cal. 102; Field, J., McCracken v. San Francisco, 16 Cal. 591; Brady v. The Mayor, 16 How. Pr. 432.

95. School District v. Thompson, 5 Minn. 280; First Nat. Bank v. Parsons, 19 Minn. 183; Nixon v. Palmer, 8 N. Y. 398; Fletcher v. Dysart, 9 B. Mon. 413; Miller v. Board of Education, 44 Cal. 166; Supervisors v. Schenck, 5 Wall. 782; Claflin v. Wilson, 51 Iowa, 15; Meyer v. Wegener, 114 Ia. 74, 86 N. W. 49. Where an agent authorized to accept the unconditional delivery of notes receives the same upon conditions that he was not authorized to make, the principal does not ratify such conditions by accepting the notes without any knowledge of the fact that they were received by the agent upon condition. Watt v. Davison, 82 Nebr. 712, 118 N. W. 562.

96. Benedict v. Miner, 58 Ill. 19; Goodwin v. East Hartford, 70 Conn. 18, 38 Atl. 876; Colvin v. Peck, 62 Conn. 155, 25 Atl. 355.

obligation.[97] If the principal ratifies in ignorance of material facts, and, on learning them, desires to disavow the contract, he can only do so by relinquishing the proceeds, and restoring the party who dealt with his supposed agent to as good a situation as he was before.[98]

§ 320. Thirdly: The contract must have been originally lawful.—This principle is plain, for ratification being equivalent to an original authority, and possessing no greater or other virtue, can only apply retrospectively to validate those things which original authority would have validated.

§ 321. Ratification cannot be partial.—But a party cannot ratify a contract so far as it is to his interest, and repudiate it as to the rest. Ratification is an integral act. And, therefore, where an attorney compromised a debt for his principal, who, with full knowledge, retained the amount paid on such compromise, the principal was held bound by all the terms of the compromise.[99] Where one assumes without authority to act for another, if that other wishes to avail himself of the acts of the agent, he must adopt the whole or none.[1]

§ 322. Illustrations.—Delivery of a note by the apparent maker as his note is an adoption of the signature, by whomsoever made.[2] Retaining proceeds of a note is ratification of the means by which they were obtained;[3] and when a wife signed her husband's name without authority, but he took the money raised, he was held bound.[4] So, if a principal receives from his agent the notes of third parties for property sold, he waives the right to hold the creditor of the agent liable for the value of the property.[5] If alleged principal accepts and

97. First Nat. Bank v. Winnebago County Agricultural, etc., Assoc., 141 Wis. 476, 124 N. W. 656, 135 Am. St. Rep. 50.

98. Culver v. Ashley, 19 Pick. 300; Eadie v. Ashbaugh, 44 Iowa, 521; McCormick Harvesting Co. v. Taylor, 5 N. Dak. 53, 63 N. W. 890, 57 Am. St. Rep. 538.

99. Henderson v. Cummings, 44 Cal. 325. See 1 Parsons on Contracts, 52.

1. Eadie v. Ashbaugh, 44 Iowa, 521; Davenport Sav. Fund Assn. v. North America Fire Ins. Co., 16 Iowa, 74; Benedict v. Smith, 10 Paige, 127.

2. Harris v. Tinder, 109 Mo. App. 563, 83 S. W. 94.

3. Coykendall v. Constable, 99 N. Y. 313; National Improvement & Construction Co. v. Maiken, 103 Iowa, 118, 72 N. W. 431; Reid v. Rigby & Co., 2 Q. B. 40 (1894).

4. National Bank v. Fassett, 42 Vt. 432.

5. Trustees of Schools v. McCormack, 41 Ill. 323; Hunt v. Listenberger, 14 Ind. App. 320, 42 N. E. 240, 964.

attempts to enforce notes taken in his name by an assumed agent, he cannot deny the agency as to the transaction.[6] Mere silence by one whose name is purported to be signed to a note, but who has in fact never signed the same, after receiving notice of protest thereof, will not amount to ratification,[7] and mere silence when informed that another has used one's name, and an attempt to get indemnity against loss, has been held, under the circumstances, not to amount to ratification.[8] Long silence, however, coupled with circumstances, may frequently operate as ratification.[9] Where an agent fraudulently sells property, and embezzles the proceeds, the principal by accepting compensation from the agent ratifies the sale, and estops himself from recourse against the purchaser.[10] A subsequent unconditional promise to pay has been held not to be a ratification of an unauthorized signature, but evidence from which a ratification might be inferred.[11]

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6. Farrar v. Peterson, 52 Iowa, 420.

7. Ritchie County Bank v. Bee, 60 W. Va. 386, 59 S. E. 181. In Corner Stone Bank v. Rhodes, 5 Ind. T. 256, 82 S. W. 739, 69 L. R. A. 812, it was held that where the principal maker of a note signed the names of two of his relatives thereto without authority, who did not repudiate the same until after the note had matured, though notified by the payee immediately after the note had been signed, and the principal maker died hopelessly insolvent, such facts were sufficient to constitute a ratification of such signatures.

8. Hortons v. Townes, 6 Leigh, 47, Brockenburgh, J., saying: "There was no evidence of any assent given, or any actual ratification of the attorney by the principals, but the ratification is inferred from their silence. That is too equivocal a circumstance from which to form such a conclusion; and the subsequent conduct of the defendants in standing a suit shows that they did not understand their failure to object as an actual ratification."

9. Wardrop v. Dunlop, 1 Hun, 325; State Bank of Tabor v. Kelly, 109 Iowa, 544.

10. Ogden v. Marchand, 29 La. 61. Executing mortgage to secure notes given by unauthorized agent constitutes ratification. Bell v. Waudby, 4 Wash. 743, 31 Pac. 18.

11. Bank of Commerce v. Bernero, 17 Mo. App. 316, denying the authority of Story on Agency (9th ed.), § 254.

CHAPTER XI

BANKS AND OTHER AGENTS FOR NEGOTIATION OR COLLECTION

§ **323.** With regard to the duties of agents in respect to bills and notes, it is said by Chitty, upon the authority of Beawes, that an agent employed in negotiating bills of exchange is bound: First, To endeavor to procure acceptance; secondly, On refusal, to protest for nonacceptance; thirdly, To advise the remitter of the receipt, acceptance, or protesting; and, fourthly, To advise any third person that is concerned, and all this without delay.[1] This seems to be a concise and accurate statement of the general principle, and we shall endeavor to follow into its various ramifications.

SECTION I

BANKS AS COLLECTING AGENTS—WHAT CONSTITUTES AGENCY, AND OF WHOM THEY ARE AGENTS

§ **324.** The business of collecting commercial paper is a part of the regular business of banking; and it is not necessary that the charter of the bank should specifically confer the power to engage in it upon the bank, as it is plainly within the powers implied by the creation of such an institution.[2] Nor is it necessary for the bank to enter into any special contract with a person who deposits paper in it for collection, in order to invest it with all the rights, duties, and liabilities of a collecting agent. Frequently the banks charge a commission for collections to be made in distant places. But the advantages arising from business association, and the possible or probable temporary use of the money, are a sufficient consideration for the undertaking to collect it.[3] And although the party bound to make payment re-

1. Chitty on Bills [*36], 48; Beawes Lex Mercatoria, 41; West Branch Bank v. Fulmer, 3 Barr, 399.

2. Tyson v. State Bank, 6 Blackf. 225; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Keyes v. Bank, 52 Mo. App. 323.

3. Halls v. Bank of the State, 3 Rich. 366; Bank of Utica v. M'Kinster, 11

sides in a distant place, or the paper is payable at a bank in a distant place, no special directions or contract for its transmission are necessary, it being assumed that there is a tacit understanding, arising from the obvious circumstances, that such transmission is expected by the depositor, and undertaken by the bank.[4]

§ **325. Effect of making paper payable at a bank.**—A bank at which negotiable paper is made payable, and at which it is deposited for collection, becomes, by receiving it from the holder, his agent to collect the amount at maturity of the paper; and demand of payment and notice of dishonor by its cashier, he being a notary, will bind the indorser; [5] and though payment be not made at maturity, the bank has implied authority to receive the money at any time thereafter, and while the paper remains at the bank.[6] Payment may, therefore, be safely made to the bank by the debtor, unless he receives actual notice not to do so.[7] The designation of the bank as place of payment, imports a stipulation that the holder will have the paper at the bank at maturity to surrender up, and that the maker or acceptor will then pay it; and if it be not then lodged there, and the payor himself or his agent is there, with necessary funds to meet it, he so far satisfies the contract that he cannot be made responsible for any future damages, either as costs of suit or interest, for delay.[8]

§ **326. When bank is agent for payee.**—But the mere fact that a bill or note is made payable at a bank does not of itself confer any agency upon the bank, on the part of the payee, to receive the amount. In order to make the bank the payee's agent to receive the money, the paper must be indorsed to, or lodged with, it, for collection, or it

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Wend. 475; Bank of Utica v. Smedes, 3 Cow. 662; Keyes v. Bank, 52 Mo. App. 323.

4. Fabens v. Mercantile Bank, 23 Pick. 330; Bank of Washington v. Triplett, 1 Pet. 25; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38; First Nat. Bank v. Sprague, 34 Nebr. 318, 51 N. W. 846, 33 Am. St. Rep. 644, citing text.

5. Blakeslee v. Hewett, 76 Wis. 341, 44 N. W. 1105; Foster, Rec., v. Rincker, 4 Wyo. 484, 35 Pac. 470; Moreland's Assignee v. Citizens' Sav. Bank, 97 Ky. 211, 30 S. W. 637; Second Bank of Baltimore v. Bank of Alama (Ark.), 138 S. W. 472.

6. Alley v. Rogers, 19 Gratt. 383; Marine Bank v. Fulton Bank, 2 Wall. 253; Ward v. Smith, 7 Wall. 447; Morse on Banking, 323.

7. Ibid.

8. Ward v. Smith, 7 Wall. 447; Greeley v. Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258.

must have received authority from the payee to collect the amount due;[9] payment of a note made at the place designated does not discharge the maker, unless the note is there to be surrendered to the payor,[10] and without such circumstances or such authority any amount which the bank receives to apply in payment, it will be deemed to have taken as the agent of the payor.[11]

§ **326a. Whether the bank at which the paper is payable may apply funds of the principal payor to pay it,** is a question upon which the authorities differ. In England it is well settled that if the acceptor makes his acceptance payable at a particular bank or banker's, it is tantamount to an order on the part of the acceptor, to the bank or banker, to pay the bill to the person who, according to the law merchant, is capable of giving a good discharge to the bill—that is, to any holder by genuine indorsement; or by delivery, when the paper is payable to bearer.[12] And this may be regarded as well-established

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9. Cheney v. Libby, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. ed. 818; Glatt v. Fortman, 120 Ind. 385; Bank of Montreal v. Ingerson, 105 Iowa, 349, 75 N. W. 351, citing text; Caldwell v. Evans, 5 Bush, 380; Balme v. Wambaugh, 16 Minn. 120; Powers v. Woolfolk, 132 Mo. App. 354, 111 S. W. 1187; Cumings v. Hurd, 49 Mo. App. 139; Griffin v. Chase *et al.*, 36 Nebr. 328, 54 N. W. 572; Chapman v. Wagner, 1 Nebr. (Unof.) 492, 96 N. W. 412; Adams v. Hackensack Commission, 44 N. J. L. 638; Kelsay v. Taylor, 56 Or. 13, 107 Pac. 609.

10. Chapman v. Wagner, 1 Nebr. (Unof.) 492, 96 N. W. 412.

11. Ward v. Smith, 7 Wall. 447; State Nat. Bank v. J. J. Hyatt & Co., 75 Ark. 170, 86 S. W. 1002, 112 Am. St. Rep. 50, citing text; Dillingham v. Parks, 30 Ind. App. 61, 65 N. E. 300; Midland Nat. Bank v. Brightwell, Assignee, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608; Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346. In Pease v. Warren, 29 Mich. 9 (1874), Cooley, J., said: "It cannot be pretended that making a note payable at a bank can make the bank the agent of the payee to receive payment, unless the officers are disposed to accept the agency; and in this case the refusal was distinct and emphatic."

12. Robarts v. Tucker, 16 Ad. & El. (N. S.) 578, 72 Eng. C. L. (1851), Parke, B.; Forster v. Clements, 2 Campb. 17 (1809), Lord Ellenborough; Keymer v. Laurie, 18 L. J. Q. B. 218 (1849), Patterson, J.: "The plaintiff, by making the acceptance payable at the defendant's (banking-house), clearly authorized them to pay it." Thompson on Bills, 120; Chitty on Bills (13th Am. ed.), 716, *639, note; 1 Parsons on Notes and Bills, 357, note. In Byles on Bills [*19], 91, it is said: "If the funds in the banker's hands have been applied to the payment of the customer's acceptance, made payable at the banker's, *though without any further authority*, that is a defense (to the banker) to an action (brought by the customer) for dishonoring the (customer's) check." See also, to same effect, Byles [*188], 319; Edwards on Bills, 166, where it is said that if a note is made *negotiable* at a bank, "the maker authorizes the bank to pay it out of his funds on deposit, or by advancing the amount to his credit."

law. When a note is made payable at a particular bank or banker's it has been held in Illinois, that although the maker may have funds there on deposit sufficient to pay it, the bank or banker has no authority to apply these funds to pay the note at maturity without being so ordered by the maker, verbally, or by check, or draft, or other writing.[13] And this view was taken by the author in the former editions of this work. But this view the author is now convinced was erroneous, and upon principle and authority we should say that a bank or banker at whose house negotiable paper is made payable, may apply to its payment funds of the maker or acceptor held on deposit at its maturity, the relations of banker and customer, and the tenor of the instrument, justifying the inference that the customer intended this to be done. In New York, in a recent case, it was said by Rapallo, J.: "A note payable at a bank where the maker keeps his account, is equivalent to a check drawn by him upon that bank, except that in the case of a note the failure to present for payment does not discharge the maker." [14] And other well-considered cases sustain this view.[15]

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13. Wood v. Merchants' Savings, etc., Co., 41 Ill. 247. In this case the note was payable "at the banking-house of J. G. Conrad, Chicago." It was there presented at maturity, and marked "Good. C. W. Dunlop, Teller." At the time the maker had funds on deposit, but had given no authority to or order on the banker to pay the note. The next day Conrad failed, and made an assignment for the benefit of creditors. The court held that the maker was still bound; and Breese, J., concluding his opinion, said: "To sum up all on this point in a few words, the fact that the note was made payable at Conrad's bank, did not authorize that bank to pay the note without being so ordered by the maker, verbally, or by check or draft or other writing. The holder of the note could not, therefore, draw the funds except on the order of the maker, and the money in the bank belonging to him remained at his risk. It would be going too far to hold that the mere certification of a note by the bank at which it was payable, that it was 'good,' should operate to release the maker, and be held equivalent to an actual payment of the money. We think the better rule is to consider nothing as an actual payment which is not really such, unless there be an express agreement that something short of a payment shall be taken in lieu of it." See on this subject the Albany Law Journal, June 29, 1878, p. 500. See also Grissom v. Commercial Bank, 87 Tenn. 351, 10 S. W. 775, Folkes, J., delivering the opinion of the court, and denying the right of the bank to make such an application of the depositor's funds.

14. Indig v. National City Bank, 80 N. Y. 106 (1880); Wyman v. National Bank, 181 Ill. 279, 54 N. E. 946, 72 Am. St. Rep. 259; People v. St. Nicholas Bank, 76 Hun, 522, 28 N. Y. Supp. 114; Central Bank v. Thein, 76 Hun, 571, 28 N. Y. Supp. 232; Riley v. Cheesman, 75 Hun, 387, 27 N. Y. Supp. 453; Bedford Bank v. Acoam, 125 Ind. 584, 25 N. E. 713, 21 Am. St. Rep. 258, citing text; First Nat. Bank v. Hall, 119 Ala. 64, 24 So. 347.

15. Lazier v. Horan, 55 Iowa, 75, 23 Alb. L. J. 150; Thatcher v. Bank of the

§ 326b. Whether the bank must pay the note or acceptance of a depositor made payable there, is another question; but one which

State of New York, 5 Sandf. 130 (1851), Sandford, J., saying: "The bank pays for its dealers who have funds to their credit such bills, notes, accepted or drawn by them, as are payable at the bank. The latter circumstance is deemed an order by the depositor for the payment of the bill or note out of its funds deposited. But it is only in respect of its dealers, persons keeping an account with the bank, that this course of business exists or can exist. A person may, no doubt, become a dealer by a deposit made on the day his draft or note falls due, though never before in the bank; but his deposit must be made with the proper officer of the institution, and with the requisite assent to his becoming a dealer." Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 88 (1871), Allen, J.: "Before this note matured, or was presented for payment, the defendant (bank) paid upon another note of the same maker, payable at the bank of the defendant, and which, by commercial usage, takes the place of, and is equivalent to, a check, and charged the same to the account of the maker, leaving an amount to the credit of the account, insufficient to pay the plaintiff. This payment was valid as against the customer of the defendant, the maker of the note, and that corporation had no cause of action against the defendant either for the money or for not paying the plaintiff's note when presented. The defendant has performed its contract with Florence Mills, and discharged its obligations to it, by honoring its draft and was without funds for the payment of the plaintiff's note when presented. If the defendant is charged with the amount of the note at the suit of the plaintiff, the anomaly will be presented, of a liability, existing in favor of a stranger to a contract after it has been fully performed, and its obligations fulfilled, in favor of and by transactions with, the party with whom it was made." In Home Nat. Bank v. Newton, a well-considered case, decided in the First District Appellate Court, Chicago, Ill., and reported in the Bankers' Magazine for July, 1881, p. 58, similar views were taken. Wilson, J., said: "As it is the duty of the bank to pay its customer's checks, when in funds, so, at least, it has authority, if it is not under actual obligation, to pay his notes and acceptances made payable at the bank. It is a presumption of law that if a customer does so make payable or negotiable at a bank any of his paper, it is his intent to have the same discharged from his deposit. The neglect of the bank to make such appropriation would discharge the indorsers and sureties. The act of thus making his paper payable at a bank is considered as much his order to pay as would be his check, and if the bank pay without express orders to the contrary, it is a defense to a suit by the depositor for money so paid. And the rule seems to be settled that if a bank advances the money to pay a bill or note of its customer, made payable at the bank, it may recover from the depositor as for money loaned, the paper so made payable being equivalent to a request to pay. He makes the bank his agent, with implied authority to protect his credit by appropriating his deposits to the payment of his maturing obligations made payable at the bank." Pennsylvania Bank v. Farmers' Nat. Bank, 130 Pa. St. 209, 123 Pa. St. 283; Lancaster County Nat. Bank v. Huver, 114 Pa. St. 218, where the bank charged up the proceeds of a discounted note, before it became payable against the maker, who had made an assignment for the benefit of creditors. Dougherty v. The Bank, 93 Pa. St. 227; *post*, § 326*c*; Adams v. Hackensack Commission, 44 N. J. L.

we think should be affirmatively decided in the interest of the bank, and of the depositor, and of the noteholder alike, and according to the general usages and interests of trade. It is quite clear that if the bank make a special agreement to apply the deposit of its dealer to payment of checks, or in any other way; [16] or if instructed to make a particular application of it; [17] then it must abide the agreement or instruction, and cannot apply the deposit otherwise—even to a debt due itself.[18] It is also clear and well settled that when a bank is itself the holder of a bill or note there payable, it may at maturity apply funds of the principal payor on deposit to meet it.[19] Now, as between the bank and the noteholder, whose agent for collection it is, it is bound to act for his interest, and it would be negligence, as to him, to fail to make the application, it being conceded that the application is authorized by the debtor, by the very fact that his paper is made there payable; [20] and as between the bank and the maker of the note,

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638, citing the text; Knapp v. Cowell, 77 Iowa, 528; Johnson v. Bank, 56 Mo. App. 257; Bank v. Schneidermeyer, 62 Mo. App. 179. See Union Nat. Bank v. McKey, 42 C. C. A. 583, 102 Fed. 662.

16. Wilson v. Dawson, 52 Ind. 513.

17. Egerton v. Fulton Nat. Bank, 43 How. Pr. 216; Bank U. S. v. Macalester, 5 Pa. St. 475; Johnson v. Parker Sav. Bank, 101 Pa. St. 599; National Bank v. Johnson, 6 N. Dak. 180, 69 N. W. 49; North Star Boot & Shoe Co. v. Stebbins, 2 S. Dak. 74, 48 N. W. 833.

18. Egerton v. Fulton Nat. Bank, 43 How. Pr. 216; Merchants' Nat. Bank v. Robinson & Co., 97 Ky. 552.

19. Dawson v. Real Estate Bank, 5 Pike, 284. Held in this case, that if it fails to do so, it releases a surety; but the case must be one in which offset would be pleadable. This right, or duty, is denied in Louisiana (Gordon v. Gomila, 34 La. Ann. 605); and in Tennessee (Grissom v. Bank, 87 Tenn. 351). An analogous decision in Tennessee is to the effect that money of the payor coming into the hands of the payee, will not be presumed, in the absence of the debtor's assent, to have been applied to the payment of the note. McGill v. McGill, 10 Lea, 147. In Eyrich v. Capital State Bank (Miss.), 6 So. 615, the doctrine of the text was carried to such an extent as to permit the bank to apply its depositor's funds to a firm debt. But in Raymond v. Palmer, 41 La. Ann. 425, 6 So. 692, the contrary was decided. Smith v. Eighth Ward Bank, 31 App. Div. 6, 52 N. Y. Supp. 290. In this case it was held, that a bank which has received from a depositor for collection a promissory note, has a general lien thereon and on the proceeds thereof to the extent of obligations of the depositor then due the bank, and where such depositor subsequently becomes insolvent and a receiver of its property is appointed, the proceeds of the note so deposited for collection may be applied to the payment of notes of the depositor held by the bank which matured before, but not to such as matured after, the appointment of a receiver. But see Gardner, Admr., v. First Nat. Bank of Billings, 10 Mont. 149, 25 Pac. 29.

20. See *ante*, § 326a; and *post*, § 330.

or acceptor of the bill, there payable, it is to the interest of the maker or acceptor that his commercial paper be protected; and as he has impliedly authorized and made the bank his agent to pay it, by making it there payable, and depositing funds sufficient to meet it, it would be the duty of the bank to subserve that interest and make the application accordingly.[21] And it is certainly to the interest of the bank, and of banks generally, that this be the recognized duty of such institutions, as it induces to the certainty, and assurance, that is so much to be desired in all commercial transactions, and is to be taken as the fair understanding and contemplation of all parties. When a general deposit is made in bank by the payor after maturity of the paper, it has been held that the presumption of authority to apply it in payment does not arise.[22] Nor can it so apply the deposits of a guarantor, whose liability is postponed until all remedies against other parties have been exhausted.[23] Nor can it apply the depositor's funds, without his consent, to the payment of a note upon which he is merely surety.[24]

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21. See McDowell v. Bank of Wilmington, 1 Harr. 369. Held, that if maker of note held by bank has funds on deposit, bank must apply them to note; or if not, it releases an indorser. State Bank of St. Johns v. McCabe, 135 Mich. 479, 98 N. W. 20.

22. National Bank v. Smith, 66 N. Y. 271; People's Bank v. Legrand, 103 Pa. St. 309; Voss v. German-American Bank, 83 Ill. 599. Deposits made prior to maturity cannot be held to meet the note when it matures, and deposits made after maturity do not affect the liability of the indorser. State Bank of St. Johns v. McCabe, 135 Mich. 479, 98 N. W. 20. In an action by a bank against the indorser of a note, the fact that the maker had, some time subsequent to the maturity of the note, a sufficient deposit in the bank to pay it which the bank failed to appropriate for that purpose, constitutes no defense; in the absence of any direction or agreement to that effect, it was optional with the bank whether it would apply the money or not upon the note in suit. Far Rockaway Bank v. Norton, 186 N. Y. 484, 79 N. E. 709.

23. Bank of Shreiner, 110 Pa. St. 188.

24. Lamb v. Morris, 118 Ind. 179. In Hodgin v. Bank, 125 N. C. 503, 34 S. E. 709, 712, held, that upon dissolution of partnership by death of one of its members the surviving partner is the legal owner of its assets which he holds in trust, first to pay the debts of the firm and then for the benefit of the estate of the deceased partner. When the bank knew that plaintiff was the only surviving partner of firm and that he was making deposits as such, it had no right to apply them to the payment of a debt created by the partnership before its dissolution without consent of depositor, court saying: "It is only where the depositor stands in the same relation to the bank as the debtor and held by him in the same right as the debtor, that the bank has the right to approximate and apply the deposits to the payment of a debt due it. There must be mutuality between the debtor and the creditor, and between the debt and the fund deposited. If the fund is a

If when the note becomes due and payable the bank has not sufficient funds of the maker to satisfy the debt, it is not required to appropriate the deposit to the payment of the note, neither is it required to appropriate subsequent deposits in such case to its payment.[25]

§ **326c.** Where an agent deposits in bank the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposited other moneys of his own; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substitutes other moneys therefor.[26] If the bank be the owner of a bill or note thus payable, and have funds of the payor on deposit, it may claim the bill or note as offset in a suit for the deposit;[27] and such plea may be available in equity under some circumstances, the insolvency of the payor for instance, before the maturity of the bill or note.[28]

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trust fund, it cannot be applied by the bank to the payment of an individual debt." See also Adams v. First Nat. Bank of Winston, 113 N. C. 332, 18 S. E. 513.

25. Bacon v. Bacon, 94 Va. 693, 20 S. E. 576, citing National Bank v. Smith, 66 N. Y. 271, 23 Am. Rep. 48; Martin v. Bank, 6 Harr. & Johns. 235; Corn Nat. Bank v. Hennings, 105 Pa. St. 496.

26. Van Alen v. American Nat. Bank, 52 N. Y. 4. See the Overseers of Poor v. Bank of Virginia, 2 Gratt. 547. This doctrine has been applied to a case in which a bank, after collecting a draft, deposited with it "for collection," made a general assignment for the benefit of creditors; it being considered that the proceeds of the draft, in its hands, were impressed with a trust in favor of the depositor. Ryan v. Paine, 66 Miss. 678. Compare the case of Ewart v. Bank of Monroe, 70 Hun, 91, 23 N. Y. Supp. 1124. In this case it was held that if a commission merchant deposits to his credit in his own general bank account his principal's share of the proceeds of goods sold, which the principal is entitled to have immediately remitted by the agent, and dies, leaving the deposit so credited, the principal may recover the same from the bank in which it is deposited, in an action at law; and the bank cannot resist payment thereof on the ground that it has a lien on the deposit from the mere fact that it holds an unpaid note of the depositor which it has discounted for him, but which was not due at the date of the deposit, or on the ground that the depositor's estate is insolvent; nor is it a defense to such action that the plaintiff had not obtained or presented a check for his money drawn by the depositor or by his representatives. State of Nebraska v. State Bank of Wahoo, 42 Nebr. 897, 61 N. W. 252. But see Cady v. National Bank, 46 Nebr. 756, 65 N. W. 906.

27. Ford v. Thornton, 3 Leigh, 695. *Contra*, Cady v. National Bank, 46 Nebr. 756, 65 N. W. 906.

28. Ford v. Thornton, 3 Leigh, 695; Lancaster County Nat. Bank v. Huver, 114 Pa. St. 218.

SECTION II

RIGHTS AND DUTIES OF BANKS OR OTHER COLLECTING AGENTS

§ 327. Presentment for acceptance, and for payment.—It is the duty of the bank, as soon as the bill, note, or check is placed in its hands for collection, to take the appropriate steps necessary to its prompt payment or prompt acceptance, by making presentment for acceptance without delay, and presentment for payment at maturity. And if the instrument be not duly accepted or paid, the bank must take all necessary steps to fix the liability of the drawer, if it be a foreign bill, by placing it in the hands of a notary for protest, and by giving due notice of its dishonor to the party who indorsed the instrument to it for collection, whether it be a bill or note, inland or foreign. If the bank fail in any of these duties, it becomes immediately liable in damages to the holder.[29] And it will be no defense that it was unaccustomed to undertake collections, and that its error arose from want of familiarity with the ordinary course of proceedings.[30] Nor that it acted in accordance with its own best views of the requirements of law, as where it presented a bill without allowing grace, conceiving it to be a check.[31]

§ 328. Implied undertaking to make demand and protest.—The theory of this rule is, that the receipt by the bank of negotiable paper, deposited for collection, forms an implied undertaking to make the demands and protests, and give the notices required by law or mer-

29. West Branch Bank v. Fulmer, 3 Barr, 399, Gibson, C. J.; Merchants' Nat. Bank v. Stafford Nat. Bank, 44 Conn. 567; McKinster v. Bank of Utica, 9 Wend. 46; Allen v. Merchants' Bank, 22 Wend. 215; Smedes v. Bank of Utica, 20 Johns. 372, 3 Cow. 663; Blanc v. Mutual Nat. Bank, 28 La. Ann. 921; Indig v. National Com. Bank, 17 Hun, 200; Armington v. Gas Light Co., 15 La. Ann. 515; Beawes Lex Mercatoria, 41. See Bird v. Louisiana State Bank, 93 U. S. 97. But it has been held that if the bank acted in the best of faith and no damage results to the customer, no liability exists. Citizens' Bank of Paris v. Houston, 98 Ky. 139, 32 S. W. 397; Trumpbour v. Trumpbour, 70 Hun, 571, 24 N. Y. Supp. 212; Bank v. Bank, 49 Ohio St. 351, 30 N. E. 958; Citizens' Nat. Bank, etc., v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Wood River Bank v. First Nat. Bank, 36 Nebr. 744, 55 N. W. 239; Dern v. Kellogg, 54 Nebr. 560, 74 N. W. 844; Kavanaugh v. Bank, 59 Mo. App. 540.

30. Ivory v. Bank of State, 36 Mo. 475.

31. Georgia Nat. Bank v. Henderson, 46 Ga. 493 (1870).

cantile usage, for the perfect protection of the holder's rights against all previous parties, for which undertaking the use of the funds thus temporarily obtained, or of the average balances thereof, for the purposes of discount or exchange, forms a valuable consideration.[32] And so valuable frequently is this consideration, that collections constitute a most lucrative branch of the business of banking, and are often so desirable as a means of acquiring exchange which is above par, that the allowance of a small premium by the collecting bank for the privilege of making such collections is not unusual.[33]

§ 328a. Duty of collecting bank to employ a subagent to present transmitted paper.—For the purposes of collection, the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of another, a claim against itself.[34] Therefore, where a bank, receiving a check for collection, forwarded it to the bank upon which it was drawn, requesting payment thereof, which bank, upon receiving the check, charged it to the drawer's account, canceled and marked it paid, and remitted to the collecting bank in payment, a draft which proved to be worthless, it was held that the collecting bank was liable to the depositor, in that it had failed to employ a subagent for the collection of the check, who would have received the cash therefor, or, in default thereof, have protested the check and returned it to the depositor, as his evidence of a right of action against the drawer.[35]

§ 329. The measure of damages which the holder is entitled to recover of the bank, or other collecting agent, who has been guilty of negligence or default in respect to it, is the actual loss which has been

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32. Allen v. Merchants' Bank, 22 Wend. 215, Verplanck, Senator.

33. Reeves v. State Bank of Ohio, 8 Ohio St. 480; *ante,* § 324; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976.

34. Herron & Co. v. Mawby, 5 Cal. App. 39, 89 Pac. 872, quoting text; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 71; Anderson v. Rodgers, 53 Kan. 542, 36 Pac. 1067, citing text; Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687, 89 N. W. 570, 95 Am. St. Rep. 449; Ivory v. Bank of State, 36 Mo. 475; Western Wheeled Scraper Co. v. Sadilek, 50 Nebr. 105, 69 N. W. 765, 61 Am. St. Rep. 550, citing text; First Nat. Bank v. City Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

35. American Exchange Bank v. Bank, 71 Mo. App. 451, citing text.

suffered.[36] That loss is *prima facie* the amount of the bill or note placed in its or his hands; but evidence is admissible to reduce it to a nominal sum.[37] "The defendant may mitigate damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages." [38]

§ 330. Duty of collecting bank to present for acceptance.—Elsewhere in this volume, it will be seen that bills payable upon a certain day—say, for instance, thirty days after date—need not be presented for acceptance, but only for payment at maturity. If such a bill, however, be placed in the hands of a bank or other agent for collection, the principle which exonerates the holder as between him and the drawer and indorsers from making presentment for acceptance, does not apply as between the collecting agent and himself. While the holder is not himself bound to make such presentment, it is his interest that it shall be done; and as has been well said respecting a bill placed in an agent's hands: "It is the duty of a faithful agent to do for his principal whatever the principal himself would probably have done if he was a discreet and prudent man. Even where the principal is habitually negligent in attending to his own interests, it forms no excuse for similar negligence on the part of his agent." [39] Therefore

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36. Bank of Washington v. Triplett, 1 Pet. 25; Tyson v. State Bank, 6 Blackf. 225; Merchants' Bank v. Stafford Bank, 44 Conn. 567; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Dern v. Kellogg, 54 Nebr. 560, 74 N. W. 844; Selz v. Collins, 55 Mo. App. 55.

37. Van Wart v. Woolley, 5 Dowl. & R. 374; Allen v. Suydam, 20 Wend. 321; Borup v. Nininger, 5 Minn. 523; Livaudaise v. Denis, 4 La. Ann. 300; Blanc v. Mutual Nat. Bank, 28 La. Ann. 921; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, wherein the text is approved: Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

38. Borup v. Nininger, 5 Minn. 523; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320.

39. Allen v. Suydam, 20 Wend. 321; First Nat. Bank of Meadville v. Fourth Nat. Bank, 77 N. Y. 320. See chapter XVII, on Presentment for Acceptance and authorities quoted, §§ 476, 477. Allen v. Suydam, 20 Wend. 321 (1838), confirming 17 Wend. 268, Verplanck, Senator, said: "The principle is familiar that an agent for pay is bound to use such means, care, skill, and precaution as are adequate to the due execution of his trust. He must use the ordinary diligence of a skilful and prudent man in such affairs. Now an early presentment for acceptance is an obvious precaution, which a prudent man of business would

it has been considered that an agent would be liable to the owner for any damages resulting from the nonpresentment of such a bill. In

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take to insure collection of a questionable draft. By this neglect or delay, the payees were prevented from making those demands and taking such immediate measures as to the drawer, on receipt of notice of nonacceptance, as might possibly have secured the payees in some way or other. At the late period at which they did receive such notice, they preferred looking to the responsibility of their agents. These must be held responsible for the consequences of their negligence to the amount of the damage so caused. Nor is it a sufficient defense of the agents that the bill would not have been accepted if immediately presented, because the drawer had directed that it should not be, nor that it was uncertain whether the funds in the hands of the drawees were sufficient or not to meet the draft at the day fixed for payment. At and after the time when the draft should have been presented, the drawer was in business at New York, struggling for and obtaining credit, and having the command of funds which he applied to pay other drafts presented subsequently to the date, when with due diligence notice of the nonacceptance of this bill would have been received. Whatever might have been his first intention, it was not for a court and jury to assume the broad presumption that an immediate demand, upon return of the draft, with such other legal measures as the state of business between the parties or other circumstances might render advisable, would not have led to the ultimate payment. As a mere conjectural inference from the character and course of business of Eastabrook, as incidentally presented in the evidence, I should think the probability rather the other way, and that immediate and urgent measures might, perhaps, have prevented loss. His death and the consequent insolvency of his estate have left all this mere matter of conjecture; but it is quite immaterial as to the question of the agent's duty and the right of action against him, though were it distinctly in evidence either way, it might affect the measure of damages. Thus far, then, I think the law quite clear as to the rights of holders of bills and the duties of collecting agents, but I have had more hesitation as to the rule of damages. Is the plaintiff in similar cases to be obliged to make out in evidence the precise amount of the damage he sustained, and thus give to the party in fault all the numerous and great advantages of doubt, uncertainty, and difficulty in the proof? Or are we to apply to these cases the doctrine of *laches* in commercial paper, as between the holder and other parties, and consider the agent as having made the paper his own by his neglect? Contradictory as these rules are, they have yet each their share of authority, and are just and wise when applied to other questions; but I am not satisfied with the equity in the commercial policy of either, when applied to a collecting agency, and I have sought in the decisions for some safer and more equitable doctrine on that head. Considering the subject in regard to commercial policy, there is, on one side, the vast amount of paper daily collected through our banks, the great public necessity for giving every facility and inducement to such collections, the serious drawback on those facilities and inducements that would be occasioned, and the opportunity of fraud afforded, if worthless paper deposited for collection can, whenever parties are discharged by the blunder of a clerk, be saddled irrevocably on responsible agents and 'made their own' absolutely and without allowing any defense or mitigation of damages. On the other hand, the policy of holding such agents to strict accountability is equally clear.

a New York case the principles of the text were illustrated and applied.[40]

§ 331. How collecting bank should give notice of dishonor.— Sometimes a bank holding indorsed paper for collection sends notice, in the event of its dishonor, to the indorser from whom it was received. Sometimes it sends notices not only to him, but also to the drawer and to all the indorsers, addressed to their post-offices, or delivered at their places of business, respectively. Sometimes it incloses notices for all the parties entitled thereto under one envelope in company with notice to the last indorser, that he may thus be conveniently supplied with the means of transmitting notice to the successive indorsers, and to the drawer antecedent to him, if such there be. But how far the duty of the bank extends in this regard, and what it must do to discharge itself of liability, is a question upon which opinion has divided. The weight of authority, however, is strongly to the effect, and the law may be assumed to be, that it is only necessary for the bank to notify its immediate predecessor, that is, the party from whom it received the paper, no matter what may be the nature of the

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Our whole system of negotiable paper and its reponsibilities, formed, as it is, by long experience, and admirably adjusted to the varied uses of commerce, rests upon the single principle of strict punctuality in demands, presentments, and notices, as well as in payments. Now, the policy and necessity of that punctuality apply with the same force to the agent of such paper that they do to the principal. I can, therefore, find no sounder rules of damages, nor one better protecting and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction, against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus, where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default *prima facie*, to the total amount which he ought to have covered by insurance. But, at the same time, he is allowed to put himself in the place of the underwriter, and to prove fraud, deviation, or any other defense which would have been good had the insurance been made, or which would go to show that nothing at all, or how much, was actually lost by the neglect. Delancy v. Stoddart, 1 T. R. 22; Wallace v. Tellfair, 2 T. R. 188; Webster v. De Tastat, 7 T. R. 757. In the courts of this State, Rundle v. Moore, 3 Johns. Cas. 36. And in the courts of the United States, Morris v. Summeril, 2 Wash. 203. See also 1 Phillips on Insurance, 521. and the cases there cited." Selz v. Collins, 55 Mo. App. 55.

40. First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320, 89 N. Y. 412; Edmonston v. Gilbert, 3 Mackey, 351; Crouse v. First Nat. Bank, 137 N. Y. 383, 33 N. E. 301.

title or interest of that party to or in it.[41] But special circumstances may vary this general principle. Thus an agreement between the bank and its principal may vary it.[42] So also may a usage of the collecting bank.[43] And a local usage, as in the city of New York, for the collecting bank to notify all parties entitled to notice, would undoubtedly be respected and enforced.[44]

§ 332. **In respect to a check put in bank for collection** from another bank located in the same place, the collecting bank may present it for payment at any time before the close of banking hours on the business day next following that on which it comes into possession of the check.[45] The holder of the check, whether he be the payee, or an indorsee, is obliged to present it within a like time from the day of its date, in order to escape all contingency of loss; and if on the day after it is drawn he places it in another bank for collection, instead of presenting it at the counter of the drawee bank for payment, he takes the peril of loss upon himself without recourse against the drawer, should the drawee bank fail in the meantime; and without recourse against the collecting bank by reason of its not presenting the check until a day later.[46]

§ 333. **When collecting bank bound to pay amount.**—The collecting bank is not bound to pay the amount of a bill, note, or check placed in its hands for collection to the holder, until such amount is received, or would be received but for the default of itself or some

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41. Phipps v. Millbury Bank, 8 Metc. (Mass.) 79; Bank U. S. v. Goddard, 5 Mason, 366; State Bank v. Bank of the Capitol, 41 Barb. 343; Spencer v. Ballou, 18 N. Y. 327; Mead v. Engs, 5 Cow. 303; Howard v. Ives, 1 Hill, 263; Farmers' Bank v. Vail, 21 N. Y. 485; Bank of Mobile v. Huggins, 3 Ala. (N. S.) 206; Branch Bank v. Knox, 3 Ala. (N. S.) 206; Lynn Nat. Bank v. Smith, 132 Mass. 227; Auten v. Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337; Big Sandy Nat. Bank v. Chilton, 40 W. Va. 491, 21 S. E. 774; Fielding & Co. v. Corry, 1 Q. B. 268.

42. State Bank v. Bank of the Capitol, 41 Barb. 343, where notification to a part only of the indorsers was held evidence going to show an agreement to notify all.

43. Morse on Banking, 340.

44. Smedes v. Bank of Utica, 20 Johns. 372, 3 Cow. 662.

45. Boddington v. Schlencker, 4 B. & Ad. 752, 1 Nev. & M. 540; Alexander v. Burchfield, 1 Car. & M. 75, 3 Scott N. R. 555, 7 M. & G. 1061; Moule v. Brown, 4 Bing. N. C. 266, 5 Scott, 694; Hare v. Henty, 10 C. B. (N. S.) 65; Rickford v. Ridge, 2 Campb. 537. See vol. 2, chapter XLIX, on Checks.

46. Morse on Banking, 324; Moule v. Brown, 4 Bing. N. C. 266 (33 Eng. C. L.).

agent for whose act it is responsible.[47] It is frequently the case that for the accommodation of customers they are permitted to draw before, and in anticipation of, the reception of such amounts. But this habit is mere favor, and, though long continued, gives the customer no right to demand that it be done in any particular case.[48] And although a bank, according to its custom, put to its customer's credit the amount of a bill deposited for collection, deducting the proper discount, and he was thereafter entitled to draw upon it, it has been held in England that upon a subsequent failure of the bank before collection, the customer could recover the bills specifically, no title to the bank having passed; or that he could recover the amount from the assignees if the collection had been made.[49] But in New York, by statute, checks drawn on banks in other places, deposited for collection, and by agreement passed to the depositor's account with liberty to check against them, become thereby the property of the bank, with the right of charging them back to the depositor's account if returned unpaid.[50]

§ 334. Relation of bank to depositor for collection.—As soon as the bank collects the money, it becomes the debtor of the depositor of the instrument for collection—especially if it places the amount with its other funds, and uses it as its own, although it be credited on the account of such depositor,[51] and although instructed to hold it

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47. When the collecting bank employs another bank as subagent under an arrangement by which all collections made by it for its principal are credited to the latter in a collection account regularly settled at short periods, the acceptance by the collecting bank of the responsibility of the subagent upon the collection account will be regarded as payment to the collecting bank, and for which it will be liable. Briggs v. Cent. Nat. Bank, 89 N. Y. 184; Gilbert v. Walker, 64 Conn. 391, 30 Atl. 132.

48. Scott v. Ocean Bank, 23 N. Y. 289; Morse on Banking, 365; Midland Nat. Bank v. Brightwell, Assignee, 148 Mo. 358, 49 S. W. 852, 71 Am. St. Rep. 608.

49. Giles v. Perkins, 9 East, 13. But see Ayres v. Farmers' Bank, 79 Mo. 421; First Nat. Bank of Omaha v. First Nat. Bank, 55 Nebr. 303, 75 N. W. 843; German Fire Ins. Co. Bank v. Kimble, 66 Mo. App. 370; Gadden v. Savings Bank, L. R., App. Cas. 281 (1899).

50. Brooks v. Bigelow, 142 Mass. 7; Rev. Stat. N. Y. (6th ed.), chap. 18, art. 9, §§ 368, cl. 7, 389, 397, 399; Corn Exch. Bank v. Farmers' Nat. Bank, 118 N. Y. 443. See also Flannery v. Coates, 80 Mo. 444; Ayres v. Farmers' Bank, 79 Mo. 421.

51. Marine Bank v. Fulton Bank, 2 Wall. 253; Bank of United States v. Bank of Georgia, 10 Wheat. 333; Wallace v. McConnell, 13 Pet. 136; Levy v. Bank of United States, 4 Dall. 234; Thompson v. Riggs, 5 Wall. 663; Bank v. Millard, 10 Wall. 152; Oulton v. Savings Inst., 17 Wall. 109; Scammon v. Kimball,

subject to his order, which the very deposit itself would imply.[52] And if it receive, by the depositor's instructions, the amount of the instrument in specific bank bills, which are at the time depreciated, any subsequent depreciation will be at the risk of the bank if it uses them as its own, instead of holding them as a bailment.[53] But the depreciation of the currency of payment at the time of payment would be the depositor's loss.[54] If it receives a cashier's check instead of cash, its liability to the depositor becomes fixed, as much so as if it had received the cash.[55]

§ 334a. To whom collecting bank should make payment.—The recognized practice and usage of collecting banks in the United States is, where the indorsee collecting bank collects paper which has passed through the hands of a series of collecting banks, to remit, or credit the proceeds to the last forwarder or indorser for collection, without regard to the actual ownership of the paper.[56] In a case, however, where the last of a series of indorsee collecting banks collected paper and accounted with its immediate correspondent therefor, by directing its New York agent to credit such correspondent with the proceeds, and then received notice of the failure of its correspondent, without countermanding such direction of credit, which it could have done before the New York agent had bound itself by action thereon, it was held liable to the real owner of the paper, for the resulting loss.[57]

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92 U. S. 362; Newcomb v. Wood, 97 U. S. 581; People v. City Bank, 93 N. Y. 584; Phenix Bank v. Risley, 111 U. S. 127; Sayles v. Cox, 95 Tenn. 579, 32 S. W. 626, 49 Am. St. Rep. 940; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669, 42 Am. St. Rep. 921; Hallam v. Tillinghast, 19 Wash. 20, 52 Pac. 329; Bowman v. First Nat. Bank, 9 Wash. 614, 38 Pac. 211, 43 Am. St. Rep. 870; First Nat. Bank of Omaha v. First Nat. Bank, 55 Nebr. 303, 75 N. W. 843; Midland Nat. Bank v. Brightwell, Assignee, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 628; Clarkson v. London, etc., Co., 1 Q. B. 552 (1897).

52. Marine Bank v. Fulton Bank, 2 Wall. 253; Naser v. First Nat. Bank, 37 Hun, 343; Union Nat. Bank v. Citizens' Nat. Bank, 153 Ind. 45, 54 N. E. 97.

53. Ibid.

54. Marine Bank v. Fulton Bank, *supra;* Morse on Banking, 369.

55. Fifth Nat. Bank v. Ashworth, 123 Pa. St. 212; *post*, § 1625; Merchants' Bank v. Goodman, 109 Pa. St. 424; Wyman v. Colorado Nat. Bank, 5 Colo. 30.

56. Banking Law Journal, vol. 4, p. 1; Dappelt v. National Bank, 175 Ill. 432, 51 N. E. 753.

57. Commercial Nat. Bank v. Hamilton Nat. Bank, 42 Fed. 880. This decision has been reviewed and criticised in an article entitled "The Gresham Decision," contained in the Banking Law Journal, vol. 4, p. 1.

§ 334b. Banker's lien.—A bank advancing money to a party dealing with it, has a lien on all of the securities of the latter which are in its hands for the amount of his general balance, unless such securities are impressed with a particular trust, or some particular agreement affects them.[58] This lien rests upon the presumption of credit extended in faith of securities in possession, or in expectancy, but does not arise in reference to securities of a bank under circumstances, or where there is a particular mode of dealing, inconsistent with such lien.[59] "Nor where they have been pledged for a particular loan or debt."[60] Nor will the bank be entitled to a lien upon the funds of the depositor merely to provide against a possible loss on his unmatured paper which it has discounted.[61]

§ 335. Currency to be collected.—Without special authority, a bank or other agent for collection can only receive payment of the debt due the principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community; and such bank or agent will not be authorized, by the

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58. Bank of Metropolis v. New England Bank, 1 How. 234; Sweeney v. Easter, 1 Wall. 166; Wood v. Boylston Nat. Bank, 129 Mass. 358; Ford v. Thornton, 3 Leigh, 695; Commercial Bank v. Hughes, 17 Wend. 94; Bank of United States v. Macalester, 9 Barr. 475; Morse on Banking, 34. See § 337 *et seq.*; National Bank v. Insurance Co., 104 U. S. 54; Continental Nat. Bank v. Weems, 69 Tex. 489; Masonic Sav. Bank v. Bangs, 84 Ky. 135; London Bank of Australia v. White, 53 Eng. Rep. 312; Wyckoff v. Anthony, 90 N. Y. 448 (but in Pennsylvania this lien is not recognized. Liggett Spring & Axle Co.'s Appeal, 111 Pa. St. 298; Hackett v. Reynolds, 114 Pa. St. 332; Carroll v. Bank, 30 W. Va. 520. In Kentucky it is held, when securities are pledged to a banker for payment of a particular loan or debt, he has no lien on a surplus existing after paying such debt, for a general balance, or other claims. Masonic Sav. Bank v. Bangs, 84 Ky. 137. Unless specially indorsed "for collection," where there are mutual dealings between a forwarding and a collecting bank, it has been held in Missouri, that the latter will have a lien on the proceeds of the paper as against the owner, for any balance due it by the forwarding bank, unless the special circumstances of the case are inconsistent therewith. Bury v. Woods, 17 Mo. App. 252; Munch v. Valley Nat. Bank, 11 Mo. App. 144; Armstrong v. Chemical Nat. Bank, 41 Fed. 239.

59. Reynes v. Dumont, 130 U. S. 391; Brandas v. Barnett (C. P.), 1 M. & G. 908; Bock v. Gorrisseau, 2 De G., F. & J. 434.

60. Bacon v. Bacon, 94 Va. 694, 27 S. E. 576; Lloyd v. National Bank, 86 Va. 690, 11 S. E. 104; Wyckoff v. Anthony, 90 N. Y. 442; Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. Rep. 486.

61. State Sav. Assn. v. Boatman's Sav. Bank, 11 Mo. App. 292; Niblack v. Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203.

circumstance that they were the principal currency in which the ordinary transactions of business were conducted, to receive depreciated bank bills or other depreciated bills issued as a circulating medium.[62] Clearly an agent for collection would have no implied authority to receive payment in goods; and the party bound for payment is chargeable with notice of the agent's authority.[63] The collecting agent has no right to accept certification of a check, instead of payment. By doing so he assumes the risk of payment, and becomes liable to the owner for the amount of the check, with interest from the day of certification. The law presumes damages to the owner of the check in such case, and it is unnecessary to prove them.[64]

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62. See *post*, § 1245; Ward v. Smith, 7 Wall. 447; Alley v. Rogers, 19 Gratt. 366 (1869), in which case Moncure, J., said: "In regard to notes deposited in a bank for collection during the war, when Confederate money was the only currency, they might properly have been paid in such money, at least without notice that other money was demanded. To have made such a deposit without such a notice could have been for no other purpose and with no other expectation than to get Confederate money. In regard to notes payable at bank before the war, deposited for collection and protested for nonpayment, but neglected to be withdrawn from bank by the owner residing in this State, it might be very questionable whether, after the lapse of two or three years, the bank would have authority to receive payment of such notes in a currency which came into existence after the protest of the note, and which, at the time of such payment, had depreciated in value as twelve to one compared with specie, in which payment might legally be demanded; or whether the debtor, having notice of the facts, could make a valid payment of the notes in such a currency and under such circumstances." But in this case the notes were payable to a resident of the State of Kentucky, who had deposited them at the bank before the war, and it was held that to receive payment in Confederate currency under these circumstances was not authorized in the bank, and did not release the debtor. But if the subagent of the collecting bank collects the note or draft and places proceeds to the credit of last-named bank and same is taken into account in settlement, between them, held to be payment though no money actually passed. Howard & Co. v. Walker, 92 Tenn. 452, 21 S. W. 897; Midland Nat. Bank v. Brightwell, Assignee, 148 Mo. 358, 49 S. W. 994, 71 Am. St. Rep. 608.

63. Mudgett v. Day, 12 Cal. 139; Moore v. Pollock, 50 Nebr. 900, 70 N. W. 541; Rush v. Rush, 170 Ill. 624, 48 N. W. 990.

64. Essex County Nat. Bank v. Bank of Montreal, 7 Biss. 193. See *post*, §§ 1625, 1626; National Bank v. Bank, 151 Mo. 320, 52 S. W. 265, 74 Am. St. Rep. 527, citing text. But it has been held that if it be the custom of a bank to accept check in payment of claims thus held for collection, the customer will be bound thereby, with or without knowledge of the existence of such custom. See Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38.

SECTION III

THE MANNER OF PLACING COMMERCIAL PAPER IN BANK FOR COLLECTION; THE RIGHTS OF THE COLLECTING BANK; AND THE RIGHTS OF THE DEPOSITOR

§ 336. As to the manner of placing a bill, note, or check in bank for collection, it is always better to indorse it specially to the bank, with the restrictive words, "for collection," superadded. Those words are a clear indication that the indorser does not intend to bind himself by his indorsement, or to part with his legal title to the proceeds of collection. They prevent the danger which would arise from the loss or misappropriation of the paper if it were indorsed in blank. And by showing that the indorser only constitutes the bank his agent for collection, it forestalls any difficulty in accounting between subsequent banks.[65]

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65. Sweeney v. Easter, 1 Wall. 173 (1863); Cecil Bank v. Farmers' Bank, 22 Md. 148; §§ 698, 698*a*, 698*b*. In Evansville Bank v. American Bank, 155 U. S. 556, 15 Sup. Ct. Rep. 221, where the German-American Bank of Peoria, Ill., sent a bill of exchange to the Fidelity Bank of Cincinnati, Ohio, for collection, indorsing it "Pay Fidelity Nat. Bk. of Cincinnati, Ohio, or order, Supreme Court held that this was "notice to it and every subsequent holder that it was forwarded simply for collection" and that after insolvency of the Fidelity National Bank and the taking possession thereof by a bank examiner, no other bank acting as its first agent for collection could make any settlement with it by entry upon its books to the prejudice of the right of the German-American National Bank to the money derived by the collection of the bill by such subagent. Kavanaugh v. Bank, 59 Mo. App. 540; Bank of Clarke County v. Gilman, 81 Hun, 486, 30 N. Y. Supp. 1111. The various decisions affecting the rights of depositors or forwarders of commercial paper for collection, and the rights of intermediary agents, and subagents actually making the collection, may be classified as follows, viz.:

(1.) WHERE THE INDORSEMENT WAS IN BLANK, AS BETWEEN DEPOSITOR AND BANK, FORMER HELD NOT TO HAVE PARTED WITH TITLE TO THE PAPER.—Giles v. Perkins, 9 East, 1114; Balbach v. Frelinghuysen, 15 Fed. 675; St. Louis Ry. Co. v. Johnson, 10 Sup. Ct. Rep. 390; Bank of Meridian v. Strauss, 66 Miss. 479; Dod v. Fourth Nat. Bank, 59 Barb. 265; Van Amee v. Bank of Troy, 8 Barb. 12; Lindauer v. Fourth Nat. Bank, 55 Barb. 75. *As between depositor and subagent claiming a lien against, or as purchaser from, intermediary agent, former held to have parted with title:* Bank of the Metropolis v. New England Bank, 1 How. 237; Dickerson v. Wason, 47 N. Y. 439; Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530; Hoffman v. First Nat. Bank of Jersey City, 46 N. J. L. 604; Carroll v. Bank, 30 W. Va. 518, a case in which the paper, instead of being indorsed in blank, was drawn payable to the order of the collecting bank, and by it forwarded to its correspondent; Cody v. City Nat. Bank, 55 Mich. 379; Vickery v. State Sav. Assn.,

§ 337. Rights between banks.—The importance of this precaution is often exhibited where one bank claims a lien upon securities, really or ostensibly another's, for balances or advancements. As a general rule, a bank has a general lien on all securities in its hands

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21 Fed. 773; Wood v. Boylston Nat. Bank, 129 Mass. 358; German Nat. Bank v. Coors (Colo.), 7 Law. Rep. Annot. 845; Foster, Receiver, v. Rincker, 4 Wyo. 484, 38 Pac. 470.

(2.) WHERE THE RESTRICTIVE INDORSEMENT "FOR COLLECTION" WAS EMPLOYED.—*As against receiver or other representative of insolvent collecting bank; proceeds of paper collected before insolvency recovered; relation of principal and agent established; trust impressed:* Continental Nat. Bank v. Weems, 69 Tex. 493; Arnot v. Bingham, 55 Hun, 553; People v. Bank of Dansville, 39 Hun, 187; *trust impressed upon general estate of insolvent without identifying proceeds of trust subject:* Peak v. Ellicott, 30 Kan. 156; McLeod v. Evans, 66 Wis. 401; Stoller v. Boates, 88 Mo. 514; Harrison v. Smith, 83 Mo. 210; Broechus v. Morgan, 5 Cent. L. J. 53; *collection after insolvency, itself an identification of the trust subject:* Commercial Nat. Bank v. Armstrong, 39 Fed. 684, as to part of fund; National Butchers & D. Bank v. Hubbell, 117 N. Y. 384; Fifth Nat. Bank v. Armstrong, 40 Fed. 46; First Nat. Bank of Wellston v. Armstrong, 42 Fed. 193, as to part of fund; *In re* Armstrong, 33 Fed. 405; First Nat. Bank of Montgomery v. Armstrong, 36 Fed. 59; Manufacturers' Bank v. Continental Bank, 148 Mass. 553. *Debtor and creditor relation established; right to impress proceeds with trust denied*: Philadelphia Nat. Bank v. Dowd, 38 Fed. 172; Commercial Nat. Bank v. Armstrong, 39 Fed. 684, as to part of fund; First Nat. Bank of Elkhart v. Armstrong, 39 Fed. 231; First Nat. Bank of Wellston v. Armstrong, 42 Fed. 193, as to part of fund; Edson v. Angell, 58 Mich. 336; Union Nat. Bank v. Citizens' Bank, 153 Ind. 45, 54 N. E. 97; Pearce v. Dill, 149 Ind. 136; Importers, etc., Bank v. Peters, 123 N. Y. 272, 25 N. E. 319; Lafort v. Carpenter, 91 Hun, 76, 36 N. Y. Supp. 168; Daniel v. St. Louis Nat. Bank, 67 Ark. 223, 54 S. W. 214; People v. Merchants' Bank, 92 Hun, 159, 36 N. Y. Supp. 989.

(3.) WHERE THE RESTRICTIVE INDORSEMENT "FOR COLLECTION" WAS EMPLOYED; LIEN OF SUBAGENT HELD NOT TO HAVE ATTACHED.—Sweeney v. Easter, 1 Wall. 173; Blaine v. Bourne, 11 R. I. 119, 23 Am. Rep. 429; First Nat. Bank v. Reno County Bank, 3 Fed. 257; Cecil Bank v. Farmers' Bank, 22 Md. 148; Central R. Co. v. First Nat. Bank of Lynchburg, 73 Ga. 384; City Bank of Sherman v. Weiss, 67 Tex. 332; Bank of Metropolis v. First Nat. Bank of Jersey City, 19 Fed. 301; Tyson & Ralls v. Western Nat. Bank, 77 Md. 412, 26 Atl. 520.

(4.) *The following authorities are cited in favor of the proposition that a trust may be impressed upon any subject in which the trustee (or agent) has incorporated the trust money:* Taylor v. Plumer, 3 Maule & S. 562; Pennell v. Deffell, 4 De G., M. & G. 372; Knatchbull v. Hallett, L. R., 13 Ch. Div. 696; *Ex parte* Dale, 11 Ch. Div. 772; Overseers of the Poor v. Bank, 2 Gratt. 544; Kip v. Bank, 10 Johns. 63; Whitely v. Foy, 6 Jones Eq. 34; Thompson v. Perkins, 3 Mason, 232; Bank v. King, 57 Pa. St. 202; Cook v. Tullis, 18 Wall. 332; National Bank v. Insurance Co., 104 U. S. 54; Van Alen v. American Nat. Bank, 52 N. Y. 1; Schuler v. Bank, 27 Fed. 424; Winters v. Armstrong, 37 Fed. 508; Montgomery Nat. Bank v. Armstrong, 36 Fed. 59; Continental Nat. Bank v. Weems, 69 Tex. 493; Commercial Nat. Bank v. Armstrong, 39 Fed. 684.

belonging to a customer for the general balance due from the latter; [66] and if the bank A., which receives a note indorsed in blank by the holder H. for collection, transmits it to bank B., which has a general balance against bank A., the question arises whether or not it may apply the proceeds of the note to the discharge of such balance as against H., its actual holder and owner. Clearly, if the bank B. knew the fact that the bank A. was not the real owner of the note, it could not do so; [67] and we think that the question simply resolves itself into the inquiry whether or not the bank B. can be regarded as a *bona fide* holder of the note without notice of any defect of title—or at least is to be decided by exactly the same principles that apply to the rights of such a holder.

§ 338. **The United States Supreme Court** has stated the doctrine with admirable clearness, that if the B. bank, actually in possession of the proceeds of collection, had regarded and treated the A. bank as the owner of the paper transmitted, it would be entitled to retain such proceeds as against the real owners, provided that upon the credit of such remittances, made or anticipated in the usual course of dealing between them, balances had been suffered to remain in the hands of the A. bank to be met by the proceeds of such paper.[68] In other words, that the B. bank could retain the funds whenever they could be regarded applied by agreement to the payment of the preexisting debt; and that the paper being received under a blank indorsement would be evidence of title in the A. bank, and its transmission to the B. bank as evidence of application to such debt, when the course of dealing between the two authorized such inference.

§ 339. **Opposite doctrine followed.**—In New York, the opposite doctrine is followed, but mainly upon the ground peculiar to the de-

66. Davis v. Bowsher, 5 T. R. 488; Bank of Metropolis v. New England Bank, 1 How. 239; Van Amee v. Bank of Troy, 8 Barb. 315; *ante*, § 334*a*. See also part 3, p. 340. People v. St. Nicholas Bank, 44 App. Div. 314, 60 N. Y. Supp. 719, holds with the text, and further says that this lien is superior to that of a warrant of attachment issued against the property of the customer, although the bank has not actually appropriated the deposit to the payment of its claim at the time the warrant was attempted to be levied on the deposit.

67. Van Amee v. Bank of Troy, 8 Barb. 315 (1850); Bank of Metropolis v. New England Bank, 6 How. 227 (1848); People's Bank v. The Jefferson County Savings Bank, 106 Ala. 524, 17 So. 728, 54 Am. St. Rep. 59.

68. Bank of Metropolis v. New England Bank, 6 How. 227 (1848), Taney, C. J., explaining and confirming same case in 1 How. 234 (1843); First Nat. Bank v. Reno County Bank, 3 Fed. 260.

cisions of that State, that receiving negotiable paper in payment of, or as security for, an antecedent debt, is not such a valuable consideration as to constitute the holder for value; and that the case is not altered by a long course of dealings between the parties, by which the bank claiming to retain the proceeds has been in the habit of receiving payment of balances due in notes, or has omitted to collect a balance by reason of an expectation or promise of payment of it in notes, or in consequence of the omission to collect it after taking such a note in payment.[69] And it is there held that it is only where, by express contracts or well-established course of dealing, the correspondent becomes responsible for the collection, and cannot seek reimbursement for advances, in case of nonpayment of the paper, that he can retain it or the proceeds of collection, as against the real owner, the mere giving credit for the amount not being sufficient.[70] And in Connecticut, it has been denied altogether that the custom of transmitting bills for collection from one bank to another, and crediting in account the avails to overbalances due, can affect the claims of the actual owner, on the ground that a usage between the banks could not deprive a third person of his rights.[71] The same is held in Nebraska.[72]

§ 340. But the views of the United States Supreme Court seem to us to embody the true logic of the question. The bank transmitting the paper indorsed in blank is ostensibly its owner. It has agreed, by implied contract arising from usage, that the avails shall be applied to balances against it. With this understanding, its correspondent undertakes the collection and applies the avails. And then, when this contract has been executed, it would seem to be in contravention of the universally recognized principles which control the negotiation of commercial paper, to permit a third party, who had

69. McBride v. Farmers' Bank, 26 N. Y. 454 (1863), Balcom, J.; Van Amee v. Bank of Troy, 8 Barb. 322 (1850), Hand, J.; Commercial Bank of Clyde v. Marine Bank, 1 Abb. Ct. App. Dec. 405 (1867); Lindauer v. Fourth Nat. Bank, 55 Barb. 75 (1869); Dod v. Fourth Nat. Bank, 59 Barb. 265 (1871); Castle v. Corn Exchange Bank, 75 Hun, 89, 26 N. Y. Supp. 1035; Benjamin v. Rogers, 126 N. Y. 60, 26 N. E. 970; United States Nat. Bank v. Ewing, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. Rep. 615.

70. Dickerson v. Wason, 47 N. Y. 439 (1872), revg. 54 Barb. 230 (1869); Dod v. Fourth Nat. Bank, 59 Barb. 275 (1871).

71. Lawrence v. Stonington Bank, 6 Conn. 529 (1827), Hosmer, C. J., distinguished in Wood v. Boylston Nat. Bank, 129 Mass. 358.

72. Branch v. National Bank, 50 Nebr. 470, 70 N. W. 34.

declared by his form of indorsement that he had parted with title, to come in and assert it. If he chooses not to adopt the well-known form of indorsement—"for collection"—he should not be permitted to deny, against the bank which has collected the paper, the legal effect of that form of indorsement which he chose to adopt.[73]

§ 340a. Controversies as to the ownership of paper placed in bank to be collected.—A variety of circumstances give rise to controversies as to the right to claim paper, or the proceeds of paper, which was put in bank to be collected.

When the holder places his paper in bank, he usually does so in one of three ways: *First.* As a principal employing the bank as a mere agent for collection, in which case the restrictive indorsement "*for collection*" is, or should always be, used, so that all subsequent holders may be advised of the bank's want of title. This is the form of indorsement generally used when the holder is not a customer of the bank. *Second.* As an avowed seller to the bank, in which case the indorsement is in blank and the transaction a plain one. *Third.* As a customer having account with the bank, in which case the restrictive indorsement is or is not employed, according to the relations established by agreement between the parties. If the bank treats the paper as a cash deposit, and allows the customer to draw against it in anticipation of the collection, the indorsement is generally in blank.

§ 340b. Rights as between holder and collecting agent under a blank indorsement.—As between the holder (whether a bank or an individual) and the collecting bank with which the holder has an account, it may be stated as a rule, where the rights of no third party are concerned, that an indorsement of a bill, note or check in blank to the latter for collection, does not carry with it title to the paper before actually collected unless the paper is deposited to make good

73. In Bank of Washington v. Triplett, 1 Pet. 30 (1828), Marshall, C. J., used language which militates against this view. But the cases referred to *supra* are subsequent, and may be regarded as overruling the above case *pro tanto.* He said: "The custom to indorse a bill put in bank for collection is universal; and the Bank of Washington had no more reason to suppose that Triplett & Neale (the payees and indorsers) had ceased to be the real holders from their indorsement, than for supposing that the cashier of the Bank of Washington had become the real holder by the indorsement to him." The view that the indorsement in blank puts the bank on inquiry is also taken in Van Amee v. Bank of Troy, 8 Barb. 322; Ditch v. Weston Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, note, dissenting opinion citing and approving text.

the account of the depositor, or is immediately drawn against; nor to the proceeds of the paper after collection, unless balances had been suffered to remain in the hands of the transmitting bank to be met by the proceeds of such paper. But there may be an express contract between the parties that it shall be so treated, or an implied contract to that effect arising from an established course of dealing.[74] The rule is stated by Lord Ellenborough, thus: "Every man who pays bills not due into the hands of his banker, places them there as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill, or advance money upon the credit of it, that alters the case. He then acquires the entire property in it, or has a lien on it, *pro tanto*, for his advances." [75] If the transaction be between the bank and a stranger employing the services of the bank for the first time, the acquisition of the paper by the bank, indorsed in blank, could not as against the owner be regarded as a purchase. The decision of the Court of Appeals of New York in the case of Metropolitan Nat. Bank v. Loyd [76] is sometimes cited as authority for the proposition that the deposit of a check with a bank for collection, indorsed in blank by its regular customer, carries with it title to the paper. But this decision appears to have been made, and justly, in the interest of a subsequent purchaser of the check, who had advanced money upon it to the agent, though that fact is not stated, and does not appear, to have been the reason of the decision, and the case seems to be properly cited as authority for the proposition that the mere deposit of a check with a bank, indorsed in blank by its customer for collection, without more, makes the bank a purchaser of the paper, without regard to the rights or dealings of any subsequent party with reference

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74. St. Louis Ry. Co. v. Johnston, 10 Sup. Ct. Rep. 390; Balbach v. Frelinghuysen, 15 Fed. 675; *ante*, p. 342; Morse on Banking, p. 247; Riverside Bank v. Land Co., 34 App. Div. 359, 54 N. Y. Supp. 266. "An indorsement of a check in blank for collection, when passed to the credit of the drawee and drawn against by him, amounts to a transfer of the legal title to the fund against which the check is drawn." Vaughn v. Farmers' &c. Nat. Bank (Tex. Civ. App.), 126 S. W. 690, citing text.

75. Giles v. Perkins, 9 East. 1114; Armour Packing Co. v. Davis, Receiver, 118 N. C. 548, 24 S. E. 360, holding that the fact that a bank has given depositor credit for the amount of negotiable instrument is not conclusive evidence that the bank had purchased the paper. See also Boykin v. Bank, 118 N. C. 567, 24 S. E. 357; Stevenson v. Bank, 113 N. C. 485, 18 S. E. 695; Tyson & Ralls v. Western Nat. Bank, 77 Md. 412, 26 Atl. 520; Fourth Nat. Bank v. Mayer, 89 Ga. 108, 14 S. E. 891.

76. Metropolitan Nat. Bank v. Loyd, 90 N. Y. 530. See also Hutchinson v. Manhattan Co., 150 N. Y. 250, 44 N. E. 775.

thereto. The collection of checks, which are drawn upon a deposit of funds, and of sight drafts, which are usually expected and provided for by the drawee, are so much matters of course, and comparatively so seldom attended with obstruction or delay, that the readiness of banks to treat them as cash deposits and to allow their customers to draw against them in anticipation of the collection, is easily understood, especially when the bank reserves the right to charge back the paper to the customer's account if it is returned unpaid. Out of this practice has grown the erroneous idea that the bank, without more, becomes the owner of the deposited paper before collection, exemplified in the case of Metropolitan Nat. Bank v. Loyd, above. Later cases hold, and correctly as we conceive, that checks deposited in bank by its customers do not at once become the property of the bank, but that it continues to be the agent of the customer until actual collection, the check in the meantime remaining the property of the depositor.[77]

Where the owner is itself a bank there seems to be no reason why it should stand upon other or different ground than does an individual depositor for collection. If it is indebted to its correspondent, holding a balance in its favor, or if it actually draws against the transmitted paper, the lien of the latter will then attach, or rather the paper thereby becomes the property of the correspondent, the transaction between them amounting to nothing more nor less than a purchase.[78]

§ **340c. Circumstances from which a purchase is implied.**—As to the facts or course of dealing from which a purchase will be implied, they should be such as show that the agent has become absolutely responsible for the collection of the paper.[79] The idea of a purchase will be repelled by the fact that the paper was credited to the customer without discount; that the agent exercises the right to charge back

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77. Balbach v. Frelinghuysen, 15 Fed. 675; St. Louis Ry. Co. v. Johnston, 10 Sup. Ct. Rep. 390; Ditch v. Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, dissenting opinion citing and approving text. But see McLean v. Lowe, 126 Ind. 449, 26 N. E. 398; Richardson v. New Orleans Coffee Co., 43 C. C. A. 583, 102 Fed. 785.

78. Scott v. Ocean Bank, 23 N. Y. 289; Balbach v. Frelinghuysen, 15 Fed. 682.

79. Dickerson v. Wason, 47 N. Y. 439; Fulton Nat. Bank v. Gosline, 168 Mass. 86, 46 N. E. 406; Shawmut Nat. Bank v. Manson *et al.*, 168 Mass. 425, 47 N. E. 196; Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; Wheatland v. Pryor, 133 N. Y. 97, 30 N. E. 652; Ditch v. Western Nat. Bank, 79 Md. 192, 29 Atl. 72, 138, 47 Am. St. Rep. 375, note, dissenting opinion citing and approving text.

the paper to the customer's account if returned unpaid; that it accepts no risk on the paper; and often, by the terms and conditions upon which the relations between the parties have been established, showing that only an agency was intended. The presumption is that the depositor does not intend to part with the title to his paper, subject to be rebutted only by evidence of an express contract to the contrary, or of facts from which such a contract must be inferred.

§ 340d. Agreements affecting title to the proceeds of the paper when indorsed "for collection."—When a bank transmits paper to its correspondent indorsed with the restrictive words, "*for collection*," the presumption is that an immediate collection and return of the proceeds is contemplated. If it has no interest in the paper other than that of a mere collector, this presumption will be absolute. But if it owns the paper, or is entitled to a lien on the proceeds, the presumption may be rebutted by evidence that it has entered into an agreement with its correspondent by which the latter is permitted to treat such proceeds as its own, as by a direction to credit the proceeds, in consideration of a privilege allowed the principal of drawing against the paper before actually collected.[80] The effect of such agreement is to make the indorsee bank the debtor of its principal for the amount of money in its hands, instead of a trustee thereof. The change is immaterial so long as the agent remains solvent, but may affect the distribution of its assets in case of insolvency. Such agreement may be verbal or written, but in the selection of a correspondent the transmitting bank usually makes or accepts proposals in writing, submitted for that purpose, an example of which may be seen below.[81] The

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80. First Nat. Bank of Elkhart v. Armstrong, 39 Fed. 231.

81. Commercial Nat. Bank v. Armstrong, 39 Fed. 684. The Fidelity National Bank of Cincinnati, acting as correspondent of the Commercial National Bank of Philadelphia, received from it a large amount of paper indorsed "for collection," but pending the collection became insolvent. This paper being afterward collected by the insolvent's receiver, the question arose whether such proceeds should enter into the general fund in the receiver's hands subject to ratable distribution among the insolvent's creditors, or whether the relation of principal and agent being established between the two banks, a preference should be made in favor of the principal, and a trust impressed upon such of the proceeds of the paper as were collected by the receiver after the insolvency. The following propositions were submitted by the Fidelity to the Commercial National Bank, as to which the court said that the first contemplated a debtor and creditor relation, but the second, third, and fourth, that of principal and agent:

"Coml. Nat. Bnk., Philadelphia, Pa.—Gentlemen: Inclosed herewith we hand

proposals are most frequently in the alternative, some contemplating a debtor and creditor relation between the parties; others that of principal and agent. In these communications are sometimes found a solution of the question of title to the proceeds of the paper. In other cases the transmitting bank, apprehensive of danger, or desiring to exempt a particular transaction from the consequences of a settled course of dealing, add to the restrictive indorsement the further direction, "*and immediate return of proceeds,*" or other words clearly indicating that a debtor and creditor relation is not intended.[82]

What course of dealing between the parties will justify the presumption of a debtor and creditor relation, is a question more of fact than of law; each case depending upon its own particular circumstances.[83] If the transaction be of the first instance between the parties, without more, it imports the relation of principal and agent. But if the transmitting bank were accustomed to permit balances to accumulate in the agent's hands and remain there longer than necessary for convenient remission, or if the parties acted each as collecting agent for the other, striking balances and remitting the same at regular intervals, the opposite presumption would arise.[84] But the mere method of keeping its accounts which the agent adopts cannot

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you our last statement. * * * We should be pleased to serve you, and trust you will find it to your advantage to accept one of the following propositions.

"No. 1. We will collect all items at par, and allow 2½ per cent. interest on daily balances, calculated monthly. We will remit any balance you have above $2,000 in New York draft, as you direct, or ship currency at your cost for expressage.

"No. 2. Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month.

"No. 3. We will collect at par Ohio, Indiana, and Kentucky items, and remit balances every Monday by draft on New York. We do not charge for exchange on propositions Nos. 1, 2, and 3.

"No. 4. Will collect Cincinnati items, and remit daily at 40 cents per thousand, or 20 cents for $500 or less. National banks not in a reserve city can count all they have with us as reserve. Your early reply will oblige."

It has been held in North Carolina, that if one deposits in bank "for collection," a draft and the bank sent it with like indorsement ("for collection") that such restrictive indorsement was notice to the subcollecting bank that the plaintiff was the owner of draft and that first bank was only an agent for collection. Boykin v. Bank, 118 N. C. 556, 24 S. E. 307. See also Bank v. Bank, 119 N. C. 307, 25 S. E. 971.

82. Continental Nat. Bank v. Weems, 69 Tex. 493.

83. St. Louis Ry. Co. v. Johnston, 10 Sup. Ct. Rep. 390.

84. First Nat. Bank of Elkhart v. Armstrong, 39 Fed. 231; National Butchers' & D. Bank v. Hubbell, 117 N. Y. 384; Edson v. Angell, 58 Wis. 336.

change its agency relation to that of debtor to its principal, unless the concurrence of the principal be shown, either by express assent, or by acquiescence in the practice.[85]

§340e. Amount of recovery against insolvent collecting bank.—It is sometimes very important to determine whether the liability of a bank undertaking the collection of paper is that of an agent or that of a debtor. When the funds collected have been, with the depositor's assent, put to his credit, the bank is simply his debtor. And in the event of its insolvency he must share ratably with other creditors in its assets. But if its liability remains that of an agent bound to pay to the party who has deposited paper "for collection" in its hands, and it has without his assent mingled the amount collected with its general funds, there are numerous decisions which hold that in the event of insolvency, the principals may trace their funds in their substituted form, and recover the full amount.[86] This right of the principal only ceases when the means of ascertainment fail, or where his property or funds have reached a *bona fide* holder for value, and without notice of the trust.[87]

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85. Commercial Nat. Bank v. Armstrong, 39 Fed. 691.

86. See authorities cited *ante*, § 336, parts (2) and (4) of note, 79; Union Nat. Bank v. Citizens' Bank, 153 Ind. 45, 44 N. E. 97—in this case the general proposition of the text is announced and approved, but under the facts of the case held that the relation of trustee and *cestui que trust* was not created between the banks, but simply that of debtor and creditor, and that plaintiff was not entitled to be preferred in its claim over the general creditors of the insolvent bank. Foster, Receiver, v. Rincker, 4 Wyo. 484, 35 Pac. 470; Guignon v. National Bank, 22 Mont. 140, 55 Pac. 1051, 1097; Beal v. National Bank, 5 C. C. A. 304, 55 Fed. 894; Richardson v. New Orleans Coffee Co., 43 C. C. A. 583, 102 Fed. 785; Richardson v. Denegre, 35 C. C. A. 452, 93 Fed. 572; First Nat. Bank of Lapeer v. Sanford, 62 Mo. App. 394.

87. Commercial Nat. Bank v. Armstrong, 39 Fed. 684; Burnham v. Barth, 89 Wis. 362, 62 N. W. 96; Thuemmler v. Barth, 89 Wis. 381, 62 N. W. 94. In the case of Nonotuck Silk Co. v. Flanders, 87 Wis. 237, 58 N. W. 383, it was decided, that one for whom a banker had collected a draft before making a voluntary assignment is not entitled to a preference over the other creditors, if the proceeds of such collection were disposed of by the banker prior to the assignment, so that no part thereof came in any form to the hands of the assignee. Chief Justice Norton dissents. This case overrules three well-considered cases in Wisconsin, namely: McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, 57 Am. Rep. 287; Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bowers v. Evans, 71 Wis. 133, 36 N. W. 629. See also Henry v. Martin, 88 Wis. 366, 60 N. W. 263; Thuemmler v. Barth, 89 Wis. 381, 62 N. W. 94. See authority cited in notes to § 1612*a;* Bank v. Bank, 115 N. C. 226, 20 S. E. 370; First Nat. Bank v. Davis, 114 N. C. 344, 19 S. E. 280, 41 Am. St. Rep. 795.

SECTION IV

HOW FAR BANK LIABLE FOR DEFAULT OF NOTARY, SUBAGENT, OR CORRESPONDENT BANK

§ **341.** What is the extent of the duty and responsibility of the collecting bank in taking the steps necessary to collection, or fixing the parties' liabilities, is a question of difficulty. How far is it liable for the neglect or default of the notary which it employs to perform notarial functions? or of the subagent or corresponding bank to which it may confide the paper? Thus, suppose A., residing in Richmond, Virginia, holds a note payable in New York, and deposits in "The State Bank" at Richmond for collection, the bank in Richmond forwards it to the "First National Bank" in New York city, which is its correspondent, and the latter places it in the hands of a notary public, to make demand and protest, and to forward notice to the indorsers. The question arises, then, whether the "State Bank" of Richmond has fully discharged its duty, and absolved itself from all further liability by the due transmission of the note in its course for collection.

There are several classes of cases in which the courts have pronounced different views of this question.

The first class maintains the absolute liability of the bank for any negligence or default of the notary, agent, or correspondent, as well as of its own immediate servants, regarding it, by the act of undertaking the collection, as obligating itself to see that every proper measure is taken, and not inquiring whether it has itself been guilty of any negligence or not, or whether the parties reside at the place of its location or not. This doctrine has become firmly established in the jurisprudence of New York, the leading case of Allen *v.* Merchants' Bank, decided by the Court of Errors, having been followed by numerous others, and the question being considered there as *res adjudicata.*[88]

88. Allen v. Merchants' Bank, 22 Wend. 215 (overruling 15 Wend. 482); Walker v. Bank of New York, 9 N. Y. 482; Ayrault v. Pacific Bank, 47 N. Y. 573, Allen, J., saying: "A bank receiving a bill or promissory note for collection, whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection by which any of the parties are discharged, whether of the officers and immediate servants, or other agents of the bank, or its correspondents, or agents employed by such correspondents. If the bank employ a notary to present a promissory note for payment, and give the proper notices to charge the parties, the notary is the agent of the bank, and not of the depositor or owner of the paper. A notary is not necessarily employed, as the service can be performed by any

And it has been sustained by the Supreme Court of the United States.[89]

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clerk or other servant of the bank. This general liability may be varied by express contract or by implication arising from general usage." Montgomery County Bank v. Albany City Bank, 7 N. Y. 459 (1852); Commercial Bank of Pennsylvania v. Union Bank, 11 N. Y. 211 (1854); Donner v. Madison County Bank, 6 Hill, 648; Reeves v. State Bank, 8 Ohio St. 465; Hyde v. First Nat. Bank, 7 Biss. 156; Davey v. Jones, 13 Vroom, 28; Titus v. Mechanics' Bank, 6 Vroom, 588; Naser v. First Nat. Bank, 116 N. Y. 498; Simpson v. Waldby, 63 Mich. 447; Corn Exch. Bank v. Farmers' Nat. Bank, 118 N. Y. 443; Davis v. King, 66 Conn. 465, 50 Am. St. Rep. 104, note, 34 Atl. 107; St. Nicholas Bank v. State Nat. Bank, 128 N. Y. 26, 27 N. E. 849—among other things held, that the insolvency of the subagent does not shield the collecting agent from liability for the loss. Bank of Clarke County v. Gilman, 81 Hun, 486, 30 N. Y. Supp. 1111; State Nat. Bank v. State Nat. Bank, 128 N. Y. 27, 27 N. E. 849; Kirkham v. Bank of America, 26 App. Div. 110, 49 N. Y. Supp. 767; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74.

89. Exchange Nat. Bank v. Third Nat. Bank, 112 U. S. 276, Blatchford, J., saying: "It is contended by the defendant that its liability, in taking at New York for collection these drafts on a drawee at Newark, extended merely to the exercise of due care in the selection of a competent agent at Newark, and to the transmission of the drafts to such agent, with proper instructions; and that the Newark bank was not its agent, but the agent of the plaintiff, so that the defendant is not liable for the default of the Newark bank, due care having been used in selecting that bank. * * * The contrary doctrine that a bank receiving a draft or bill of exchange in one State for collection in another State from a drawee residing there, is liable for neglect of duty occurring in its collection, whether arising from the default of its own officers, or from that of its correspondent in the other State, or an agent employed by such correspondent, in the absence of any express or implied contract varying such liability, is established by decisions in New York, Allen v. Merchants' Bank, 22 Wend. 215; Bank of Orleans v. Smith, 3 Hill, 560; Montgomery County Bank v. Albany City Bank, 7 N. Y. 459; Commercial Bank v. Union Bank, 11 N. Y. 203, 212; Ayrault v. Pacific Bank, 47 N. Y. 570; in New Jersey, Titus v. Mechanics' Nat. Bank, 6 Vroom, 588; in Pennsylvania, Wingate v. Mechanics' Bank, 10 Pa. St. 104; in Ohio, Reeves v. State Bank, 8 Ohio St. 465; and in Indiana, Tyson v. State Bank, 6 Blackf. 225. It has been so held in the Second Circuit, in Kent v. Dawson Bank, 13 Blatchf. 237; and the same view is supported by Taber v. Perrott, 2 Gall. 565, and by the English cases of Van Wart v. Wooley, 3 B. & C. 439, 5 Dowl. & R. 374; and Mackersy v. Ramsays, 9 Clark & F. 818. * * * We regard as the proper rule of law applicable to this case, that declared in Van Wart v. Wooley, 3 B. & C. 439, where the defendants, at Birmingham, received from the plaintiff a bill in London, to procure its acceptance. They forwarded it to their London banker, and acceptance was refused, but he did not protest it for nonacceptance or give notice of the refusal to accept. Chief Justice Abbott said: 'Upon this state of facts it is evident that the defendants (who cannot be distinguished from, but are answerable for, their London correspondent) have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a

The second class of cases requires the bank to prove that it exercised due care and diligence in selecting a competent and trustworthy notary, agent, or correspondent. This much is perfectly agreed; but these cases hold it sufficient, and exonerate the bank from all liability beyond making such a selection.

There is implied authority, in the deposit for collection, to employ a subagent, as they hold, and such subagent is really the agent of the holder, and not of the bank, which is only bound to act judiciously in selecting him.[90]

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pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect.' In that case there was a special pecuniary reward for the service. But, upon the principles we have stated, we are of opinion that, by the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage, or of any express agreement to that effect, liable for a neglect of duty occurring in that collection, from the default of its correspondent in Newark. The case of Britton v. Nicholls, 104 U. S. 757, is cited to show that the defendant is not liable. In that case, the defendants, bankers in Natchez, Mississippi, received from the plaintiff, a resident of Illinois, for collection, two promissory notes, dated at Natchez, but not stating any place of payment. They were sent to the defendants, through a banking-house of Bloomington, Illinois, with instructions to collect them, if paid, and if not, to protest them and give notice to the indorsers. The defendants placed the notes in the hands of a reputable notary in Natchez, to make demand of payment and give notice to the indorsers. It was held that the defendants were not liable for negligence on the part of the notary, whereby the liability of a responsible indorser was released. The negligence consisted in not presenting the notes to the maker at maturity and demanding payment." * * * "But" (the court proceeded, after referring to certain authorities cited by the court in Britton v. Nicholls, *supra*), "as there was a statute of Mississippi, passed in 1833, authorizing notaries to protest promissory notes, and requiring them to keep a record of their notarial acts in such cases, and making the record admissible in evidence in the courts, as if the notary were a witness, and, as the courts of that State had held (Tiernan v. Commercial Bank, 7 How. [Miss.] 648; Agricultural Bank v. Commercial Bank, 7 Smedes & M. 592; Bowling v. Arthur, 34 Miss. 41) under that statute, that it was a part of the duty of the notary, when protesting paper, to give all notices of dishonor required to charge the parties to it, and that a bank receiving commercial paper as an agent for collection, properly discharged its duty, in case of nonpayment, by placing the paper in the hands of such notary, to be proceeded with in such manner as to charge the parties to it, and that the bank was not liable in such cases, for the failure of the notary to perform his duty, the court says, that 'judged by the law of Mississippi' the defendants 'discharged their duty to the plaintiff when they delivered the notes received by them for collection to the notary public.'" Bailie v. Augusta Sav. Bank, 95 Ga. 277, 51 Am. St. Rep. 74, 21 S. E. 717; Wood River Bank v. First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

90. Stacy v. Dane County Bank, 12 Wis. 629; Bellemire v. Bank of the United

A third class of cases holds that where a bank receives a bill or note for collection against a drawer or maker, resident at the place of the bank, or where the bank undertakes for its collection by their own officers, there can be no doubt that it would be liable for any loss that might result from neglect. But they consider that where such an instrument is received for collection at a point distant from the location of the bank, the bank discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions.[91]

§ 342. Bank absolutely liable for negligence.—The cases which hold the bank absolutely liable for any laches or negligence, whereby the holder of the paper suffers loss, commend themselves to our approbation. Any other rule opens the door to carelessness in the con-

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States, 4 Whart. 105; Baldwin v. Bank of Louisiana, 1 La. Ann. 13; Hyde v. Planters' Bank, 17 La. Ann. 566; Frazier v. Gas Bank, 2 Rob. 296; Warren Bank v. Suffolk Bank, 10 Cush. 582. See also Jackson v. Union Bank, 6 Harr. & J. 146, which is an interesting case; 1 Parsons on Notes and Bills, 480. This view has been recently taken by the Supreme Court of the United States. Britton v. Nicholls, 104 U. S. 757, the court applying the law as settled by the decisions of the courts of Mississippi in a case from that State. Third Nat. Bank v. Vicksburg Bank, 61 Miss. 112, 38 Am. Rep. 78; Guelich v. National State Bank, 56 Iowa, 434; Bank of Lindsborg v. Ober, 31 Kan. 603; First Nat. Bank v. German Bank, 107 Iowa, 543, 70 Am. St. Rep. 216, 78 N. W. 195; First Nat. Bank v. Craig, 3 Kan. App. 166, 42 Pac. 830; Beach v. Moser, 4 Kan. App. 66, 46 Pac. 202; First Nat. Bank v. Sprague, 34 Nebr. 318, 33 Am. St. Rep. 644, 51 N. W. 846. See, however, Sherman *et al.* v. Port Huron Engine & Thresher Co., 8 S. Dak. 343, 66 N. W. 1079; Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38; Schumacher v. Trent, 8 Tex. Civ. App. 17; Bank v. Bank, 71 Mo. App. 451; Davis v. First Nat. Bank, 118 Cal. 600, 50 Pac. 666; Wilson v. Bank, 187 Ill. 222, 58 N. E. 250.

91. Dorchester, etc., Bank v. New England Bank, 1 Cush. 186; Fabens v. Mercantile Bank, 23 Pick. 330, the court saying: "It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note, in the first instance, is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as part of the same doctrine, it is well settled that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor." East Haddam Bank v. Scovill, 12 Conn. 303; Etna Ins. Co. v. Alton City Bank, 12 Conn. 303; Daly v. Butchers & Drovers' Bank, 56 Mo. 94; Bank of Louisville v. First Nat. Bank, 8 Baxt. 101; Irwin v. Reeves Pulley Co., 20 Ind. App. 101, 48 N. E. 601, 50 N. E. 317; First Nat. Bank v. City Bank, 12 Tex. Civ. App. 318, 34 S. W. 458.

duct of banking business, which should be conducted with every safeguard to the customer who intrusts his interests to the keeping of such agents. If they are averse to dealing with distant and unknown parties, they should decline undertaking the collection or handling of the paper; and if they assume it, they should so do for sufficient compensation, and be held responsible. If unwilling to take charge of the collection under this implied understanding, they should insist on a special contract, or refuse it. General usage might vary this liability, but the mere practice of banks for their own convenience would raise no implication of such usage.[92]

§ 343. Defaults of notary.—In a number of cases where a notary public was employed to make demand and protest, or give notice, stress has been laid upon the circumstance that such an officer is an agent provided by law, and holding a governmental commission to perform these functions, and that the bank has a right *prima facie* to repose a confidence in his official character, which it could not, save upon its own responsibility, repose in an unofficial employee.[93] Professor Parsons, taking this view, compares the notary to the "mail

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92. Power v. First Nat. Bank, 6 Mont. Ter. 251, approving the text; Ayrault v. Pacific Bank, 47 N. Y. 570; Savings Bank v. National Bank, 89 Tenn. 337, 39 S. W. 338; Howard & Co. v. Walker, 92 Tenn. 452, 21 S. W. 897. In the case of Sahlien v. Bank, 90 Tenn. 221, 16 S. W. 373, held, banks are liable in their character of collecting agents for a failure to exercise ordinary care and diligence in the discharge of their duties, but are not responsible for mere error of judgment, especially when they have been left to act without instructions. In such case burden of proof is on the plaintiff, and not only must negligence of the collecting bank be shown, but that the claim could have been collected by due diligence. Query: Is common usage of banks in that particular locality, though unknown to customer, absolutely binding on him as an implied element in the contract of agency? Court, while not deciding the question, intimates an affirmative answer. Sahlien v. Bank, *supra*; Kirkeys & Sons v. Crandall, 90 Tenn. 532, 18 S. W. 246. Usages are presumed to be reasonable, and the burden of showing their unreasonableness is on the person attacking them. Kershaw v. Ladd, 34 Oreg. 375, 56 Pac. 402; Bailie v. Augusta Sav. Bank, 95 Ga. 277, 21 S. E. 717, 51 Am. St. Rep. 74. And the usage of the bank to accept checks in payment of claims it holds for the collection, is binding upon a customer, whether he has knowledge of the usage or not, in the absence of any direction by him as to the mode of payment. See Farmers' Bank & Trust Co. v. Newland, 97 Ky. 464, 31 S. W. 38; First Nat. Bank v. Sprague, 34 Nebr. 318, 33 Am. St. Rep. 644, 51 N. W. 846; Waterloo Milling Co. v. Kuenster, 158 Ill. 259; 41 N. E. 906, 49 Am. St. Rep. 156.

93. Baldwin v. Bank of Louisiana, 1 La. Ann. 13; Bellmire v. Bank of the United States, 4 Whart. 105; Bank of Mobile v. Huggins, 3 Ala. 206; Tiernan

service."[94] Thus, in Mississippi, it has been held that a notary was to be regarded *prima facie* as a competent and suitable person to intrust with such duties; but if the plaintiff proved that he was not a competent and faithful person, by reason of his intemperate habits when the note was delivered to him, the bank which committed it to him was liable for any negligence or default on his part from which damage resulted.[95] But, in a subsequent case, it was held, in the same State, that it was not sufficient proof of a notary's unfitness to show that he was a man of habitually dissipated character, but that it must be shown "that he was drunk at the time he took the note."[96]

But if the notary is so employed by the bank as to become its own officer, like its cashier or teller, the bank is liable for all his defaults, because he is placed on the same footing as its regular bank officials, and acts in discharge of certain allotted functions. Thus, in Missouri, where any private individual is allowed to perform all notarial duties, and a bank appointed a person to be its notary for one year, and required a bond from him, it was held that he was an officer of the bank, for whose defaults in the line of his employment the bank was liable.[97]

SECTION V

REMEDY OF THE HOLDER AGAINST COLLECTING AGENT

§ **344.** The authorities differ greatly as to the remedy of the holder and owner of a bill or note, when one of a series of banks through which it passes in the course of collection, or the notary employed to make presentment or protest, has committed a default whereby loss has ensued. One class of cases holds that only the first bank which received the paper for collection is liable to the holder, the contract for collection being between him and it, and it alone being his agent.[98]

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v. Commercial Bank, 7 How. (Miss.) 618; Argicultural Bank v. Commercial Bank, 7 Smedes & M. 592; Stacy v. Dane County Bank, 12 Wis. 629; Bank v. Butler, 41 Ohio St. 519; First Nat. Bank v. German Bank, 107 Iowa, 543, 78 N. W. 195, 70 Am. St. Rep. 216.

94. 1 Parsons on Notes and Bills, 480.

95. Agricultural Bank v. Commercial Bank, 7 How. (Miss.) 648.

96. Bowling v. Arthur, 34 Miss. 41.

97. Gerhardt v. Boatman's Savings Inst., 38 Mo. 60.

98. Montgomery County Bank v. Albany City Bank, 7 N. Y. 459 (1852), case in point; Commercial Bank v. Union Bank, 11 N. Y. 212 (1854). [These cases overrule Bank of Orleans v. Smith, 3 Hill, 560 (1842).] See McBride v.

Another class of cases holds that the holder can sue only the bank or the notary which committed the default, such bank or notary being agent of the owner, selected for him by the bank which received the paper for collection, under implied authority from the holder to do so.[99] And still another doctrine has been declared that the holder has an election as to the remedy, and may resort to either party--the first bank employed to collect the paper, or the one to whom it was transmitted, and which actually does the act of default complained of.[1]

§ 345. Distinction between terms of collection.—A distinction has been taken which, though fine, seems reasonable, between cases in which the paper is put in bank "for collection," and those in which it is there placed to be "transmitted for collection." And it has been held that, in the latter case, the first bank performs its whole duty, and discharges itself from further liability, by transmitting the paper duly in course of collection;[2] while, in the former, it undertakes to

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Farmers' Bank, 26 N. Y. 450; Hyde v. First Nat. Bank, 7 Biss. 156, Hopkins, J., saying: "It follows that the owner is to look to his immediate contractor, and has no remedy against the under-contractor or agent employed by the bank; that such agents or contractors have no privity of contract with the owner, and are not liable to him, but are only liable to the party immediately employing them; in short, that the subagent employed by the bank owes no duty to the party who deposited the paper for collection with his principal, and hence is not responsible to him for any damages. This, I understand to be the effect and meaning of the late decision of the Supreme Court of the United States in the case of Hoover, Assignee v. Wise, 8 Chic. Leg. N. 193, 91 U. S. (1 Otto) 308." See also Reeves v. State Bank, 8 Ohio St. 465; Mackay v. Ramsay, 9 Clark & F. 818; Castle v. Corn Exch. Bank, 148 N. Y. 122, 42 N. E. 578; Sherman *et al.* v. Port Huron Engine & Thresher Co., 8 S. Dak. 343, 66 N. W. 1007.

99. Farmers' Bank of Virginia v. Owen, 5 Cranch C. C. 504 (1838). See Mechanics' Bank v. Earp, 4 Rawle, 386; Bank of Washington v. Triplett, 1 Pet. 25. In Wilson v. Smith, 3 How. 769, the United States Supreme Court, per Taney, C. J., held that the subagent for collection might be sued by the owner. Taney, C. J., said: "We think the rule very clearly established, that whenever, by express agreement between the parties, a subagent is to be employed by the agent to receive money for the principal, or where an authority to do so may be fairly implied from the usual course of trade, the principal may treat the subagent as his agent; and where he has received the money, may recover it in an action for money had and received." First Nat. Bank v. Reno County Bank, 3 Fed. 260.

1. Bank of Orleans v. Smith, 3 Hill (N. Y.), 563, Nelson, C. J.

2. Bank of Washington v. Triplett, 1 Pet. 28, 30. The payees of a bill indorsed it in blank and delivered it to the cashier of the Mechanics' Bank of Alexandria, "For the purpose of being transmitted through the said bank to a bank in Wash-

collect the paper, and is absolutely bound, if it be not properly attended to, whatever agency it may employ.[3] Where nothing is said upon the subject, and the contract is to be implied from the mere act of placing the paper in the bank, we should say that, by accepting it, it undertook absolutely its collection.

§ 346. If the paper change ownership after being left at a bank for collection, it seems that an action will lie against the bank for negligence, by any person who becomes beneficially interested.[4]

§ 347. Instructions to the collecting bank or other agent, given by the holder in respect to the method to be pursued in collecting or protesting the paper, or notifying any of the parties, must be duly transmitted; and if the bank fail to do so, it is bound for any resulting damages.[5] Thus, where bankers at St. Paul, Minnesota, received paper for collection payable at St. Anthony, were informed that there were two persons of the same name as the indorser, the one residing at St. Paul, and the other at Nininger, and that the latter was the indorser (which the note did not state), they should have trans-

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ington, for collection." The cashier indorsed it to the order of the Bank of Washington, and transmitted it to it for collection; and suit was brought by the holder against the Bank of Washington for damages, on the ground of negligence in failing to give proper notice of nonacceptance. Marshall, C. J., said: "The bill was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to some bank in Washington to be collected. That bank would, of course, become the agent of the holder. By transmitting the bill as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose; the Mechanics' Bank was the mere channel through which Triplett and Neale (the payees) transmitted the bill to the Bank of Washington." See also Mechanics' Bank v. Earp, 4 Rawle, 386; Allen v. Merchants' Bank, 22 Wend. 235.

3. Montgomery County Bank v. Albany City Bank, 7 N. Y. 462, Jewett, J.; Sherman *et al.* v. Port Huron Engine & Thresher Co., 8 S. Dak. 343, 66 N. W. 1077; First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. 183, 56 Fed. 967.

4. Bank of Utica v. M'Kinster, 11 Wend. 475.

5. Borup v. Nininger, 5 Minn. 523; Merchants' Bank v. Stafford Bank, 44 Conn. 567. "If a sight draft, attached to a sealed package addressed to the drawee of the draft, is sent by mail to a bank for collection with the instruction, 'papers to be delivered only on payment of draft,' and the cashier of the bank hands the draft and package to the drawee at his request, to allow him to open the package and examine its contents, after which he returns the draft and package to the cashier and declines to pay the draft, there is no delivery of the papers, within the meaning of the prohibition in the instruction." People's Nat. Bank v. Freemans' Nat. Bank, 169 Mass. 129, 47 N. E. 588, 61 Am. St. Rep. 279.

mitted such information to their agents at St. Anthony, and failing therein, were liable in damages to the holder of the paper.[6]

§ **348. Collections by express companies.**—Collections are sometimes undertaken by express companies, and they come then within the rule laid down. Thus, where an express company received a draft for collection, with instructions to return it at once if not paid, and on demand of the drawee he refused to pay until certain explanations were received from the drawer, whereupon the company consented to wait until the drawee could communicate with the drawer: and he receiving satisfactory explanations, was ready to pay, and so remained two days without renewed demand from the company, but on the fourth day (the third being Sunday) became insolvent, the company was held liable to the drawee for the loss.[7]

§ **349.** When the owner of a bill or note sends it to a notary or correspondent for collection, he has a right to anticipate that the maker or acceptor will honor his paper, and it is not incumbent on him to inform the holder for collection where notices shall be sent, in the event of dishonor, to the drawer or indorsers. The "due diligence" required by law it is incumbent on the holder for collection to exercise by making proper inquiries; and if he is not in default, the owner may recover.[8] It might be otherwise where the collector is a mere servant of the owner, acting under his supervision.[9]

§ **349a. Liability of the collecting agent for money paid upon forged or altered instruments, or under mistake of fact.**—While it is a general principle of law that money paid on forged or altered instruments may be recovered back as having been paid under a mistake of fact,[10] yet where such payment is made to an agent holding the paper under the restrictive indorsement "*for collection*," acting in good faith, and asserting no claim to the proceeds other than that of a mere agent for collection, its indorsement thereof is no warranty of the genuineness or validity of the paper, and it will not be liable

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6. Borup v. Nininger, *supra;* Bank of Scotland v. Dominion Bank, L. R., App. Cas. 592 (1891).

7. Whitney v. Merchants' Union Express Co., 104 Mass. 152.

8. Bartlett v. Isbell, 31 Conn. 297.

9. Bartlett v. Isbell, *supra.*

10. *Post,* § 1369; Onondaga County Sav. Bank v. United States, 12 C. C. A. 407, 64 Fed. 703.

thereon, it having, before discovery of the mistake or fraud, paid over the proceeds in good faith to its principal.[11]

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11. National City Bank v. Westcott, 118 N. Y. 468, Bradley, J., saying: "The payment was made by the plaintiff upon a mistake of fact as to the character of the check; and money paid under such circumstances may be recovered back from the party to whom payment is made. If the Westcott Express Company had been or had assumed to be the apparent owner of the check when it was presented to and paid by the plaintiff, the defendant would have been liable to reimburse the plaintiff. Canal Bank v. Bank of Albany, 1 Hill, 287; Bank of Commerce v. Union Bank, 3 N. Y. 230; Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74. But in the present case the check was in fact sent to the defendant company for collection, of which the plaintiff was advised by the indorsement upon it to that effect, made by the N. Y. & B. D. Express Co. The defendant, therefore, apparently and in fact represented that company, and in the relation of such agency received the money from the plaintiff. Montgomery County Bank v. Albany City Bank, 7 N. Y. 459. And prior to the time of the discovery of the fraudulent character of the check, having handed the money over to the company from which it was so received for collection, the defendant was not liable to the plaintiff as for money paid by mistake. National Park Bank v. Seaboard Bank, 114 N. Y. 28." See also National Bank of Commerce v. National Mech. Banking Association, 55 N. Y. 211; White v. Continental Nat. Bank, 64 N. Y. 316.

CHAPTER XII

PARTNERS AS PARTIES TO NEGOTIABLE INSTRUMENTS

SECTION I

NATURE AND VARIETIES OF COPARTNERSHIP

§ **350.** A partnership exists whenever two or more persons unite skill, labor, or property in an undertaking, and participate in its profits; unless such participation in the profits be by way of services as an employee without interest in, or control of, the subject matter, in which case the participant is not a partner.[1] Partners are of several kinds. I. Actual and ostensible. II. Secret or dormant. III. Nominal or ostensible. IV. General. V. Special or limited. VI. Retired.

§ **350a. Liability of partners.**—In the first case, where the partner is both actual and ostensible, there can be no difficulty in fixing his liability, which is palpable, although his name may not be expressed in the style of the firm. Secret or dormant partners are just as liable, when they are discovered, as those who are ostensible, because, participating as they do in the profits, they are held equally liable for losses. But in case of withdrawal from the firm, no notice is necessary, the secrecy of their connection with it rendering it superfluous.[2] And the dormant partner who retires will not, therefore, be bound on a note made in the firm name after dissolution.[3]

§ **351. English cases.**—In an English case, it was said by Bayley, B.: "We are of the opinion that where a partnership name is pledged, the partnership, of whomsoever it may consist, whether the partners are named in the firm or not, and whether they are known or secret partners, will be bound unless the conduct or title of the per-

1. Ogden v. Astor, 4 Sandf. 311; Vandenburg v. Hall, 20 Wend. 70.
2. Davis v. Allen, 3 N. Y. 168; Magill v. Merrie, 5 B. Mon. 168; Scott v. Colmisnil, 7 J. J. Marsh. 416; 1 Parsons on Contracts, 143.
3. Vacarro v. Toof, 9 Heisk. 194.

son who seeks to charge them can be impeached." [4] Where a bill of exchange has been drawn, accepted, or indorsed in the name of a firm, as, for instance, "Brown, Robinson & Co.," without stating the names of each of the partners, the holder may sue only those known to him to be partners at the time he received the bill; and though he may, if he pleases, sue all whom he discovers afterward to be partners, he is not obliged to do so.[5]

§ **352. A mere nominal or ostensible partner** is as much bound by the negotiable paper, or other engagements of the firm, as if actual; for if he suffer himself to be held out to the world as a member, he authorizes third persons to regard him as a contracting party. If such partner desires to avoid liability, he must give due notice that he is not an actual partner.[6]

§ **352a. General and special partners.**—A general partnership is such as exists by operation of law when two or more persons combine in an undertaking and share the profits, and in which all are jointly and severally bound for all the partnership debts. A special or limited partnership is one in which the special partner contributes to the common stock a specific sum in actual cash, and is liable only to that extent for the debts of the partnership. This privilege is granted by statute in most of the States, being unknown to the common law, and is accompanied by stringent conditions.[7]

§ **353. Retiring partner.**—When a copartner, who has not been secret or dormant, retires from a firm, he should take immediate steps to acquaint all having business connections with the firm of his retirement, in order that they may be apprised that he no longer designs to be held responsible for its transactions.[8]

Personal notice to those indebted to, or doing business with, the firm, by circular letters addressed to them or otherwise, and advertisement in a public journal, is the proper and business-like way to proceed. And when these steps are taken, they are sufficient notice

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4. Wintle v. Crowther, 1 Tyrw. 215, 1 Cromp. & J. 310. See *Ex parte* Hamper, 17 Ves. 403.

5. De Mantort v. Saunders, 1 B. & Ad. 398; Bailey Loan Co. v. Hall, 110 Cal. 490, 42 Pac. 962.

6. 1 Parsons on Notes and Bills, 143, 142; Davis v. Allen, 3 N. Y. 172.

7. Edwards on Bills, 106, 107.

8. See *post*, § 369*a et seq.*

for the purpose of exonerating the retiring partner from further liability.[9] But unless notice is brought home to those who have regularly dealt with the firm, it is insufficient.[10]

§ 354. Rights and liabilities as between partners.—A partner cannot sue the firm of which he is a member on a note payable to himself; and if a person is a partner in two firms, the one firm cannot sue the other at law, as the names of all the members, whether appearing in the firm's name or not, must be set forth in the declaration, and the same party cannot be both a plaintiff and a defendant.[11] The remedy would be in equity. In some States, however, as in Pennsylvania, the common law has been changed by statute, so that an action will lie.

But this difficulty ceases when the instrument passes to a third party, and if the payee and indorsee be a member of the firm making the note, or the firm making the note have a member in the firm which is payee and indorser, the holder may sue all parties.[12] When there

9. See § 369*a et seq.* In Davis v. Allen, 3 N. Y. 172, Jewett, C. J., says: "The general principle is, that where a person has done business with another, as a member of a firm, or has so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such, and he suffers the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he will be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. An omission to give such person notice, under such circumstances, of his retirement, is held to be equivalent to a continual representation that he still remains a member of the firm. But in order to render him liable on this ground, it is necessary that he should have been known as a member of the firm to the plaintiff, either by direct transactions or public notoriety." See Edwards on Bills, 115, 116.

10. Parkin v. Carruthers, 3 Esp. 248; Vernon v. Manhattan Co., 17 Wend. 524.

11. Pitcher v. Barrows, 17 Pick. 361; Babcock v. Stone, 3 McLean, 172; Mainwaring v. Newman, 2 Bos. & P. 120; Neale v. Turton, 4 Bing. 149; Moffat v. Van Milligan, 2 Bos. & P. 124; Thompson on Bills, 163; Chitty on Bills [*60], 75.

12. Pitcher in Barrows, 17 Pick. 361; Walker v. Wait, 50 Vt. 668; Davis v. Briggs, 39 Me. 304. In Young v. Chew, 9 Mo. App. 387, indorsee after maturity, sued a firm on a note to one of its members as payee, and as such payee, being a copartner, could not sue the firm at law, it was contended that indorsee could not recover. But the court held otherwise, Lewis, P. J., saying: "A mere personal disability in the payee to sue cannot negative the maker's duty to pay; and, therefore, such a disability is not to be reckoned among the possible equities of which the indorsee must assume the risk. * * * According to the findings of the referee from the testimony before him, a settlement between the partners would bring the defendant in debt to plaintiff's assignor, even after payment of the note sued on." Livermore v. Truesdell, 9 Colo. App. 332, 48 Pac. 276; Kraus

is a good defense against one of several partners, it applies equally to all, although the others may have been entirely innocent of complicity in the fraud of the one, or have been themselves its victims.[13]

One member of a firm may advance money to another to relieve him from liability for debts of the firm, and take his note therefor; and the transaction will be regarded as a private one between the two members. The other members, in such case, are not liable to pay the note, and have nothing to do with it.[14] A note of a firm payable to one of its members is valid in the hands of an indorsee, who may sue upon it in his own name.[15] And such is the rule as to the note of a member to the firm who may be held as indorsers to their indorsee.[16] On dissolution, the partnership ceases, and then one ex-partner may sue another on a note given for balance struck between them.[17]

One partner cannot become a purchaser of the firm's note. If he buys its paper, it is a payment and not a purchase, and only entitles him to a charge against the partnership for the amount paid.[18]

SECTION II

THE AUTHORITY OF A COPARTNER TO BIND THE FIRM

§ 355. General authority of partner to bind firm.—The general authority of a partner to bind the firm springs from the mutual

v. Givens, 110 Mo. 58, 19 S. W. 535, citing text; Willis v. Barron, 143 Mo. 450, 45 S. W. 289, 65 Am. St. Rep. 673, citing test; O'Day v. Sanford, 138 Mo. App. 343, 122 S. W. 3.

13. Richmond v. Heapy, 1 Stark. 204; Brandon v. Scott, 7 El. & Bl. 234 (90 Eng. C. L.); Aistley v. Johnson, 5 H. & N. 137.

14. Chamberlain v. Walker, 10 Allen, 429.

15. Hapgood v. Watson, 65 Me. 510; Thompson v. Lowe, 111 Ind. 272.

16. Coon v. Pruden, 25 Minn. 105.

17. Rockwell v. Wilder, 4 Metc. (Mass.) 562.

18. Easton v. Strother, 57 Iowa, 506; Houk v. Walker, 131 Ind. 231, 30 N. E. 1080; Deavenport v. Green River Deposit Bank (Ky.), 128 S. W. 88, holding that when a firm note comes into the hands of an individual member of the firm by assignment, this operates as an extinguishment of the note, and his assignee will take nothing by such assignment; he cannot sue upon the note and he can pass no such right to another, but his remedy is to be credited upon the partnership books with the amount so paid. When a bank sold and assigned to a partner a half interest in a partnership note, the partner and his comakers were still liable to the bank for the other half of the note. Deavenport v. Green River Deposit Bank (Ky.), 128 S. W. 88.

agency of the copartners for each other; and from the course and usage of the business in which they are engaged. It follows, therefore, that a person contemplating partnership with another cannot, without a special authority, bind him by a contract for the proposed partnership benefit—for example, for the purpose of raising capital—his agency not commencing until the connection is consummated.[19] The copartnership being formed, the copartner can bind his associates only in such transactions as pertain to their partnership business; and the copartnership business must be of such a character that the giving of negotiable paper would be the convenient and proper mode of conducting it, in order to create the presumption of agency in a copartner to give a bill or note in the firm's name.[20]

§ 356. Implied authority of partner to bind the firm.—It results from the very nature of partnership—from the very fact that the copartners are mutual general agents for each other in their copartnership affairs—that the express assent of one to the act of another within the scope of their business is unnecessary. The authority to each partner is implied to bind the firm within the legitimate scope of its business by the very fact that it is a firm, and it has been said by Lord Ellenborough, C. J.: "It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners, to know whether the others assented to such indorsement or that it should be void." [21]

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19. Greensdale v. Dower, 7 B. & C. 635, 6 L. J. (K. B. O. S.) 125; Bank of Fort Madison v. Alden, 129 U. S. 373; Childs v. Pellett, 102 Mich. 558, 61 N. W. 54; Kirby v. McDonald, 17 C. C. A. 26, 70 Fed. 139.

20. Evidence that one partner told another to arrange matters with a dissatisfied partner as best he could was sufficient to authorize a finding of authority in the partner, who was directed to arrange matters, to bind the firm by a note given the dissatisfied partner on his retirement. Taylor v. Herron, 72 Kan. 652, 82 Pac. 1104.

21. Swan v. Steele, 7 East. 210; Hutchinson & Wilson v. Powell, 92 Ala. 619, 9 So. 170; Rocky Mt. Nat. Bank v. McCaskill, 16 Colo. 413, 26 Pac. 821, citing text; Haskins v. Throne, 101 Ga. 126, 28 S. E. 611; Davis & Co. v. Howell Cotton Co., 101 Ga. 128, 28 S. E. 612; First Nat. Bank v. Grignon, 7 Idaho, 646, 65 Pac. 365; Fulton v. Loughlin, 118 Ind. 286; Sondheim v. Gilbert, 117 Ind. 71; Moffit v. Roche, 92 Ind. 96; Thomas v. Hardsocg & Burton, 137 Iowa, 597, 115 N. W. 210; Fidelity Loan & Trust Co. v. Hogan, 94 Iowa, 303, 62 N. W. 740; Barber v. Van Horn, 54 Kan. 33, 63 Pac. 1070; Wilson v. Richards, 28 Minn. 393; National Bank v. Burott, 23 Tex. Civ. App. 663, 59 Am. Rep. 783. In Fox

§ 357. Trading partnerships.— The borrowing of money and negotiation of bills and notes being incidental to, and usual in, the business of copartnerships formed for the purpose of trade, it follows that when a copartner borrows money professedly for the firm, and executes therefor a negotiable instrument in the copartnership name, it will bind all the partners, whether the borrowing were really for the firm or not, and whether he diverts and misapplies the funds or not, provided the lender is not himself cognizant of the intended fraud. And the burden will not be thrown on him to show that he was not cognizant of such fraud, or to prove value given for the

v. Clifton, 6 Bing. 795, Tindal, C. J., said: "By the general rule of law relating to partnerships in trade, each member of it is liable to the debts and engagements of the whole company contracted in the course of the trade. This is a consequence not confined to the law of this country, but extending generally throughout Europe; and it is founded, partly on the desire to favor commerce, that merchants in partnership may obtain more credit in the world; and more especially on the principle that the members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership, so that by the contracts of the agent all his principals are bound. But to subject a person to responsibility, as a partner, for the acts of another done without his express concurrence, he must stand in one or other of these two situations; first, he must at the time of making the contract, whether bill, note, or other instrument, have been actually a partner in the joint concern; or secondly, admitting that he was not, he must have represented or permitted himself to be represented as such, before or at the time of making the contract, either generally or to all the world, or to several individuals, or to the plaintiff in particular, or to some person through whom he claims." The execution and delivery of a promissory note as a renewal of a firm obligation already outstanding and due upon which liability is admitted is a transaction within the scope of the business of the partnership. Chapek v. Oak Creek Valley Bank, 19 Okl. 80, 91 Pac. 1129. When a check, indorsed for a partnership by part of the partners, has been dishonored and duly protested, the firm is liable upon such indorsement. Sullivan v. Sullivan, 122 Wis. 326, 99 N. W. 1022. Checks of a partnership drawn by the bookkeeper under instructions of one of the partners, and by which the partnership fund was overdrawn, became a valid claim against the partnership and each member thereof notwithstanding previous instructions from a copartner to the bookkeeper not to draw checks for the firm; as between the firm and third persons, one partner had as much authority to direct the bookkeeper as his copartner. Morris v. First Nat. Bank, 162 Ala. 301, 50 So. 137. If a partner, having authority to bind the partnership only for liabilities not exceeding a certain sum, do nevertheless borrow money in excess of that sum in behalf of the firm and give note for it, the note is binding on the partnership and the members thereof to the extent of the authority the partner had. Taylor v. Felder, 3 Ga. App. 287, 59 S. E. 844. Where a note was signed by a number of persons as trustees and treasurer of an unincorporated association, all of the associated persons were liable: McKenney v. Bowie, 94 Me. 397, 47 Atl. 918, the court saying: "Those sued being associates, and not interposing the

paper.[22] Such authority is only an inference or presumption arising from the relationship of the parties, and is not conclusive,[23] and one dealing with a partnership is chargeable with notice of the character

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objection that others bound were not sued, cannot escape liability on the note, whether it is regarded as the note of the association or of the individual signers."

22. Union Nat. Bank v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426; United States Bank v. Booney, 5 Mason, 176; Haskins v. Throne *et al.*, 101 Ga. 126, 28 S. E. 611; Davis & Co. v. Howell Cotton Co., 101 Ga. 128, 28 S. E. 612; Buckner v. Lee, 8 Ga. 285; Bishop v. People's Bank, 7 Ga. App. 432, 67 S. E. 119; Chicago Trust & Savings Bank v. Kinnare, 174 Ill. 358, 51 N. E. 607; Platt v. Koehler, Dickey & Co., 91 Iowa, 592, 60 N. W. 178; Buettner v. Steinbrecher & Hertzler, 91 Iowa, 588, 60 N. W. 177; Sherwood v. Snow, 46 Iowa, 485; Lindh v. Crowley, 29 Kan. 756; Deitz v. Regnier, 27 Kan. 94; Calvert Bank v. J. Katz & Co., 102 Md. 56, 61 Atl. 411; Ashley v. Dowling, 203 Mass. 311, 89 N. E. 434, 133 Am. St. Rep. 296; Hayward v. French, 12 Gray, 453; Hayes v. Blacker, 138 Mo. App. 24, 119 S. W. 1004; Carter v. Steele, 83 Mo. App. 211; Augusta Wine Co. v. Weippert, 14 Mo. App. 485; Rude v. Harvey, 12 Mo. App. 576; Spaulding v. Kelley, 43 Hun, 301, citing text; Onondaga County Bank v. De Puy, 17 Wend. 47; Whittaker v. Brown, 16 Wend. 505; Sedgwick v. Lewis, 70 Pa. St. 221; Hatchett & Large v. Sunset Brick & Tile Co. (Tex. Civ. App.), 99 S. W. 174; National Bank v. Burrott, 23 Tex. Civ. App. 663, 59 Am. Rep. 783; Ihmsen v. Negley, 1 Casey, 297; Edwards on Bills, 106; and it has been held to be within the scope of the legitimate business of a mercantile partnership to raise money by making and negotiating promissory notes, and a member thereof has the power to exchange a promissory note of the partnership for the promissory note of another of like amount, the proceeds of which are intended for use in carrying on the partnership business. Morris & Co. v. Maddox, 97 Ga. 575, 25 S. E. 487. Unless there are restrictions limiting his authority, one member of a commercial firm may borrow money for use in their business, and issue in payment the promissory note of the partnership without knowledge of his associates, who will be bound by his action. Christian Feigenspan v. McDonald, 201 Mass. 341, 87 N. E. 624. An act done by an agent at the instance of and in the presence of his principal is in law the act of his principal; and if, at the instance and in the presence of a member of a partnership, the name of the partnership is signed by another person to a promissory note under seal, the note thus executed has the same legal effect as if such member had performed the physical act of signing. Merchants' & Farmers' Bank v. Johnston, 130 Ga. 661, 61 S. E. 543, 17 L. R. A. (N. S.) 969.

23. First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198. The presumption of the authority of a member of a trading partnership to bind the firm by making a negotiable note, is not only true when the note is transferred before maturity, but is also true when such note is in the hands of the payee, for the giving of such notes is ordinarily within the scope of a trading partnership. Wilson v. Gordon, 84 S. C. 444, 66 S. E. 675. When a note has been made in the name of a trading firm by a partner, the firm is liable thereon unless the person dealing with the partner had distinct notice that the firm would not be answerable as such partner had not that authority. Dodson v. Baskin, 88 Ark. 415, 114 S. W. 922 (1908).

of the partnership business as conducted; and if a person take from one of the partners a note signed by him in the firm name as payment for goods supplied such partner, the payee is bound to know whether the transaction is within the apparent scope of such business.[24] A committee appointed by partners to make sales for the firm, has authority to indorse and negotiate a check for the firm.[25] Besides firms engaged in the classes of business well recognized as carrying on trade and commerce, it has been held that a partnership whose business is the taking and execution of plumbing contracts,[26] engaged in buying and selling logs,[27] in buying and slaughtering cattle,[28] or which buys and sells real estate on its own account,[29] is a commercial or trading partnership. And it has been held that parties running a vessel as partners under the firm name of "Propeller Ira Chaffee," were a trading partnership, and paper executed by one of them in the regular course of their business, held binding on the firm.[30]

§ 358. Rule as to joint owners.—If there be mere joint ownership, as in the case of a ship, or only a particular agreement to share in a single transaction, or a copartnership in a matter of business not requiring the execution of negotiable paper as the proper, usual, and convenient mode of conducting it, the copartners will not be impliedly bound by the act of one, but must give him express authority.[31] Thus, where a bill was addressed to two owners of a ship, as for necessaries furnished the same, and one accepted in the name

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24. Standard Wagon Co. v. D. P. Few & Co., 119 Ga. 293, 46 S. E. 109.

25. Sullivan v. Sullivan, 122 Wis. 326, 99 N. W. 1022.

26. Marsh, Merwin & Lemmon v. Wheeler, 77 Conn. 449, 59 Atl. 410, 107 Am. St. Rep. 40, wherein the contract said: "These are those whose conduct so involves buying and selling, whether incidentally or otherwise, that it naturally comprehends the employment of capital, credit, and the usual instrumentalities of trade, and frequent contact with the commercial world in dealings which, in the character and incidents, are like those of traders generally."

27. Bank of Monroe v. E. C. Drew Inv. Co., 126 La. 1028, 53 So. 129.

28. Wagner v. Simmons, 61 Ala. 143.

29. Adams v. Long, 114 Ill. App. 277. Neither banking nor buying and selling real estate on commission comes strictly within the definition of a trading partnership, and yet either may be so conducted as to clothe the partners with all the implied powers of members of a trading partnership. Masterson v. Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505. In Bank of Monroe v. E. C. Drew Inv. Co., 126 La. 1028, 53 So. 129, it was held that those who deal in lands, and buy and sell standing timber, are not commercial partners.

30. First Nat. Bank v. Freeman, 47 Mich. 408.

31. Chitty on Bills (13th Am. ed.) [*45], 58.

of both, it was decided that the other was not bound to a *bona fide* holder, the bill having been drawn for the separate use of the acceptor.[32]

§ 358a. Nontrading partnerships.—In a nontrading partnership, one partner cannot bind the other by the execution of negotiable paper, unless authority is expressly given or recognized by all the partners, or implied from their general business habits.[33] So, where there is no partnership in trade, but an agreement as to a particular transaction between farmers, the acceptance by one of bills, without the other's concurrence, will not bind him.[34] The principle seems to be well stated by Mr. Chitty, who says: "The partnership must be in a trade or concern to which the issuing or transfer of bills is necessary or usual." [35] The United States Supreme Court has held that a bill drawn by a partner in the name of a firm engaged in farming, working a steam sawmill, and in trading, was binding, because trading and running the mill required capital and the use of credit; but if the firm had been engaged in farming alone, no one partner could have bound it by a bill or note.[36] A firm of insurance and loan brokers,[37] one engaged in the business of contracting with the government for transportation of mail over certain mail routes,[38] or in manufacturing lumber from logs, has been considered noncommercial, and that one of the partners could not bind the other on commercial paper.[39] So, also, one engaged in the real estate and collecting busi-

32. Williams v. Thomas, 6 Esp. 18; Edwards on Bills, 111.

33. Teed v. Parsons, 202 Ill. 455, 66 N. E. 1044; Masterson v. Mansfield, 25 Tex. Civ. App. 262, 61 S. W. 505. To make such paper binding, the party seeking to hold other members must show, either previous authorization, or subsequent ratification. First Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755.

34. Greenslade v. Dower, 7 B. & C. 635, 1 Man. & Ry. 640.

35. Chitty on Bills (13th Am. ed.) [*45], 58. See Thompson on Bills, 158; Shellenbeck *et al.* v. Studebacker, 13 Ind. App. 437, 55 Am. St. Rep. 240. Held in this case that a partnership to conduct a dairy business is a nontrading partnership within the rules as to implied authority in one partner to execute firm paper. Stavnow v. Kenefick, 79 Mo. App. 41.

36. Kimbro v. Bullit, 22 How. 256. See Greenslade v. Dower, *supra;* Worster v. Forbush, 171 Mass. 423, 50 N. E. 936; Benton v. Roberts, 4 La. Ann. 216; Deardorff v. Thacher, 78 Mo. 128, 47 Am. Rep. 95; Bays v. Connor, 105 Ind. 415, 5 N. E. 18; Smith v. Sloan, 37 Wis. 285, 19 Am. Rep. 757; Hymes v. Weld, 91 Ga. 743, 17 S. E. 1001, *contra.*

37. Schele v. Wagner, 163 Ind. 20, 71 N. E. 127.

38. Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755.

39. Nat. State Cap. Bank v. Noyes, 62 N. H. 44. But in New York it is

ness; [40] and also, one dealing as coffee-brokers, in the absence of custom or usage to the contrary. [41] It has also been held that partners in mining [42] and gaslight [43] companies have no implied authority to bind the firm as parties to negotiable instruments.

Upon these principles one of a law firm cannot bind it by a promissory note without consent of all the members; [44] nor can one of a firm practicing medicine bind it in a like manner except for medicine and other necessaries of his profession; [45] nor can one of a firm keeping a tavern bind his copartners except strictly within the business. [46] It is said, however, that if the concerns were of such vast magnitude as to require large capital and credit, the rule would be of doubtful application, and that it would depend very much upon the usage of the particular firm and others similarly engaged. [47] The general authority of a partner to bind the firm exists only by implication, and may be rebutted by evidence that the party who took the security had previous notice that no such authority existed. [48]

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held that a partnership for the manufacturing and selling of lumber, bark, etc., upon a tract of land specified and "also upon any other tract, which shall be purchased by said copartners," is such a trading copartnership as clothes the members thereof with authority to bind the partnership, especially if the partnership obligation be given for the purchase of land to be used in connection with the business of the firm. See Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929.

40. Deardroff v. Thatcher, 78 Mo. 128, 47 Am. Rep. 95; Presbrey v. Thomas, 1 App. D. C. 171; Lee v. First Nat. Bank, 45 Kan. 8, 25 Pac. 196.

41. Third Nat. Bank v. Snyder, 10 Mo. App. 211.

42. Dickinson v. Valpy, 10 B. & C. 128.

43. Brumah v. Roberts, 3 Bing. N. C. 96.

44. Levy v. Pyne, Car. & M. 453; Hedley v. Bainbridge, 3 Q. B. 316 (42 Eng. C. L.), Lord Denman, C. J., saying: "There is no custom or usage that attorneys should be parties to negotiable instruments, nor is it necessary for the purposes of their business." Marsh v. Gold, 2 Pick. 285; Thompson on Bills, 58; Garland v. Jacomb, L. R., 8 Exch. 218, 6 Moak's Eng. Rep. 289; Smith v. Sloan, 37 Wis. 285; Friend v. Duryee, 17 Fla. 111; Nat. State Cap. Bank v. Noyes, 62 N. H. 44; Presbrey v. Thomas, 1 App. D. C. 171.

45. Crosthwait v. Ross, 1 Humphr. 23; Edwards on Bills, 102.

46. Cooke v. Branch Bank, 3 Ala. 175. Nor can a partnership organized for the purpose of transacting a general contracting and building business. Snively v. Matheson, 12 Wash. 88, 40 Pac. 628, 50 Am. St. Rep. 877.

47. 1 Parsons on Notes and Bills, 139; National State Cap. Bank v. Noyes, 62 N. H. 44. It has also been held that one member of a nontrading firm may bind it by an obligation in the firm's name for necessaries. Deardorff v. Thacher, 78 Mo. 128.

48. Gallway v. Matthews, 10 East. 264; King v. Faber, 22 Pa. St. 21; Randall v. Lee & Randall, 68 Mo. App. 561; Stevens v. McLachlan, 120 Mich. 284, 79 N. W. 627; Savings Bank v. Webster, 121 Mich. 153, quoting text.

§ 359. Ratification of paper by partnership.—The act of a partner in executing or indorsing negotiable paper in the name of the firm, which was unauthorized, may be ratified by his copartner.[49] If the firm receive and hold the proceeds of negotiable paper, executed by one of their number in a transaction not in their business, the firm will be considered as ratifying the act and will be bound; [50] and this is the rule whether the paper be signed by the partner in his own name or the firm's; [51] and likewise if they delay so long after having knowledge of the transaction as to raise a presumption that they ratify and adopt it. But if as soon as the other partners hear of the transaction they repudiate it, they will not be bound.[52] And when a note has been given for a firm by one partner, without authority, all the other partners must ratify it to make it a binding obligation of the firm.[53]

SECTION III

FORMAL SIGNATURE OF THE FIRM'S NAME

§ 360. As to the form of signature of the firm.—The signature of the firm should be written by the copartner in the very terms of the style of the firm. Or the copartner should express that he signs his own name for himself and his copartners, or should write out the names of the firm. The best way is to write simply the firm's name, and, if he pleases, with the addition "by A. B.," that being the name

49. Moran Bros. Co. v. Watson, 44 Wash. 392, 87 Pac. 508.

50. Richardson v. French, 4 Metc. (Mass.) 577; Clay v. Cottrell, 18 Pa. St. 408; Whitaker v. Brown, 16 Wend. 505; Deitz v. Regnier, 27 Kan. 94; Buettner v. Steinbrecher & Hertzler, 91 Iowa, 588, 60 N. W. 177; Eggleston v. Mason & Co., 84 Iowa, 630, 51 N. W. 1.

51. Hardeman v. Bank of Middletown, 28 Pa. St. 440; Carter v. Mitchell, 94 Ky. 261, 22 S. W. 83.

52. Foster v. Andrews, 2 Pa. St. 160; Richards v. Jefferson, 20 Wash. 166, 54 Pac. 1123. In this case, one copartner, without authority, executed sundry promissory notes in the name of the firm. Subsequent thereto, a memorandum in writing was signed by the copartnership, reciting that the firm was indebted to the payee "in sums evidenced by promissory notes executed by the company, and overdue," amounts to ratification of the notes, even if some of the notes were not then due, when there were no other notes between the parties than the ones in suit. Evidence that a partner who signed a firm note talked with his copartner several times after the execution of the note, and that the latter never denied liability, was sufficient to authorize a finding of ratification by the latter of the former's act in executing the note. Taylor v. Herron, 72 Kan. 652, 82 Pac. 1104.

53. Blake v. Third Nat. Bank, 219 Mo. 644, 118 S. W. 641.

of the signing member. Certainly, it should distinctly appear that the signature is intended to bind the firm, and (except in the case of an acceptance by one partner in his own name of a bill drawn on the firm, which case will presently be considered) such will not be the manifest intention unless the instrument be signed in the manner above indicated.[54]

And in general, when the name of one partner only appears on the bill or note, his copartners would not be chargeable, although the instrument were used for partnership purposes, unless, indeed, the firm transacted business in his name.[55] Therefore, where the plaintiff declared, on a note made by T. W., in his own name, as on a note made to T. W. and R., and offered to show that they were jointly indebted, and that they gave the note for that debt, he was nonsuited, on the ground that this was a separate security for a joint debt.[56] The same rule applies to acceptance.[57] So the indorsement of one partner does not bind the firm on the bill, though the money were applied to the firm's purposes, and they might be sued for money lent.[58] When, however, notes were signed, not in the firm name but by the individual members of the firm, oral evidence may be received to show that the consideration of the notes was a firm obligation, that the form was accidental, and that it was intended to be a partnership liability.[59]

Where two partners are accustomed to obtain money for their partnership purposes signed by one member of the firm, made payable to and indorsed by the other, it is a partnership paper in everything but form, and the holder would be entitled to participate in partnership assets.

The principle is simply this: that when it can be collected from the face of the paper that the signing partner intended to bind the firm, it will be bound; otherwise not.

§ **361. Illustrations.**—In accordance with the principle of the

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54. Chitty on Bills [*57], 72; Thompson on Bills, 164.

55. See *post*, §§ 363, 399; Rumsey v. Briggs, 139 N. Y. 323, 34 N. E. 929.

56. Siffkin v. Walker, 2 Campb. 307.

57. Cunningham v. Smithson, 12 Leigh, 43; Colwell v. Weybosset Nat. Bank, 16 R. I. 290, 15 Atl. 80, 17 Atl. 913.

58. Emly v. Lye, 15 East. 7; Kilgour v. Finlayson, 1 H. Bl. 156; *Ex parte* Emly, 1 Rose, 61; Cunningham v. Smithson, 12 Leigh, 43. But see the case of Denton v. Rodie, 3 Campb. 493, and Chitty on Bills [*59], 74, note *f*; Meir & Co. v. Bank, 55 Ohio St. 446, 45 N. E. 907.

59. *In re* Stoddard Bros. Lumber Co., 169 Fed. 190; Markham v. Cover, 99 Mo. App. 83, 72 S. W. 474; Davis v. Turner, 120 N. C. 605.

text, it has been held that a note beginning "I promise," and signed by one of the firm for the rest, as "A. B. for A. B. C. D. & Co.," will bind the whole firm,[60] and not the signing partner singly.[61] So if it begins "I promise," and is signed in the firm's name.[62] Where the note is signed by two individuals, it will be presumed, in the absence of evidence, to be as joint makers, and not as partners.[63] And if a partner draws a bill or note in a fictitious name, and indorses it in the partnership name, the firm will be bound by the indorsement.[64]

If the partner, intending to use the firm's name, make a slight and immaterial variation from it, the firm is still bound;[65] but if the variation is material, it will not be.[66] If A., B., and C. are partners, a note given by one of them, signed "A. & Co.," will be presumed to be in the partnership name;[67] and if the names of all the partners are written on the paper, instead of the firm's name, and it is given in the firm's business, the firm will be bound.[68] If the firm adopt any name as their copartnership designation, they will be bound by that name, although different from the one ordinarily used by them.[69]

One partner cannot, without special authority, execute a joint and

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60. Gallway v. Matthews, 10 East. 264, 1 Campb. 403; Staats v. Howlett, 4 Den. 559; Thompson on Bills, 156; Colwell v. Weybosset Nat. Bank, 16 R. I. 290, 15 Atl. 80, 17 Atl. 913. See also City Bank's Appeal, 54 Conn. 269, 7 Atl. 548; *Ex parte* First Nat. Bank, 70 Me. 369; Smith v. Felton, 43 N. Y. 419.

61. *In re* Clarke, 14 M. & W. 469, overruling Hall v. Smith, 1 B. & C. 407.

62. Doty v. Bates, 11 Johns. 544.

63. Ellinger's Appeal, 114 Pa. St. 505; Salomon v. Hopkins, 61 Conn. 47, 23 Atl. 716, where J. M. Hopkins signed a note "A. J. and J. H. Hopkins," it was held that he was liable if he adopted the signature as his own or as a firm member, or induced the payee to part with the goods under the belief that he intended to be bound by it.

64. Thicknesse v. Bromilowe, 2 Cromp. & J. 425; Taylor v. Reger, 18 Ind. App. 466, 48 N. E. 262, 63 Am. St. Rep. 352.

65. Williamson v. Johnson, 1 B. & C. 146; Faith v. Richmond, 11 Ad. & El. 339; Forbes v. Marshall, 11 Exch. 166.

66. Kirk v. Blurton, 9 M. & W. 284; Maclae v. Sutherland, 3 El. & Bl. 31. Where the style of the firm was simply "John Blurton," it was held that a bill signed "John Blurton & Co." did not bind them. Kirk v. Blurton, 12 L. J. Exch. 117; Thompson on Bills, 164.

67. Drake v. Elwyn, 1 Caine, 184. But where a note bears the several signatures of parties as indorsers on promissory notes which are negotiable, the presumption is that the obligation created thereby is several and not joint. See Palmer v. Field, 76 Hun, 229, 27 N. Y. Supp. 736.

68. Norton v. Seymour, 3 C. B. 792; Maynard v. Fellows, 43 N. H. 258; Meir & Co. v. Bank, 55 Ohio St. 446, 45 N. E. 907; Dreyfus v. The Union Nat. Bank, 164 Ill. 83, 45 N. E. 408.

69. Moffat v. McKissick, 8 Baxt. 517; §§ 363, 399

separate note in the partnership name;[70] but it has been held—and justly, as we think—that such a note would be void only as a several note, and good as a joint note.[71]

§ **361a.** Where persons organized as a club authorized their president to execute a note in the name of the club, for purchases made for its use, it was held that they were to be regarded as partners and principal makers of the note executed accordingly; and likewise as to a renewal thereof.[72]

§ **362. Acceptances.**—The doctrine is generally recognized that if a bill be drawn upon a firm, the acceptance by one partner, whether in his own name or the name of the firm, will bind the firm, it being only necessary for it to appear that he acted for it.[73] In an English case a bill was drawn on "Rumsey & Co." It was presented to "T. Rumsey, Jr.," who wrote across it "accepted, T. Rumsey, Sen." It was contended that the firm was not bound. But Lord Ellenborough said: "This acceptance does not prove the partnership; but if the defendants were partners, they are both bound by it. For this purpose it would have been enough if the word 'accepted' had been written on the bill, and the effect cannot be altered by adding 'T. Rumsey, Sen.' If a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which it was drawn." [74] This seems the true *rationale* of the question, and should be sustained on the familiar maxim, "*Ut res magis valeat quam pereat.*" But it has been held that, in such a case as that quoted, the firm would not be bound, because its name is not

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70. Perring v. Hone, 2 Car. & P. 401, 4 Bing. 28 (77 Eng. C. L.).

71. Maclae v. Sutherland, 3 El. & Bl. 36 (77 Eng. C. L.).

72. Ferris v. Shaw, 5 Mo. App. 279. Members of a voluntary association are liable for an obligation of the association evidenced by a promissory note signed by the members, the signature being followed by certain abbreviations indicating the offices which they held in the association, and they are liable without regard to what was intended by the members in regard to liability, and despite the fact that they mistook the law. Evans v. M. C. Lilly & Co., 95 Miss. 58, 48 So. 612.

73. 1 Parsons on Notes and Bills, 123; Collyer on Partnership, § 410; Byles on Bills, 144; Gooding v. Underwood, 89 Mich. 187, 50 N. W. 818.

74. Mason v. Rumsey, 1 Campb. 384 (1808). To same effect see Wells v. Masterman, 2 Esp. 731; Dolman v. Orchard, 2 Car. & P. 104 (*semble*); Tolman v. Hanrahan, 44 Wis. 133. In Thompson on Bills, 164, note *i*, it is said, "It may be doubted whether this doctrine would be adopted in Scotland." See *post*, § 488.

signed as acceptor, and that the single partner, whose name is not on the bill, could not be charged as acceptor, because not the drawee of the bill.[75] In Connecticut, this view of the text seems to be taken;

75. Heenan v. Nash, 8 Minn. 409 (1863). In this case it was said, in sustaining this doctrine, by Flandrau, J.: "In the case of Mason v. Rumsey, 1 Campb. 384, it was held that an acceptance by one member of a firm in his own name would bind the firm when the bill was drawn on the firm." The same was again held in Wells v. Masterman, 2 Esp. 731. This doctrine seems to have been adopted in Collyer on Partnership, § 410, and in Byles on Bills, 144, on the authority of these cases and some others there collected. In the case of Dougal v. Cowles, 5 Day, 511, the same is again laid down on the authority of the case of Mason v. Rumsey. There are other cases that hold an acceptance by a member of a firm in a name other than the firm name, to raise a question of fact to be left to the jury, whether the name used substantially describes the firm, or whether it so far varies that the acceptor must be taken to have made it on his own account. See Faith v. Richmond, 11 Ad. & El. 338, 339, Eng. C. L. 113; Drake v. Elwyn, 1 Caine, 184. Acceptances could formerly be made by parol, which was the law in Connecticut at the time of the decision cited from 5 Day, and that point is expressly made by the court in deciding the case. The same may be said of the case of Mason v. Rumsey, which was decided before the statute of 1 & 2 George IV, chap. 78, § 2, which provided that acceptances to be valid must be in writing. Even after this statute the English courts have held that the word 'accepted,' written on the bill by one having authority, is sufficient to bind the drawees. The only principle upon which the courts have held that an acceptance by one partner in his own name will bind the firm, is the implied authority which each member has to act for the whole, and when the bill is drawn upon the firm and accepted by one, they hold that he intended to accept as drawn. I find one English case, decided in the Court of Exchequer in 1841, which holds a doctrine much more in accordance with our views of the principles which should govern the question. In Kirk v. Blurton, 9 M. & W. 283, the defendants were partners under the name of 'John Blurton.' One of the firm drew a bill in the name of 'John Blurton & Co.' The firm was sued upon it, and the partner who did not draw the bill defended. Faith v. Richmond, Mason v. Rumsey, and other cases were cited. Alderson, B., in delivering the opinion, says: 'The court do not entertain any doubt as to the principles of law applicable to this case. One partner can bind his copartner only to the extent of the authority which is given to partners generally, to enable them to carry on the partnership business,' which authority, he says, in another part of the opinion, is 'to bind the firm in the name of the partnership, and in that only.' Since the passage of our statute on the subject of acceptances, no inferences can be indulged in. To make an acceptance valid it must be in writing, signed by the acceptor or his lawful agent. Mr. Nash, as a partner of the firm of Nash & McGrorty, had a right to accept the bill for the firm by virtue of his general powers as a partner, but this power of a partner is to bind the firm by the use of the firm name, and in no other way. This he did not do, and we are clear that the acceptance cannot be held to bind the firm. We are next to consider whether the defendant can be held as acceptor individually. It is a well-settled rule of commercial civil law that no one can accept a bill but the person upon whom it is drawn, except for honor. Polhill v. Walter, 3 B. & Ad. 114; Davis v. Clark, 1

and it is there held that the drawing of a bill by one partner in his own name on the firm of which he is a member, is, in contemplation of law, an acceptance of the bill by the drawer in behalf of the firm.[76]

And in England, where a bill was drawn on "E. M. and others, trustees, etc.," and there was written across it, "accepted, E. M."—it appearing that E. M. had authority to accept for the trustees—they were held liable as acceptors, Pollock, C. B., saying: "His acceptance did not import that he accepted merely as an individual, but that he was the party whose hand performed that duty by direction of the rest: and the mere fact that he needlessly added his name to the acceptance made no difference." [77]

§ 362a. Where the firm consists of one person transacting business with the addition of the words " Co.," or " & Co."—In such case, an acceptance, or other assurance signed with the individual name of such person, either by himself or by an authorized agent, is as valid and binding as the formal signature of the firm name.[78]

Car. & K. 117; May v. Kelly & Frazier, 27 Ala. 497. If a bill is drawn upon A., and B. accepts it, the act is merely voluntary, without any consideration, and creates no liability whatever in the law. It is allowed for the convenience of commerce, that a person, other than the drawee, may, after presentation, refusal, and protest, accept for the honor of the drawer or any of the indorsers, or of all the parties, as he may see fit; but this is a well-understood transaction, and is done *supra protest*, and under certain well-settled forms and ceremonies. There is no pretense that Mr. Nash was such an acceptor of the bill in question. Where a bill is drawn upon several individuals an acceptance by any one of them is binding upon him, although the bill may be treated, and should be, as dishonored, if not accepted by all the drawees, because the holder is entitled to the acceptance of them all; but in such a case a liability accrues against the party accepting, because he is a drawee, as much as if the bill had been drawn upon him alone. Where, however, the bill is drawn upon a firm, any member of the partnership, in his individual capacity, is quite as much a stranger to the same as a third person. He is only connected with the bill through his membership of the firm, which is drawee, and in virtue of such membership he has power to use the firm name in accepting it. If he accepts it in his individual name, he does not bind the firm, and there is no consideration for his act. It is the case of a bill drawn on one party, and accepted by another."

76. Dougal v. Cowles, 5 Day, 511; McKinney v. Bradbury, Supreme Court of Texas, Dallam's Decisions, 445 (1841). The court saying: "If a bill or note be drawn by one partner in his own name only, and upon the firm, of which he is a partner, the act of drawing has been held to amount in judgment of law to an acceptance of the bill by the drawer on behalf of the firm, and to bind the firm as an accepted bill."

77. Jenkins v. Morris, 16 M. & W. 877.

78. Odell v. Cormack, 19 L. R. (Q. B.) 223.

§ 363. Where firm transacts business in one partner's name.—Sometimes the firm transacts business in the name of a single partner, and questions often arise whether or not paper executed in the name of a single partner was intended as his only, or as that of the firm. *Prima facie*, it is to be presumed to be the paper of the individual partner whose name is signed to it, and the burden of proof is upon the holder to show affirmatively that the signature was intended for the signature of the firm.[79] If the individual carried on no business apart from the firm, an implication would arise that the paper signed by him was that of the firm.[80] Judge Story has said on this subject: "Where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, it is necessary not only to prove the signature, but that it was used as a signature of the firm, by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects and as a partnership act. The proof of the signature is not enough. The burden of proof is upon the plaintiffs to establish that it is a contract of the firm, and ought to bind them."[81] But when it is shown to have been executed in the business of the firm, and that the firm was intended to be bound, there is no doubt that it will be.[82] One

79. Dockery v. Faulkner (Tex. Civ. App.), 101 S. W. 501, citing text; Cunningham v. Smithson, 12 Leigh, 43; Macklin v. Crutcher, 6 Bush, 401; Boyle v. Skinner, 19 Mo. 82; Mercantile Bank v. Cox, 38 Me. 500; Buckner v. Lee, 8 Ga. 285; Bank of Rochester v. Monteath, 1 Den. 402; Manufacturers, etc., Bank v. Winship, 5 Pick. 11. Putnam, J. "If it had been proved that the note had been given for the use of the firm at the manufactory, the partners in that concern would be liable. The burden of proof was on the plaintiffs." Isaac and Peter Blackburn carried on business near Plymouth in the name of Isaac Blackburn only. Peter carried on business separately in London. In respect to bills drawn by Isaac in his own name, Lord Eldon said, in *Ex parte* Bolitho, 1 Buck, 100: "Unless you can show that when Isaac drew the bills he drew them not as Isaac, but as Isaac and Peter, there can be no legal contract upon the bills against the two; there may be a right of action, if you can bring it to this, that the money was raised by them for partnership purposes." Chitty on Bills [*42, 43], 56. See §§ 304, 360, 399.

80. Yorkshire Banking Co. v. Beatson, 42 L. T. R. 455.

81. United States Bank v. Binney, 5 Mason, 176; National Exchange Bank of Lexington v. Wilgus' Exrs., 95 Ky. 309, 25 S. W. 2.

82. South Carolina Bank v. Case, 8 B. & C. 427; Moore v. Williams, 26 Tex. Civ. App. 142, 62 S. W. 977. Where a partner purchased goods for a partnership and gave a note signed by himself individually, this does not preclude a recovery against the partnership on showing that he was authorized to act for the firm and that the firm had the benefit of the transaction. Beckwith v. Mace, 140 Mich. 157, 103 N. W. 559 (the action was not alone on the note).

partner has no implied authority from his relation to others, to bind them individually as parties to negotiable instruments.[83]

§ **364.** In New York it has been held, that where the bank account of a firm was kept in the name of one of its members, and all checks were drawn in his name, with the knowledge and assent of the others, the firm was liable upon such a check drawn in the firm business; and that the holder of such a check might show that the money was not advanced by him upon the individual security of the single partner.[84]

In accordance with the principles stated, if the partnership is carried on in the name of one individual only, and he issues a bill or note in his own name for his separate use, his copartners would not be liable in case of misapplication, because the firm is not pledged,[85] though if really for the benefit of the firm it would be.[86]

SECTION IV

ACCOMMODATION, PRIVATE, AND PROHIBITED TRANSACTIONS

§ **365. (I.) As to accommodation transactions of copartner.**—No one member of a firm can bind it, without the consent of all of its members, by signing the copartnership name as drawer, maker, acceptor, or indorser of a negotiable paper for his private accommodation or for the accommodation of a third party, for the obvious reason that such a transaction is not within the scope of copartnership business, unless expressly or impliedly made so, and would ordinarily be without authority, and in fraud of the firm. And every holder of such paper, chargeable with notice of its character, would be disqualified to recover upon it;[87] and if the plaintiff be payee, he would be

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83. McAuley v. Gordon, 64 Ga. 221.

84. Crocker v. Colwell, 46 N. Y. 212; Mohawk Nat. Bank v. Van Slyck, 29 Hun, 191.

85. *Ex parte* Bolitho, 1 Buck, 100. Explained in Wintle v. Crowther, 1 Tyrw. 214.

86. South Carolina Bank v. Case, 8 B. & C. 433, 2 Moody & R. 459.

87. Union Nat. Bank v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426; Chenowith v. Chamberlain, 6 B. Mon. 60; Bank of Rochester v. Bowen, 7 Wend. 158; Tompkins v. Woodward, 5 W. Va. 229; 1 Parsons on Notes and Bills, 129; Bloom v. Helm, 53 Miss. 21; Heffron v. Hanaford, 40 Mich. 405; Atlantic St. Bank v. Savery, 83 N. Y. 294; National Bank v. Law, 127 Mass. 72; Burke v. Wilbur, 42 Mich. 329; Bank of Fort Madison v. Alden, 129 U. S. 372; Federal Bank v.

required to prove the assent of the copartners before he could do so.[88]

If it appears on the face of the bill or note that it was signed by a partner, in the name of the firm, as surety, this will be notice to the world that it was not given in due course of the partnership business; and the burden would be thrown upon the holder not only to show that he gave value for the instrument, but also that all the parties assented to its execution in their name.[89] If the word "surety" be attached to the partnership name, that would impress upon the paper notice of its character.[90] Where a bill or note is carried by the drawer or maker to a bank to get it discounted on his own account, or transfer it to another party, and it bears the name of a firm which is payee and indorsed thereon, the transaction shows on its face that it is accommodation paper, and the bank or other holder must prove the copartners' assent in order to bind them.[91] And if there be anything in the appearance of the note itself to indicate that the partnership name is signed for accommodation, the holder cannot recover without showing the assent of all the partners.[92] But a bank discounting

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Northwood, 7 Ont. 395, citing the text; Central Nat. Bank v. Frye, 20 N. E. 325; Clark v. Wallace, 1 N. Dak. 404, 48 N. W. 339, 26 Am. St. Rep. 636; Second Nat. Bank v. Weston, 31 App. Div. 403, 45 N. Y. Supp. 315; Van Voorhis v. Brown, 29 App. Div. 119, 51 N. Y. Supp. 440; Presbrey v. Thomas, 1 App. D. C. 171; McCord v. Callaway & Co., 109 Ga. 796, 35 S. E. 171; Talmage & Co. v. Millikin & Meigs, 119 Ala. 40, 24 So. 843; National Bank v. Berrott, 23 Tex. Civ. App. 663, 59 Am. Rep. 783.

88. Hayes v. Blaker, 138 Mo. App. 24, 119 S. W. 1004; Tompkins v. Woodward, 5 W. Va. 230; Sternenberg & Co. v. Morgan, 8 Tex. Civ. App. 654; Lyon, Potter & Co. v. First Nat. Bank, 29 C. C. A. 45, 85 Fed. 120, text cited.

89. 1 Parsons on Notes and Bills, 140; National Bank v. Law, 127 Mass. 72; National Park Bank v. Security Co., 22 N. E. 567, citing the text; Tyree v. Lyon, 67 Ala. 1; Smith v. Weston, 159 N. Y. 194, 54 N. E. 38.

90. Austin v. Vandemark, 4 Hill, 259; Foot v. Sabin, 19 Johns. 154; Boyd v. Plumb, 7 Wend. 309; Edwards on Bills, 103, 104.

91. Bank of Vergennes v. Cameron, 7 Barb. 143. See Bloom v. Helm, 53 Miss. 21; First Nat. Bank v. Weston, 25 App. Div. 414, 49 N. Y. Supp. 542.

92. National Security Bank v. McDonald, 127 Mass. 82. In National Bank v. Law, 127 Mass. 72, L. was a member of the firms of C. F. P. & Co. and J. S.'s Sons. He made a note payable to C. F. P. & Co., or order, signed it in his own name, and indorsed it "J. S.'s Sons," and then "C. F. P. & Co." Held, apparent in the light of the Massachusetts statute, which treats "J. S.'s Sons" as indorsers, that their signature was *prima facie* for accommodation of payees, and that purchaser was chargeable with notice. In Atlas Nat. Bank v. Savery, 127 Mass. 75, it was held that upon a note similar to the above, except that the payees' name as indorsers was above that of J. S.'s Sons, and, therefore, in regular order,

partnership paper for one partner, and placing the amount to his credit, would not by that circumstance alone (as held in England) be chargeable with notice that he was acting in fraud of the firm, or be required to prove assent of his copartners.[93] If the partnership engagement as surety or indorser is really for the partnership benefit in their legitimate business, it has been held that the paper will be valid.[94] Where A., B. & C., copartners, indorsed a note for accommodation, and A. dying before its maturity, B. & C. renewed the indorsement in the partnership name, it was held that A.'s estate was discharged, on the old note by want of notice, and on the new one by want of authority;[95] but that if A., B. & C. had been makers of the note that was renewed, it would be different.[96]

§ 366. (II.) As to private debts of a member of the firm.—No one member of a firm can, without the consent of all of his copartners, bind them by making, drawing, accepting, or indorsing a bill, note, or check for his private debt, in the partnership name; and the creditor who receives such an instrument, or the indorsee who takes it with notice of the consideration, cannot recover upon it.[97] In order to

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plaintiff was not chargeable with notice of its accommodation character, and could recover. See Stimson v. Whitney, 130 Mass. 591.

93. *Ex parte* Bonbonus, 8 Ves. 542. This is very questionable according to weight of authority in America.

94. Langan v. Hewitt, 13 Smedes & M. 122; Steuben County Bank v. Alberger, 101 N. Y. 202.

95. Central Sav. Bank v. Mead, 52 Mo. 546.

96. Boatman's Sav. Inst. v. Mead, 52 Mo. 543.

97. King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; Adams v. Long, 114 Ill. App. 277; Campbell v. Huffines, 151 N. C. 262, 65 S. E. 1000, 134 Am. St. Rep. 987. And one who has obtained the note after it was past due, took it subject to the same defect and infirmity that was available against his indorser, and cannot recover as against the firm or the nonsigning partners. King v. Mecklenburg, 43 Colo. 316, 95 Pac. 951. Where a member of a partnership draws a check in payment of his personal obligations or for a debt without and beyond the scope of the partnership and the payee named in such check cashes the same without knowledge, either actual or constructive, that the check was drawn without authority, in an action by the payee to recover the debt evidenced by such check, the partnership cannot defend upon the ground that the member drawing such check had no authority to draw the same. Camas Prairie State Bank v. Newman, 15 Idaho, 719, 99 Pac. 833, 21 L. R. A. (N. S.) 703, 128 Am. St. Rep. 81. A partnership is not liable on a note given by one of the partners for the purchase of goods bought and used for his own private benefit, when such note is still in the hands of the vendor, and the purchase of such goods was not authorized or ratified by the other partners, and was an act neither actually nor apparently within

recover, the party who took the paper from the partner for his private debt, must prove the assent of all the copartners to his act.[98] Prof. Parsons seems to think that the English authorities are to the contrary;[99] and Mr. Chitty's opinion seems to be that the mere circum-

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the scope or ordinary course of the partnership business. Standard Wagon Co. v. D. P. Few & Co., 119 Ga. 293, 46 S. E. 109. That a partnership may frequently have drawn checks against its funds in bank for the purpose of discharging the individual debts of its members would not constitute such "a course of dealing" as would justify the bank in assuming that it was within the scope of the partnership business to pledge its credit and give its promissory note in satisfaction of a debt due by one of the partners to the bank. In no event could such "a course of dealing" be set up by the bank if it did not, as matter of fact, act upon the faith thereof. People's Sav. Bank v. Smith, 114 Ga. 185, 39 S. E. 920.

98. Atlantic State Bank v. Savery, 83 N. Y. 294; Union Nat. Bank v. Underhill, 21 Hun, 178; Foot v. Sabin, 19 Johns. 154; Dob v. Halsey, 16 Johns. 34; Williams v. Wallbridge, 3 Wend. 415; Rogers v. Batchelor, 12 Pet. 229; Smith v. Strader, 4 How. 404; Braid v. Cochran, 4 Serg. & R. 397; Noble v. McClintock, 2 Watts & S. 152; Mauldin v. Branch Bank, 2 Ala. 502; Tyree v. Lyon, 67 Ala. 4. See McClellan v. Detroit File Works, 56 Mich. 579, applying the same rule in a case where corporate notes were executed for individual debts of members of the company. Roberts v. Pepple, 55 Mich. 367; Davis v. Smith, 27 Minn. 391, where also held that knowledge by the bank that partnership funds were used in payment of a draft drawn by the creditor on the individual partner, was sufficient to charge such creditor with knowledge thereof. The objection to the validity of an indorsement of paper owned by a firm in payment of a partner's individual debt, cannot be raised by the maker, for the reason that his liability is not thereby in any way affected. Drexler v. Smith, 30 Fed. 756; Sweetser v. French, 2 Cush. 309; Taylor v. Hillyer, 3 Blackf. 433; Windham County Bank v. Kendall, 7 R. I. 77; Tompkins v. Woodward, 5 W. Va. 229, 230; Gale v. Miller, 54 N. Y. 538; 1 Parsons on Notes and Bills, 126, 127; Sherwood v. Snow, 46 Iowa, 486; Bank of Commerce v. Selden, 3 Minn. 155. In Harrington v. Baker, 173 Mass. 488, 53 N. E. 903, member of a firm sent by letter to bank for discount, a note signed by A., payable to B. and indorsed by B. in the name of firm of which he was a member—in letter it was stated, "We have good captains in our employ whom we frequently assist, and the inclosed I offer you. I do not hesitate to say is a strong one for the reason that our concern B. & Co., do not have any notes of any nature"—the bank discounted note, sending check payable to B.'s order—held, that that letter gave notice to the bank that the indorsement of the firm name was for accommodation. See Follmer v. Frommel, 63 Hun, 370, 18 N. Y. Supp. 318; Terry v. Platt, 1 Pennnewill, 185, 40 Atl. 243; Platt v. Koehler, Dickey & Co., 91 Iowa, 592, 60 N. W. 178; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426, 25 S. W. 904; Midland Nat. Bank v. Schoen, 123 Mo. 650, 27 S. W. 547; Kahn v. Overstolz, 82 Mo. App. 235; Broughton Bros. v. Summer, 80 Mo. App. 386; Huttig, etc., Co. v. Gough, 81 Mo. App. 440.

99. 1 Parsons on Notes and Bills, 127. In Ridley v. Taylor, 13 East. 175, Lord Ellenborough, C. J., said: "This bill had an existence, according to its apparent date, eighteen days before the time of its delivery to the plaintiffs; it was

stance that an acceptance in the partnership name by one partner is given for his private debt, does not raise the presumption that it was wrongfully made. But such a transaction is out of the orderly and usual course of business. It does not import fairness on its face, and the American authorities seem to us to reach the correct conclusion. In a case where a creditor drew on his debtor through bank for an individual debt, and the debtor gave the check of the firm to which he belonged in payment, the creditor was held chargeable with notice of the misappropriation by the very nature of the transaction, and through the bank as his agent.[1] We quote Mr. Chitty's language as showing the state of the English law on the subject.[2]

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drawn for a sum considerably exceeding the debt, and was not only drawn and indorsed, but accepted also, before it was produced to them; and although it is stated in the case, that in fact the bill was drawn and indorsed by Ewbank in the partnership name, it does not appear that the plaintiffs knew that it was drawn and indorsed by him. Under these circumstances it might reasonably be supposed, by the party to whom it was given, to be a partnership security, of which Ewbank, the partner in possession of it, had for some valuable consideration, or in virtue of some arrangement with Ord, the other partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate, the contrary does not either actually or presumptively appear." See Green v. Deakin, 2 Stark. 347.

1. Davis v. Smith, 27 Minn. 390. But in Nebraska a different conclusion has been reached. There, in a similar case, it was held that the creditor receiving the check might presume that it was given on account of the partner's interest in the profits of the business. Warren v. Martin, 24 Nebr. 273. But it is equally well settled that in payment of money to a creditor who receives it in discharge of an existing debt, without knowledge, that it is the property of another, than the one paying, does not create liability on the part of the recipient to the true owner. Dike v. Drexel, 11 App. Div. 77, 42 N. Y. Supp. 979. In this case, the court cites in support of the proposition above stated, the cases of Justh v. National Bank of the Commonwealth, 56 N. Y. 478, 11 Am. Rep. 734; Stephens v. The Board of Education, 79 N. Y. 187, 35 Am. Rep. 511; Southwick v. First Nat. Bank, 84 N. Y. 434; Newhall v. Wyatt, 139 N. Y. 452, 34 N. E. 1045, 36 Am. St. Rep. 712; Goshen Nat. Bank v. The State, 141 N. Y. 379, 36 N. E. 316; Hatch v. Fourth Nat. Bank, 147 N. Y. 184, 41 N. E. 403.

2. Chitty on Bills (13th Am. ed.) [*47], 60, where it is said: "It has been considered that the mere circumstance of a bill being given for an antecedent debt due from one only of the partners raises a presumption that the creditor knew the bill was given without the concurrence of the other partners," and in *Ex parte* Goulding, 2 Gill & J. 118, the vice-chancellor said: "After an attentive consideration of the authorities, I am of opinion that when one partner gives the acceptance of the firm in payment of his separate debt, without authority from his copartner, such acceptance does not bind the firm." And it has also been considered that the taking the instrument from one of the partners in his own handwriting without consulting the others, raises a presumption that there is not any concurrence of the firm. Hope v. Cust, 1 East, 53. And in an action on

§ 367. Proof of express authority.—Distinct proof, it has been held, must be given of the copartners' assent, and that mere knowledge on their part is not sufficient.[3] But unless they were prompt to repudiate the act as not binding on them, we should say they were bound.[4] And their assent may be implied by circumstances.[5] A course of dealing by the firm in recognizing such transactions would suffice.[6] And when such a course of dealing is proved, evidence that the copartnership articles contained an express prohibition of such acts by any copartner would be inadmissible.[7] The admissions of the partner executing partnership paper for his private debt, are no evidence to bind the firm. One partner has no implied authority to bind the firm by a blank acceptance, there being no drawer to the

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a bill against three acceptors where it appeared that the defendants were partners in a tea speculation, and the drawer, a wine merchant, drew, in payment for wine delivered to one of the three, the judge directed the jury that if they found that the bill was so drawn without the knowledge and consent of the other two defendants, they were not liable; and the jury found for the defendant. Wood v. Holbeck, May 28, 1826. And from the cases of Shirreff v. Wilks, 1 East, 48, and Green v. Deakin, 2 Stark. 347, a conclusion has been reached, in an excellent work, that if one partner accept in the partnership name a bill drawn by his own separate creditor for his separate debt, or if for such separate debt he give a promissory note in the name of the firm, it lies upon the creditor to show that his debtor had authority so to give him the joint security of the firm, and that *prima facie* the transaction is fraudulent on the part of both debtor and creditor. Bayley on Bills, 59. But as a partner may, in his individual capacity, have a claim upon the firm, in the respect of which he might draw, accept, or indorse a bill in the name of the firm, it has in other cases been considered that the mere circumstance of the party to whom he delivers it knowing that he was using it for his private benefit does not of itself necessarily afford sufficient presumptive evidence of collusion to invalidate the transaction, and that the partner objecting to liability must prove all the facts sufficient to induce a jury to find that the partner really acted fraudulently, and that the holder had notice of the fraud. See *Ex parte* Bonbonus, 8 Ves. 542; Ridley v. Taylor, 13 East, 175.

3. Elliott v. Dudley, 19 Barb. 326; Presbrey v. Thomas, 1 App. D. C. 171.

4. Foster v. Andrews, 2 Pa. St. 160.

5. Gansevoort v. Williams, 14 Wend. 133; Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40. Even if firm notes were accommodation paper, because they were given outside the business of the firm, a partner would be liable if he authorized them to be given, or if he ratified the giving of them with knowledge of the facts, or omitted to stop their issue after knowledge. Hunter v. Bacon, 111 N. Y. S. 820, 127 App. Div. 940.

6. Butler v. Stocking, 8 N. Y. 108; Bank of Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40; Midland Nat. Bank v. Schoen, 123 Mo. 650, 27 S. W. 547.

7. Michigan Bank v. Eldred, 9 Wall. 544.

bill; and any person taking a bill, knowing that it was issued in that form, would be chargeable with notice, if the partner making such acceptance exceeded his authority.[8]

§ 368. (III.) As to special limitations of partnership authority.—Copartners may enter into any contract between themselves restraining the firm, or any member of it, from executing or indorsing a negotiable instrument; and it is a fraud upon the firm for any member to violate it, for which his injured copartners may maintain an action.[9]

But in the hands of a *bona fide* holder, without notice, the fact that express partnership articles have been violated, or that the name of the firm has been used in a private or accommodation transaction, is no objection to the validity of the instrument, or his right to recover; for their association with the wrongdoer enabled him to commit the fraud.[10]

§ 369. (IV.) As to the burden of proof.—The order in which the burden of proof shifts from one side to the other may be stated as follows: (1) When the payee of a bill or note sues upon it, and it appears to have been signed in the firm's name, and he exhibits the paper and proves the signature of the signing partner (where this is necessary), he establishes his case *prima facie*, it being presumed that the partner acted within the scope of the partnership business.[11]

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8. Hogarth v. Latham, 39 L. T. R. 75.

9. Byles on Bills (Sharswood's ed.), 128.

10. Michigan Bank v. Eldred, 9 Wall. 544; Kimbro v. Bullit, 22 How. 256; Winship v. Bank of United States, 5 Pet. 529; Union Nat. Bank v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426, citing text; Wright v. Brosseau, 73 Ill. 381; Miller v. Hughes, 1 A. K. Marsh. 181; Redlow v. Churchill, 73 Me. 146; Waldo Bank v. Lambert, 16 Me. 416; Stimson v. Whitney, 130 Mass. 591; First Nat. Bank v. Stadden, 103 Minn. 403, 115 N. W. 198; Hibernian Bank v. Everman, 52 Miss. 500; Bascom v. Young, 7 Mo. 1; Lincoln Nat. Bank v. Schoen, 56 Mo. App. 160, citing text; Wells v. Evans, 20 Wend. 251; Catskill Bank v. Stall, 15 Wend. 364, 18 Wend. 466; First Nat. Bank v. Morgan, 6 Hun, 346; Cotton v. Evans, 1 Dev. & Bat. Eq. 284; Parker v. Burgess, 5 R. I. 277; Walker v. Kee, 14 S. C. 142.

11. Michigan Bank v. Eldred, 9 Wall. 548; Knapp v. McBride, 7 Ala. 19; Griffin v. Colonial Bank, 7 Ga. App. 126, 66 S. E. 382; First Nat. Bank v. Carpenter, 34 Iowa, 432; Mitchell v. Whaley (Ky.), 92 S. W. 556; Hamilton v. Summers, 12 B. Mon. 11; Manning v. Hayes, 6 Md. 5; Lamwersick v. Boehmer, 77 Mo. App. 136; Feurt v. Brown, 23 Mo. App. 332; Davis v. Cook, 14 Nev. 265, Leonard, J., rendering an able and instructive opinion; Vallett v. Parker, 6 Wend. 615; Doty v. Bates, 11 Johns. 544; Foster v. Andrews, 2 Pa. St. 160; Edwards on Bills, 105.

(2) If the firm resist payment, it will be sufficient to show that the copartner signed the firm's name for a private debt due the plaintiff, and its defense is then complete, unless the plaintiff reply by showing the assent of the copartners.[12]

(3) And the burden, it has been held, would also be devolved upon the plaintiff to prove value given, if it were shown that the paper was executed in violation of partnership articles of agreement.[13]

(4) When suit is brought by a subsequent holder, it will also be sufficient for him to produce the instrument and prove the signing partner's signature in order to make out a *prima facie* case.[14]

(5) If when this has been done the firm shows, by way of defense, that the instrument was executed by the signing partner in fraud of the firm, by being given to the payee for the partner's private debt, or for the payee's accommodation, and thus perfects its defense as against the payee, it is held, by numerous cases, that the holder must then prove that he acquired it in the usual course of business for a valuable consideration, under circumstances not affecting him with notice of the fraud.[15] And such seems to be the accepted doctrine on the subject,[16] though upon the plea of *non accepit* it has been held in England insufficient to show that an acceptance was fraudulent on the part of the signing partner, without bringing home to the plaintiff knowledge of the fraud.[17]

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12. Williams v. Walbridge, 3 Wend. 415; Rogers v. Batchelor, 12 Pet. 299; Taylor v. Hillyer, 3 Blackf. 433; Gale v. Miller, 54 N. Y. 539; Follmer v. Frommel, 63 Hun, 370, 18 N. Y. Supp. 318; Platt v. Koehler, Dickey & Co., 91 Iowa, 592, quoting the text, 60 N. W. 178; Goddard-Peck Grocery Co. v. McCune, 122 Mo. 426.

13. Grant v. Hawks, Chitty on Bills (13th Am. ed.) [*42], 55.

14. Michigan Bank v. Eldred, 9 Wall. 548; Bates v. Forcht (Mo.), 4 West. 731.

15. Bank of St. Albans v. Gilliland, 23 Wend. 311; Bank of Vergennes v. Cameron, 7 Barb. 143; Monroe v. Cooper, 5 Pick. 412; Hart v. Potter, 4 Duer, 458; Hogg v. Skene, 34 L. J. C. P. (N. S.) 153. In Carner v. Cameron, 31 Mich. 373 (1875), in an action by a transferee of a note signed in the name of a firm, it was held (1) That the presumption was that it was for the benefit of the firm; but (2) the defendants might show it was made in fraud of the firm to the knowledge of the payee; and (3) that, therefore, the presumption would be that the transferee was not a *bona fide* holder for value, and the burden of proof was on him. National Exch. Bank v. White, 30 Fed. 414; Lincoln Nat. Bank v. Schoen, 56 Mo. App. 161, citing text.

16. Chitty on Bills (13th Am. ed.) [*42], 55; Edwards on Bills, 105, 106; Byles on Bills (Sharswood's ed.) [*47], 129. Judge Sharswood says in his note: "The doctrine of the text is sustained by the whole current of the American authorities." 1 Parsons on Notes and Bills, 128.

17. Musgrave v. Drake, 5 Q. B. 185 (48 Eng. C. L.), Lord Denman saying:

(6) In an English case, it was said by Lord Ellenborough: "An indorsee may recover on a bill against partners in a concern, though the drawing or accepting were contrary to agreement between them, and by one of the partners in fraud of the rest; but then the indorsee must show that he gave value." [18] This is, we think, the correct view, though not entirely concurred in.[19] And it has been held that where an indorsement of a firm name was made by a partner upon a note which, on its face was his individual note, and it does not appear that he had authority to bind the firm by an indorsement or guaranty of his individual paper, the plaintiff must prove that the money was loaned to the firm and that their contract was the contract of makers of the note.[20]

SECTION V

THE EFFECT OF A DISSOLUTION OF THE FIRM

§ 369a. Dissolution and notice thereof.—The dissolution of a partnership may occur by agreement between the partners; by a change in the membership of the firm, by the retirement of one or more of the partners; and by operation of law. The death or bankruptcy of a partner are the most familiar instances of dissolution by operation of law, and as a general rule it is well settled that in those cases no notice is necessary to exonerate the estate of the deceased or bankrupt partner from liability for future acts done by other

"Where issue is joined on the plea of *non accepit*, and the proof offered of the acceptance is the signature of one partner competent to bind the firm, then, though the defendants show that this signature was a fraudulent act on the part of such partner, yet if the proof does not affect the plaintiff with knowledge of the fraud, that does not put the plaintiff to an answer, nor make it necessary for him to give any explanation or account of the transaction." To same effect is Thompson on Bills (Wilson's ed.), 761. But see Hogg v. Skene, *supra*.

18. Grant v. Hawks, Chitty on Bills (13th Am. ed.) [*42], 55.

19. See Michigan Bank v. Eldred, 9 Wall. 548.

20. Lowry v. Tivy, 70 N. J. 457, 57 Atl. 267. But compare Moorehead v. Gilmer, 77 Pa. St. 118; Miller v. Consolidation Bank, 12 Wright, 514. Where a partner made and issued a note with the indorsement of the firm name, the tenor of the note and the order of the indorsements raised no conclusive presumption that the indorsement in the name of the firm was for the accommodation of the maker, or that upon negotiation he received the money for his private use. Christian Feigenspan v. McDonald, 201 Mass. 341, 87 N. E. 624. See also Reed v. Bacon, 175 Mass. 407, 56 N. E. 716; Hayes v. Blaker, 138 Mo. App. 24, 119 S. W. 1004.

members in the name of the dissolved firm.[21] Nor is notice necessary when a dormant partner retires, for he has not been held out as a member of the firm.[22] But when dissolution occurs by agreement between the partners, or by retirement of one or more of them, notice of dissolution is necessary to avoid liability for future transactions in the firm name. And the general principles stated may be affected by peculiar circumstances. Thus, if a dormant partner is known to certain individuals to have been a partner he must notify them of his retirement, to avoid future liability for acts of the firm.[23] And continuing members will be bound by the acts of a bankrupt partner in the firm's name if they hold themselves out as still in partnership with him.[24]

§ 369b. Special and general notice.—Actual knowledge of dissolution in all cases where notice is necessary to exonerate ex-partners is equivalent to notice, the terms in this connection meaning the same thing.[25] Customers or dealers with the firm have a right to infer its continuance, and to regard each member as the agent of all. And therefore, upon dissolution of the firm by agreement between the partners or change in membership (while, as between the ex-members, mutual authority to act in the firm's name is at an end), all of the

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21. Dickinson v. Dickinson, 25 Gratt. 321; Williams v. Mathews, 14 La. Ann. 11; Byles on Bills (Sharswood's ed.) [*31], 136 Parsons on Partnership, 438; Lindley on Partnership, *404, *405; Ware on Notice, § 496. See as to exception when surviving partner is executor, Vulliamy v. Noble, 3 Meriv. 592; Wade on Notice, § 496. Query—When provision is made for continuance of firm? Parsons on Partnership, 438. Estate of deceased partner in such case is bound. Blodgett v. American Nat. Bank, 49 Conn. 9.

22. Carter v. Whalley, 1 B. & Ad. 11; Heath v. Sansom, 4 B. & Ad. 172; Lindley on Partnership, *406, *407.

23. Farrar v. Deflime, 1 Car. & K. 580; Davis v. Allen, 3 N. Y. 168; Cregler v. Durham, 9 Ind. 375; Nuso Vaumer v. Becker, 87 Ill. 281; Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535, citing text. As to what constitutes a sufficient notice of publication, see Thayer v. Goss, 91 Wis. 90, 64 N. W. 312.

24. Lacy v. Woolcot, 2 Dowl. & R. 438; *In re* Fraser, *Ex parte* Central Bank, 2 Q. B. 633 (1892).

25. See *ante*, § 353; Dickinson v. Dickinson, 25 Gratt. 329; Lovejoy v. Spafford, 93 U. S. (3 Otto) 441; Davis v. Allen, 3 N. Y. 172; Ketcham v. Clark, 6 Johns. 144; National Bank v. Norton, 1 Hill, 572; Stimson v. Whitney, 130 Mass. 591; Prentiss v. Sinclair, 5 Vt. 149; Davis v. Keyes, 38 N. Y. 94; Martin v. Walton, 1 McCord, 16; Parkin v. Caruthers, 3 Esp. 248; Hart v. Alexander, 2 M. & W. 484; Wade on Notice, §§ 485, 499; Parsons on Partnership, 412, 413; Lindley on Partnership, *416.

old firm will be bound to such customers and dealers upon contracts made by any ex-partner in its name, unless they have received express and special notice of the dissolution, or it is shown were aware of the fact.[26] Persons who merely take, or receive for discount, the paper of a firm are not deemed dealers so as to entitle them to actual notice.[27]

As to those who are strangers to the firm, that is to say, who are not its customers, and who knew of its existence only by general reputation or notoriety, a different rule applies: and they are entitled only to general or constructive notice by public advertisement or otherwise.[28] Reasonable notice—such as is calculated to warn the general public—is all that is necessary as to them. It need not be by publication in a newspaper, as in England, where such publication is the customary method of general notification.[29] But it must be in some public and notorious manner.[30] And it is best to give notice by advertisement in the press, by changing the signs of the firm, and circulating the information of the dissolution. An indorsement on a note of the firm's name with the words "in liquidation" is sufficient to give notice of the dissolution, and no recovery can be had on such indorsement against the parties not assenting thereto.[31]

The effect of notice of dissolution may be done away with as to ex-partners, if by subsequent conduct they induce others to regard the partnership as still existing.[32] And how unsafe it is to neglect notice,

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26. Vernon v. Manhattan Co., 22 Wend. 183; Bristol v. Sprague, 8 Wend. 423; Dickinson v. Dickinson, 25 Gratt. 321; Parsons on Partnership, 413; Lindley on Partnership, *416; Am. Law Reg., Feb., 1882, p. 128; Clement v. Clement, 69 Wis. 602; National Shoe & Leather Bank v. Herz, 89 N. Y. 630; Bank of the Monongahela Valley v. Weston, 159 N. Y. 201, 54 N. E. 40, 76 Am. St. Rep. 283; Camp v. Southern Banking Co., 97 Ga. 582, 25 S. E. 362; Dickson v. Dryden Bros., 97 Iowa, 122, 66 N. W. 148.

27. City Bank v. McChesney, 20 N. Y. 240; City Bank v. Dearborn, 20 N. Y. 244. But see as to transactions with banks, Bank v. Mudgett, 45 Barb. 663; Rocky Mountain Nat. Bank v. McCaskill, 16 Colo. 413, 26 Pac. 821, citing text; Mechanics' Bank v. Livingston, 33 Barb. 458. As to who are dealers, see Am. Law Reg., Feb., 1882, p. 130.

28. Lovejoy v. Spafford, 93 U. S. (3 Otto) 440; Dickinson v. Dickinson, 25 Gratt. 321; Uhl v. Harvey, 78 Ind. 26.

29. Ketcham v. Clark, 7 Johns. 147.

30. City Bank v. McChesney, 20 N. Y. 240. In this case ex-partner discounted note in firm's name to a bank which had not known of existence of the firm. No publication of general notice had been made, and retiring partner was held liable. Lovejoy v. Spafford, 93 U. S. (3 Otto) 439; Wardwell v. Haight, 2 Barb. 549.

31. Woodson v. Wood, 84 Va. 478.

32. Chitty on Bills (13th Am. ed.) [*53], 68; Wade on Notice, 213, 214.

special or general, and compliance therewith, is well illustrated in an English case. After dissolution an ex-partner accepted a bill in the firm's name; the payee had no notice of dissolution, but his indorsee had notice; and it was held that the latter could hold the firm responsible, because an indorsee has the right to stand on his indorser's title.[33]

§ 370. Cessation of partners' power when dissolution occurs by retirement or agreement.—The power of the partners to bind each other ceasing upon the dissolution, no one of them can thereafter enter into any contract which will bind the firm as to those affected with notice of dissolution, except such as is necessary and appropriate in settling the affairs of the concern.[34] The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created.[35] The implied power of the ex-partner does not extend to giving a note, or to drawing or accepting a bill in the firm's name.[36] Nor can he bind the firm by a check in its name.[37] Renewals of outstanding bills or notes of the firm stand on the same footing;

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33. Booth v. Quin, 7 Price, 193. See §§ 726, 782, 786, 803 *et seq.*

34. *In re* Stoddard Bros. Lumber Co., 169 Fed. 190; Darling v. March, 22 Me. 184; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535, citing text; Osborn v. Wood, 125 Mo. App. 250, 102 S. W. 580.

35. In Davis v. Poland, 92 Va. 226, 23 S. E. 292, Riely, J., said: "He cannot (after dissolution) as against him (his copartner) create a new obligation, nor revive an old one barred by the statute of limitations." Darling v. March, 22 Me. 184; Bank of Montreal v. Page, 98 Ill. 110; Parsons on Partnership, 390; 1 Parsons on Notes and Bills, 144.

36. Morrison v. Perry, 11 Hun, 33; Bank of Montreal v. Page, 98 Ill. 110; Lansing v. Gaine, 2 Johns. 300; Hackley v. Patrick, 3 Johns. 537; Sanford v. Mickles, 4 Johns. 224; Walden v. Sherburne, 15 Johns. 409; National Bank v. Norton, 1 Hill, 572; Mitchell v. Ostrom, 2 Hill, 520; Lusk v. Smith, 8 Barb. 570; Van Keuren v. Parmelee, 2 N. Y. 525; Haddock v. Crocheron, 33 Tex. 276; Floyd v. Miller, 61 Ind. 225; Curry v. White, 51 Cal. 530; Lockwood v. Comstock, 4 McLean, 383; Perrin v. Keene, 19 Me. 355; Hamilton v. Seaman, 1 Ind. 185; Bank of Port Gibson v. Baugh, 9 Smedes & M. 290; Tombeckbee Bank v. Dumell, 5 Mason, 56; Whitman v. Leonard, 3 Pick. 177; F. & M. Bank v. Kercheval, 2 Mich. 506; Smith v. Sheldon, 35 Mich. 42; Kilgour v. Finlayson, 1 H. Bl. 155; Wrightson v. Pullan, 1 Stark. 375; Dolman v. Orchard, 2 Car. & P. 104; Lindley on Partnership, *408; 1 Parsons on Notes and Bills, 145; Chitty on Bills (13th Am. ed.) [*51, 52], 65, 66; Thompson on Bills, 170; Byles on Bills (Sharswood's ed.) [*50], 134; Edwards on Bills, 111, 113; Bayley on Bills (2d Am. ed.) 58. *Contra*, see Robinson v. Taylor, 4 Barr. 242.

37. Gale v. Miller, 54 N. Y. 536; Dodd v. Bishop, 30 La. Ann. 1180.

and as the ex-partner cannot draw a bill or note for a firm debt, neither can he renew a bill or note of the firm given for their debt.[38] In New York it has been held that even where a creditor is ignorant of the dissolution, a note given in the firm name by an ex-partner, who had purchased the other's interest, would not bind the firm, the existing indebtedness of the firm still remaining good.[39] But this view is against the accepted principles and precedents of the subject.

§ 370a. **Indorsement by ex-partner when dissolution is not caused by death.**—When the dissolution has not been effected by the death of one or more of the partners, one ex-partner has no implied authority to indorse bills and notes given to the firm before dissolution, in its name.[40] For, as said by Lord Kenyon, "The moment the partnership ceases, the partners become distinct persons; they are tenants in common of the partnership property undisposed of from that period; and if they send any securities which did not belong to the partnership into the world after such dissolution, all must join in doing so." [41] And "I even doubt much," said he, in the same case, "if an indorsement was actually made on a bill or note before dissolution, but the bill or note was not sent into the world until afterward, that such indorsement would be valid." [42]

Power given to one copartner by another to sell a note that was payable to the firm before dissolution, would authorize him by implication to indorse it "without recourse" in the firm name; and the ex-partners can, if they choose, renew the agency of each partner, or satisfy an account due by one for the firm in its name.[43]

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38. Parker v. Cousins, 2 Gratt. 373; Long v. Story, 10 Mo. 636; Stone v. Chamberlain, 20 Ga. 259; Martin v. Kirk, 2 Humphr. 529; National Bank v. Norton, 1 Hill, 572; Palmer v. Dodge, 4 Ohio St. 21; Wilson v. Forder, 20 Ohio St. 89; Moore v. Lackman, 52 Mo. 323; Edwards on Bills, 117, 118. See *post*, § 373. Meyron v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. Rep. 806, *contra*.

39. Morrison v. Perry, 11 Hun, 33.

40. Edwards on Bills, 118; Chitty on Bills (13th Am. ed.) [*52], 66; Byles on Bills (Sharswood's ed.) [*52], 136.

41. Abel v. Sutton, 3 Esp. 109 (1800); Chitty, Jr., 619; Sanford v. Mickles, 4 Johns. 224; Lumberman's Bank v. Pratt, 51 Me. 563; Parker v. Macomber, 18 Pick. 505; Fellows v. Wyman, 33 N. H. 351; Humphreys v. Castain, 5 Ga. 166; White v. Tudor, 24 Tex. 639; Bogerau v. Gueringer, 14 La. Ann. 478; Edwards on Bills, 120; Story on Notes (Thorndike's ed.), § 129, and note. The case of Lewis v. Reilley, 1 Q. B. 349, has been criticised and disapproved but it does not necessarily involve a contradiction of the principle stated in the text.

42. See *post*, §§ 371, 372; Abel v. Sutton, 3 Esp. 10.

43. Murray v. Ayer, 16 R. I. 666, 19 Atl. 241.

§ 370b. Indorsement by surviving partner after dissolution caused by death.—But where the dissolution is by the death of one of the partners the survivor may indorse a note, payable to the firm in his own name.[44] The reason of the distinction between the authority of a partner after dissolution while his copartner is living, and the authority of the survivor when dissolution has been caused by death, is that in the former case the implied authority for one partner to act is all gone; whereas in the latter case the bill or note vests exclusively in the survivor, although he must account therefor as part of the partnership assets.[45] And for the like reason the surviving partner may draw a check on partnership funds to pay a firm debt.[46]

§ 371. Notes issued after dissolution by ex-partner.—Where a note is issued by a partner after dissolution, it will not bind the other partners, even though given for a debt due by the firm; [47] and even though it is antedated so as to appear of a date anterior to the

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44. Johnson v. Berlizheimer, 84 Ill. 54; Jones v. Thorn, 2 Mart. (N. S.) 463. A surviving partner has authority to transfer a partnership note; there being no debts and no administrator. Milbank-Scampton Milling Co. v. Packwood, 154 Mo. App. 204, 133 S. W. 667, the court holding further that the fact that the administrator also joined in the assignment although authorized, did not render the act of the surviving partner nugatory.

45. Story on Notes (7th ed. by Thorndike), § 125; Crawshay v. Collins, 15 Ves. 218, 226. A surviving partner has no right to create or contract new debts binding upon the partnership, except to the extent of purchasing new material and making new debts so far as may be necessary to work up unfinished material and sell the same. Howell v. Manufacturing Co., 116 N. C. 807, 22 S. E. 5.

46. Commercial Nat. Bank v. Proctor, 98 Ill. 558.

47. Whitman v. Leonard, 3 Pick. 177; Bank of South Carolina v. Humphreys, 1 McCord, 388; Haddock v. Crocheron, 23 Tex. 276; Woodson v. Wood, 84 Va. 483, citing the text; Second Nat. Bank v. Weston, 31 App. Div. 403, 52 N. Y. Supp. 315; Bank of Monroe v. E. C. Drew Inv. Co., 126 La. 1028, 53 So. 129. But see Chicago Trust & Savings Bank v. Kinnare, 174 Ill. 358, 51 N. E. 607. If a creditor of a partnership, after a dissolution thereof, with notice of such dissolution, takes from one partner, without the direction or consent of the other, a promissory note in renewal and extension of a pre-existing debt of the partnership, the partner not so consenting is discharged from liability on the debt. Minis v. Brook & Co., 3 Ga. App. 247, 59 S. E. 711. In Moon Bros. Carriage Co. v. Devenish, 42 Wash. 415, 85 Pac. 17, which was an action brought to recover on account for goods sold and delivered and not upon the note, it was held that where a creditor of a firm, after dissolution, accepts from one of the partners of a note not as a payment or discharge of the original indebtedness but merely as evidence of the indebtedness and of the agreement to extend the time of its payment, the other partners are not discharged from liability.

dissolution,[48] and though it be in the hands of a *bona fide* holder without notice, unless, indeed, he were not chargeable with constructive notice of the dissolution, in which case it would be different.[49]

§ 371a. Instruments signed in firm name before dissolution, and

48. Wrightman v. Pullan, 1 Stark. 375; Bayley on Bills (2d Am. ed.), 59. In Lansing v. Gaine & Ten Eyck, 2 Johns. 300, it appeared that L. and T. were sued on notes which T. delivered to the payees for a private debt after notice of dissolution had been given in the public press; and had been antedated by T. so as to have the appearance of having been executed when the firm was extant; and the plaintiff sued as indorsee after maturity for another's use. Kent, Ch. J., said: "The notes upon which this suit is brought were delivered by Ten Eyck to the payees, some time after notice had been given in the newspapers of the dissolution of the partnership of Gaine and Ten Eyck. The date of the notes then becomes immaterial, as they were valid only from the time of their delivery; and unless the contrary be shown, the presumption will be that they were then actually drawn, and were antedated by mistake or design. If they had been previously drawn, they had no force while in the possession and under the control of the maker. To all legal purposes the notes are to be considered as made or drawn when they were delivered. This was so ruled by Lord Kenyon, in the case of Abel v. Sutton, 3 Esp. Cas. 108, in which he held that if a fair bill existed at the time of the partnership, and was not put into circulation until after the dissolution, all the partners must join in putting it into circulation, otherwise they were not holden. Notice in the newspapers of the dissolution of a partnership is sufficient notice to all persons who have had no previous dealings with the firm; and there is no evidence in the present case that the payees ever had any such previous dealings. This rule has received repeated sanction in the English courts (Peake N. P. 42, 154; 1 Esp. Cas. 371, 3 Esp. 108, 248), and is reasonable and just. Without the protection of such a rule, one partner never could retire with safety from the concerns of partnership. Instead of being the means of enterprise and profit, a mercantile connection of this nature would prove a source of never-ceasing anxiety, and become oppressive and ruinous. The fact, then, that the notes were issued by Ten Eyck, after the partnership was dissolved, is sufficient to exempt Gaine from being bound by the notes, even if they had been given for a partnership concern. The power of one partner to bind the other ceases with the existence of the partnership. This is a proposition clear and undeniable, and it places the defense set up by Gaine upon sure and tenable ground. It would be as unjust as it is illegal to charge the defendant, Gaine; for the notes were not only given subsequent to the dissolution of the partnership, but the evidence in the case shows that they were given for the private debt of Ten Eyck." * * * "If the notes while in the hands of the payees did not bind Gaine, they are equally inoperative in the hands of the plaintiff. They were negotiated to him after they had been dishonored, and he took them, subject to all the equity that existed against them in the hands of the original payees." Knaus v. Givens, 110 Mo. 58, 19 S. W. 535, text cited.

49. Bristol v. Sprague, 8 Wend. 423; Charles v. Remick, 156 Ill. 327, 40 N. E. 970.

issued by ex-partner afterward.—As a note takes effect by delivery, it has been held that a note signed in the partnership name before the dissolution, and delivered to the payee after the dissolution, without the consent of other members of the firm, would not bind them.[50] And in like manner, if the paper was indorsed before dissolution of the firm, and not put into circulation until afterward unless all the partners unite in doing so, they would not, according to high authorities, be bound by it.[51]

In a New York case it appeared that a check was signed in the firm's name by a partner before dissolution, and issued by him for his private debt after dissolution. The acceptance of the check for an individual debt of the late partner vitiated the holder's title; but the court said their signing the paper gave no vitality to it until it was transferred, and that "the inquiry will necessarily be whether there was authority in the party issuing it, at the time it was actually issued." [52]

§ 372. English doctrines.—In an English case, where one partner drew a bill in the partnership name, leaving the amount and date blank, and then indorsed it in blank in the partnership name, to be afterward negotiated by the clerk of the firm: the partner who drew the bill afterward died, and the survivors formed a new firm, but the clerk filled up the blanks in the bill drawn by the deceased partner and negotiated it. And the surviving partners were held bound, although no part of the value came to their hands.[53] In another case, A. and B. were sued by an indorsee on a bill drawn by them payable to their own order and indorsed by them. B. pleaded that A. had indorsed the bill to the plaintiff after dissolution of the firm, and that defendant knew of the dissolution at the time of the dissolution. The plea

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50. Woodford v. Dorwin, 3 Vt. 82.

51. Abel v. Sutton, 3 Esp. 108, Lord Kenyon, *dubitante*; Glasscock v. Smith, 25 Ala. 474. See Collyer on Partnership, § 544; 1 Parsons on Notes and Bills, 146; Iron Works v. Paddock, 37 Kan. 512, citing the text.

52. Gale v. Miller, 54 N. Y. 536, distinguishing Smith v. Lusher, 5 Cow. 688, and Sherwood v. Barton, 23 How. 533; Hayward v. Burke, 151 Ill. 121, 37 N. E. 846; Buchanan v. Savings Institution, 84 Md. 430, 35 Atl. 1099. It was held in this case that "when a promissory note is drawn by a partnership payable to one of the partners and is by him indorsed for his own debt to a third person, who takes the same *bona fide* before maturity, such indorsee has all the rights of a creditor against the firm, and upon its insolvency is entitled to share equally with partnership creditors in the distribution of the assets."

53. Usher v. Dauncey, 4 Campb. 97. Lord Ellenborough said that this case came within the principle of Russell v. Langstaff, 2 Doug. 513; Buchanan v. Savings Institution, 84 Md. 430, 35 Atl. 1099.

was held bad for not showing that plaintiff had colluded with A. or was privy to the fraud. Lord Denman said: "It is, perhaps, doing no violence to language, to say that the partnership could not be dissolved as to this bill, so as to prevent it from being indorsed by either defendant in the name of the firm." [54]

§ 372a. **Rights of bona fide holder of note delivered after dissolution.**—The decisions in the particular cases above quoted seem to rest on sound principles and to be in consonance with the doctrines of the law merchant respecting negotiable instruments. But still there may be cases difficult to determine. Suppose that A. and B. are partners, and while the firm is extant A., without the knowledge of B., signs and perfects a note in the firm name, and after dissolution, and when his authority has ceased to bind the firm, issues it for a private debt, and before maturity it reaches the hands of a *bona fide* holder for value. In such case is the firm bound? It would seem that the determination of the question should depend upon the inquiry, would the firm be bound if the note had been signed and perfected at the time it was issued; and if then the *bona fide* transferee were chargeable with actual or constructive notice of the dissolution, his title would seem to us defective. The note would stand upon the same footing as one that had been antedated, so as to relate back to the time when the signer had authority to bind the firm, in which event it would clearly be invalid as a firm note.[55] The mere fact that it was perfected in form while the partner had authority to bind his associates ought not, as it seems, to render it valid when that authority remained unexercised until its expiration, and when the nonconsenting partners were ignorant of the existence of such an instrument and could not, therefore, restrain its negotiation. And at the time when it acquired apparent vitality by being put in circulation, authority to give it vitality had ceased. It may be a hard case in any event, but this solution of it seems to be the most equitable and just, and the best calculated to prevent frauds; and it is not distinguishable in substance from those in which agents antedate their transactions to give them a fictitious appearance of validity.[56]

In Massachusetts it has been held that where the individual note

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54. Lewis v. Reilly, 1 Q. B. 349.

55. See *ante*, § 371, and Lansing v. Gaine, 2 Johns. 300; Knaus v. Givens, 110 Mo. 58, 19 S. W. 535, citing text.

56. See Chitty on Bills (13th Am. ed.) [*56], 71, where a different view is intimated.

of a partner, made after dissolution, was transferred by the holder to the firm by an indorsement in blank, in payment of a debt, such note being payable to bearer, might be legally transferred to a third person by another partner who was authorized to settle the partnership concerns.[57]

In the case of a renewal note, increasing the rate of interest upon the original, made after dissolution, it does not discharge the partnership liability upon the original, and the amount of the original, with the aggregate of interest thereon, may be received (there being nothing objectionable as to the shape of the pleadings).[58]

§ **373. When ex-partner may bind firm.**—If authorized verbally, or in writing, one ex-partner may bind the firm after dissolution as party to a bill or note, but authority to settle or close up the business of the firm does not imply authority to one partner after dissolution to give a note in the name of the firm for the firm debt, or to renew one given before the dissolution.[59] Nor will authority to give or renew a note be implied by authority "to settle business of the firm, and sign its name for that purpose;"[60] "to use the name of the firm in liquidation only of past business;"[61] "to settle all demands in favor of or against the firm;"[62] "to wind up the business,"[63] or by the use of any similar expression; for such things may be done by each partner without any express contract.

In England, however, authority to use the partnership name was considered in one case sufficient to leave it for a jury to say whether, according to usage and custom, it would authorize a renewal in the firm's name.[64] In Pennsylvania, it is held that after dissolution of the firm one partner has free authority to borrow,[65] and to execute or re-

57. Parker v. Macomber, 18 Pick. 505.

58. Wilson v. Forder, 20 Ohio St. 89.

59. White v. Tudor, 24 Tex. 641; Haddock v. Crocheron, 32 Tex. 276; Myatt v. Bell, 41 Ala. 222; Palmer v. Dodge, 4 Ohio St. 21; Martin v. Walton, 1 McCord, 16; Parker v. Macomber, 18 Pick. 505; Long v. Story, 10 Mo. 636; Parker v. Cousins, 2 Gratt. 372; Kilgour v. Finlayson, 1 H. Bl. 155; Edwards on Bills, 118; Woodson v. Wood, 84 Va. 482, citing the text. Meyron v. Abel, 189 Pa. St. 215, 42 Atl. 122, 69 Am. St. Rep. 806, *contra*.

60. National Bank v. Norton, 1 Hill (N. Y.), 572; Hamilton v. Seaman, 1 Ind. 185.

61. Martin v. Kirk, 2 Humphr. 529.

62. Lockwood v. Comstock, 4 McLean, 383.

63. Bank of Montreal v. Page, 98 Ill. 121.

64. Meyers v. Huggins, 1 Strobh. 473.

65. Davis v. Desauque, 5 Whart. 530.

new bills and notes in settlement of the past business of the firm.[66] And in that State it was also held in a suit by the indorsee of a note, executed by one of two partners in the firm's name, after dissolution, he could recover against the firm, notice of the dissolution being proved as against the payee, but not as against the indorsee.[67]

§ **374. Statute of limitations.**—By some authorities it is maintained that where the statute of limitations has run against a partnership debt, one partner's promise or acknowledgment, though made after dissolution, will revive it,[68] while others take the contrary view.[69] This seems to us correct, for, as said by the United States Supreme Court, "when the statute has once run against a debt the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action."[70] Nor will a part payment by one partner made after dissolution revive the debt to which the statute has applied as against others for the same reasons.[71] But the English doctrine is otherwise.[72]

It has been held in Massachusetts than an acknowledgment signed in the partnership name, made by one partner after dissolution, of a balance due in a course of dealing proved by other evidence, is admissible against the other party in a suit against both, especially where the partner who made the acknowledgment was authorized to settle the business of the firm.[73]

§ **375. Notice of dissolution.**—Notwithstanding the dissolution

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66. Brown v. Clark, 14 Pa. St. 469; Robinson v. Taylor, 4 Pa. St. 242; Siegfried v. Ludwig, 102 Pa. St. 549.

67. Albeitz v. Mellon, 37 Pa. St. 369.

68. McIntire v. Oliver, 2 Hawks, 209.

69. Van Keuren v. Parmelee, 2 N. Y. 523; Levy v. Cadet, 17 Serg. & R. 126; Belote v. Wynne, 7 Yerg. 534; Bender v. Blessing, 82 Hun, 320, 31 N. Y. Supp. 481.

70. Bell v. Morrison, 1 Pet. 351.

71. Exeter Bank v. Sullivan, 6 N. H. 124; Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501; Terry v. Platt, 1 Pennewill, 185, 40 Atl. 243. Nor will partial payment of a promissory note by the principal debtor suspend the statute of limitations as to the surety. See Mozingo v. Ross, 150 Ind. 688, 50 N. E. 867, 65 Am. St. Rep. 387. And accordingly, a partial payment made by the principal, without the knowledge of the surety, will not operate to keep the note alive as to the surety. See Meitzler v. Todd, 12 Ind. App. 381, 39 N. E. 1046, 54 Am. St. Rep. 531.

72. Whitcomb v. Whiting, Doug. 652.

73. Ide v. Ingraham, 5 Gray, 106.

of the firm by agreement between the members, the use of the firm's name by one partner will bind all, unless due notice of the dissolution were given so as to affect the holder of the paper with its infirmities.[74] And when, after the dissolution of a firm, new notes are given by one of the partners in the firm name, either in settlement of a firm debt or in renewal of a firm obligation, the evidence should be clear and satisfactory of the notice of such dissolution to the creditor accepting such note, to discharge the other partner.[75] This question in its various bearings has been already considered.[76]

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74. Lansing v. Gaine, 2 Johns. 300; Bristol v. Sprague, 8 Wend. 423; Cony v. Wheelock, 33 Me. 366; Whitman v. Leonard, 3 Pick. 177; Booth v. Quin, 7 Price, 193; Ulrich v. McCormick, 66 Ind. 246; Doversy v. Kellogg, 44 Ill. 114; Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283.

75. Burson v. Stone & Co., 135 Ga. 115, 68 S. E. 1038; Bank of Covington v. Cannon, 133 Ga. 779, 67 S. E. 83.

76. §§ 369*a*, 370 *et seq.*

CHAPTER XIII

PRIVATE CORPORATIONS AS PARTIES TO NEGOTIABLE INSTRUMENTS

§ **376.** The first inquiry to be made in respect to an instrument purporting to be that of a corporation, is: "Has the corporation in question a legal right to bind itself in such a form?" That question being determined affirmatively, the party negotiating for the instrument should then ascertain—*First.* Whether or not the officer or agent who has signed on behalf of the corporation is competent in law to bind it. *Second.* Whether the individuals signing as officers or agents of the corporation are in fact such. *Third.* Whether or not they were authorized, expressly or impliedly, by the corporation to sign the instrument in its behalf. *Fourth.* Whether the signatures are genuine. *Fifth.* Whether or not the instrument is to be interpreted as a corporate or individual obligation. These inquiries we shall endeavor to answer under three general heads: I. Authority of the corporation to execute the instrument. II. Authority of the agent, in law and in fact, to bind the corporation. III. Interpretation of the instrument.

SECTION I

AUTHORITY OF THE CORPORATION TO EXECUTE THE INSTRUMENT

§ **377.** It is obvious that the inquiry as to the power of the corporation to execute the instrument is of the first importance, for if it exceed its powers, its act is as much a nullity as the act of a married woman or a lunatic; and however ignorantly or innocently the party dealing with it may have been, he cannot enforce his contract made with it.

It is considered as an act "*ultra vires*," that is, "beyond the powers" of the corporation, and, therefore, without legal sanction or vitality. And being a mere nullity, circulation from hand to hand, and ownership by a *bona fide* holder, can impart no vitality to it; and as against the corporation he can stand on no better footing than his predeces-

sors.[1] Nor is this rule so harsh as it might seem. Ignorance of the law excuses no one, and a corporation being a legal creation, all persons dealing with it are chargeable with notice of its legal character.[2]

§ 378. Definition of corporation.—Chief Justice Marshall has well defined a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the object for which it is created." [3] In endeavoring, then, to ascertain whether or not a corporation has authority to do a certain act, we should see, *first*, whether any express power is conferred, and, *second*, if none such be found, whether such power is implied as an

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1. School Directors v. Fogleman, 76 Ill. 189; Pearce v. Madison, etc., R. Co., 21 How. 441; Macgregor v. Dover, etc., R. Co., 18 Q. B. 618; Earl of Shrewsbury v. North Staffordshire R. Co., L. R., 1 Eq. 593. And the defense of *ultra vires* cannot be invoked in order to justify a breach of trust. Anderson v. First Nat. Bank, 5 N. Dak. 451, 67 N. W. 821. But compare Court of Appeals of New York, in the case of Seymour v. Cemetery Assn., 144 N. Y. 333, 39 N. E. 365: "That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this State." Village of Fort Edward v. Fish, 156 N. Y. 363, 50 N. E. 973; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302; First Nat. Bank of Gadsden v. Winchester, 119 Ala. 168, 24 So. 351, 72 Am. St. Rep. 904; Mt. Vernon Bank v. Porter, 52 Mo. App. 244.

2. In Broughton v. Manchester & S. Water Works Co., 3 B. & Ald. 1, where it appeared that an act of Parliament prohibited corporations, other than the Bank of England, from accepting bills payable at a less period than six months from date; and the acceptance in suit came within the prohibition, Holroyd, J., said: "Here the defendants are made a corporation by a public act of Parliament, and every person is bound to take notice of that act; and when therefore, a holder of a bill, though a *bona fide* indorsee, takes the defendant's acceptance, he must know that they are a body corporate; and he, therefore, receives it, knowing it to be the acceptance of a corporation prohibited from owing money on such a bill; he is not, therefore, an innocent indorsee, because he takes a bill which he knows is prohibited by statute." But it has been held that a note executed by a municipal corporation for a *bona fide* debt, though without authority to execute same, is binding upon the corporation, where the claim covered by the note has been approved by the city council. La France Fire Engine Co. v. Town of Mt. Vernon, 11 Wash. 203, 39 Pac. 367; People's Bank v. School District, 3 N. Dak. 496, 57 N. W. 787; Erskine v. Steele County, 4 N. Dak. 339, 60 N. W. 1050; Franklin Nat. Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 63 Am. St. Rep. 302.

3. Dartmouth College v. Woodward, 4 Wheat. 636.

incident of its nature. And in the latter inquiry, the character of the corporation is obviously the controlling element to be considered.

§ 379. **Public and private corporations.**—Corporations are either private or public—public when "the whole interests and franchises are the exclusive property and domain of the government itself;" [4] otherwise private. Public corporations are established exclusively for public purposes, and comprise cities, towns, villages, counties, townships, parishes, and all other corporations erected by the government as governmental agencies. Private corporations comprise banks, building associations, railroad companies, and all other associations formed for manufacturing, trading, or other objects of private gain, emolument, gratification, or benefit.[5]

§ 380. **Of the authority of private corporations to issue negotiable instruments** we shall first speak, and then of the authority of public corporations. It is quite easy to determine whether or not there is express power *in totidem verbis* to issue the particular instrument by consulting the terms of the corporate charter. If not expressed, then the inquiry arises, is the power implied in some power conferred, or from the general character of the institution? [6] The English decisions on this subject seem to us more consistent with principle than those in the United States.

There it has been held that trading and banking corporations might draw or accept bills without express authority to do so, because such acts are necessary to the very objects of their existence. But that a corporation chartered to supply a city with water could not do so, for, as said by Bayley, J., "It cannot be necessary for this purpose that they should become the makers of promissory notes, or the acceptors of bills of exchange." [7] And certainly it does not seem "incidental to its very existence" (to quote Chief Justice Marshall's definition) that a water supply corporation should execute a negotiable instrument, as its corporators might be expected to operate with a cash capital, unless the power were conferred to operate upon credit.

4. Dartmouth College v. Woodward, 4 Wheat. 636.

5. See Dillon on Municipal Corporations (2d ed.), vol. I, § 30, and cases cited.

6. Broughton v. Manchester & S. Water Works, 3 B. & Ald. 1, Best, J., saying that when "a company like the Bank of England, or the East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated that they should have power to accept bills or issue promissory notes."

7. Broughton v. Manchester & S. Water Works, 3 B. & Ald. 1.

Likewise, it has been held that a railroad company cannot, without express authority, bind itself by accepting a bill of exchange.[8]

§ 381. General tenor of American decisions as to validity of corporate negotiable securities.—*In the United States* the cases go to great lengths in upholding the validity of corporate negotiable instruments. "In this country it may be regarded as settled," says Professor Parsons,[9] "that the power of corporations to become parties to bills of exchange, or promissory notes, is coextensive with their power to contract debts. Whenever a corporation is authorized to contract a debt, it may draw a bill or give a note in payment of it. Every corporation, therefore, may become a party to bills or notes for some purposes. Thus a mere religious corporation may need fuel for its rooms, and as an economical measure may buy a cargo of coal, and give its note for it; and such a note would undoubtedly be valid in this country." And instancing how far a corporation may go, he adds: "If, for example, the trustees of Columbia College, in New York, bought a cargo of cotton, and gave their negotiable note for twenty thousand dollars, the seller might suppose that they had need of some means of transmitting a large amount of money, and found that they could do it to most advantage by using this cotton; or that they wanted it for some other legitimate purpose. Such a note would clearly be valid in the hands of a *bona fide* holder without notice; nor do we think that the nature of the transaction merely would be notice to the original payee that it was given for an unauthorized purpose." But it might be said with propriety, that so singular a spectacle as the trustees of a literary institution buying cotton, would more naturally lead the party dealing with them to suspect that they were speculating with their trust funds, and that such party would, by the very nature of the act, be apprised of their defective authority.

§ 382. Prevailing doctrines in United States.—In this country

8. Bateman v. Mid-Wales R. Co. L. R., 1 C. P. 499. Compare Peruvian R. Co. v. Thames & Mersey M. Ins. Co., L. R., 2 Ch. 617, and Green's Brice's *Ultra Vires*, 255. But see § 383.

9. 1 Parsons on Notes and Bills, 164, 165. Approved in Cattron v. First Universalist Society, 46 Iowa, 108. See also Field on Corporations, 306; Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634, 37 Pac. 530; Grommes v. Sullivan, 26 C. C. A. 320, 81 Fed. 45, citing text. A trading corporation has implied power to purchase and indorse bills and notes, in the absence of anything in its articles of incorporation prohibiting it. Jamieson & McFarland v. Heim, 43 Wash. 153, 86 Pac. 165; Mapes v. German Bank of Tilden, 176 Fed. 89.

three propositions respecting private corporations may be regarded as settled. *First.* That it has implied power to contract debts like an individual whenever necessary or convenient in furtherance of its legitimate objects.[10] *Second.* That whenever it may contract a debt, it may borrow money to pay it.[11] And, *Third.* That whenever it contracts a debt for materials, services, or otherwise, in the scope of its business, or borrows money, it may execute a negotiable bill, note,[12]

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10. Fay v. Noble, 12 Cush. 1; McMasters v. Reed, 1 Grant's Cas. 36; Moss v. Averill, 10 N. Y. 449; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280; Commercial Bank v. Newport, 1 B. Mon. 13; National Bank of the Republic v. Young (N. J.), 5 Cent. 115, citing the text. See also cases cited in succeeding notes. In Connecticut it has been held that a benevolent association organized to provide for its members in sickness, etc., and as such liable to be sued, might be held upon a bill of exchange given in compromise of a debt. Court Harmony v. Court Lincoln, 70 Conn. 634.

11. Alton Mfg. Co. v. Garrett Biblical Inst., 243 Ill. 298, 90 N. E. 704; Mead v. Keeler, 24 Barb. 20; Beers v. Phœnix Glass Co., 14 Barb. 358 (1852); Partridge v. Badger, 25 Barb. 146 (1857); Fay v. Noble, 12 Cush. 1; Stratton v. Allen, 16 N. J. Eq. 229. A note may be given by a corporation in consideration of a valid, subsisting indebtedness evidenced by a former note. Joseph Wolf Co. v. Bank of Commerce, 107 Ill. App. 58. A note given by a corporation for money loaned to it by a stockholder with which to settle an offer of composition with its creditors, was given for a good consideration and is provable as a claim. *In re* C. H. Bennett Shoe Co., 162 Fed. 691. Where a note was given for money advanced to the corporation and disbursed by the company in payment of its debts, the fact that the need of the corporation for the money was brought about by reason of mismanagement, dishonest acts, or conspiracy, affords no defense to the corporation or to the minority stockholders in an action on the note. Randall v. Fox (Ariz.), 108 Pac. 249 (1910).

12. Mott v. Hicks, 1 Cow. 513; Safford v. Wyckoff, 4 Hill, 442; Moss v. Oakley, 2 Hill, 265; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 289; Mead v. Keeler, 24 Barb. 20; Barber v. Mechanics' Ins. Co., 3 Wend. 96; Barnes v. Ontario Bank, 19 N. Y. 152; Leavitt v. Blatchford, 17 N. Y. 521; Curtis v. Leavitt, 15 N. Y. 66; Partridge v. Badger, 25 Barb. 146; Moss v. Averill, 10 N. Y. 449; Attorney-General v. Life & Fire Ins. Co., 9 Paige, 470; Hamilton v. Newcastle R. Co., 9 Ind. 359; Hardy v. Merriman, 14 Ind. 203; McMasters v. Reed, 1 Grant's Cas. 36; Smith v. Eureka Flour Mills, 6 Cal. 1; Crane v. Brigham, 39 Me. 35; Clark v. School District, 3 R. I. 199; Lucas v. Pitney, 3 Dutch. 221; Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13; Buckley v. Briggs, 30 Mo. 452. In a Massachusetts case it was held, that there is nothing in the nature of the business to be done by co-operative banks, or in the express provisions of the statutes, which indicates that their treasurers can create liabilities on the part of such corporations by their signatures to commercial paper, or by their indorsement or acceptance of such paper, the court saying: "Such banks are subject to the supervision of the savings bank commissioners, and in their organization and general features are closely allied to saving banks." Atwood v. Dumas, 149 Mass. 167–169, 21 N. E. 236. "They are not authorized to do a general banking business, and their rights and

or bond,[13] and secure it by mortgage, to the creditor in payment. The doctrine on this subject was well stated in a New York case, where Vice Chancellor Sandford said: "A corporation, in order to attain its legitimate objects, may deal precisely as an individual may who seeks to accomplish the same ends. If chartered for the purpose of building a bridge, it may contract a debt for labor, the materials, or the land upon which the bridge is abutted. If more advantageous, it may borrow money to purchase such land or materials, or to pay for such labor; and as the evidence of the indebtedness, it may execute to the creditors a note, a bond or a mortgage, whether the debt be for the money borrowed, or the work, material, or lands." [14] And in a more recent case it was said that "the right of corporations in general to give a note, bond, or other engagement to pay a debt is so nearly identical or so inseparably connected with the right to contract the debt, that no doubt upon the question ought to be admitted. When a corporation can lawfully purchase property, or procure money on loan in the course of its business, the seller or the lender may exact, and the purchaser or borrower must have, the power to give any known assurance which does not fall within the prohibition, express or implied, of some statute. The particular restriction must be sought for in the charter of the corporation, or in some other statute binding upon it; but if not found in that examination, we may safely affirm that it has no existence." [15]

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powers are strictly limited for the protection and benefit of their members." Jewett v. West Somerville Co-Operative Bank, 173 Mass. 54, 52 N. E. 1085, 73 Am. St. Rep. 259. Where a corporation has taken over an established business, it may be assumed that it has assumed the debts of such business, and may make a corporate note evidencing such indebtedness. Curtis, Jones & Co. v. Smelter Nat. Bank, 43 Colo. 391, 96 Pac. 172. The president of a corporation may loan money to the corporation and in good faith take its note therefor, and at a judicial sale of the company's property, may purchase it for his own benefit. Law v. Fuller, 217 Pa. St. 439, 66 Atl. 754; See also Gumaer v. Cripple Creek Tunnel, etc., Co., 40 Colo. 1, 90 Pac. 81, 122 Am. St. Rep. 1024; Black v. Ray, 110 Ky. 705, 62 S. W. 531. From the fact that a corporation had no power to conduct its corporate business in another state, it does not follow that it had no power to make acceptances of drafts for business done in such other state. Lake Charles Nat. Bank v. J. I. Campbell Co. (Tex. Civ. App.), 122 S. W. 601.

13. Smith v. Law, 21 N. Y. 296; Curtis v. Leavitt, 15 N. Y. 66; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280; Commonwealth v. Pittsburg, 41 Pa. St. 278; Railroad Co. v. Evansville, 15 Ind. 395; White Water Valley Canal Co. v. Vallette *et al.*, 21 How. 414; Hunt v. Memphis Gas Light Co., 95 Tenn. 136, 31 S. W. 1006.

14. Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280.

15. Comstock, J., in Curtis v. Leavitt, 15 N. Y. 66; Savannah & Memphis R.

§ **383. Illustrations.**—Applying these principles in particular cases, the courts have upheld the right to contract debts, and to borrow money to pay them, where the company was chartered to build a railroad; [16] to build a plankroad; [17] to hold real estate, and to erect buildings for a public exchange; [18] to build and hold property for religious purposes; [19] to operate a flouring mill; [20] and where a railroad was empowered to contract with a connecting road for its use, it was held that it might accept bills drawn by the connecting road, as a consideration for a change of gauge.[21] So where a mining company was authorized to borrow money; [22] so trustees of a society to build a monument, it has been held, may make a promissory note; [23] so may corporations empowered to buy and sell lands or goods; [24] so may one authorized to advance money upon goods, accept bills in anticipation of consignments; [25] so may one engaged in the manufacture of glass execute its bills or notes for wood to be used, or other

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Co. v. Lancaster, 62 Ala. 555. See also Mott v. Hicks, 1 Cow. 513; Barber v. Mechanics' Ins. Co., 3 Wend. 96; Jackson v. Brown, 5 Wend. 596; Moss v. Oakley, 2 Hill, 265; Attorney-General v. Life & Fire Ins. Co., 9 Paige, 470; Safford v. Wyckoff, 4 Hill, 442; Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280; Mead v. Keeler, 24 Barb. 20; Hamilton v. Newcastle, etc., R. Co., 9 Ind. 359; Hardy v. Merriman, 14 Ind. 203; Smith v. Eureka Flour Mills, 6 Cal. 1; Buckley v. Briggs, 30 Mo. 452; Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13; McMasters v. Reed, 1 Grant's Cas. 36; Carne v. Brigham, 39 Me. 35.

16. Richmond, etc., R. Co. v. Sneed, 19 Gratt. 354; Railroad Co. v. Howard, 7 Wall. 412; Hamilton v. Newcastle R. Co., 9 Ind. 349; Olcott v. Tioga R. Co., 40 Barb. 179, 27 N. Y. 546; Lucas v. Pitney, 3 Dutch. (27 N. J. L.) 221. As to powers of railroads to bind themselves by notes and bills, see Green's Brice's *Ultra Vires*, 211, 223, 229, 252, 253. Unless restrained by statute, a railroad company in the United States "may bind itself by promissory notes, bills of exchange, and negotiable bonds." Pierce on Railroads, 503, and cases cited; Morawetz on Private Corporations, § 178; Temple St. Cable Ry. Co. v. Hellman, 103 Cal. 634, 37 Pac. 530.

17. Smith v. Law, 21 N. Y. 296.

18. Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280.

19. Davis v. Proprietors' Meeting House, 8 Metc. (Mass.) 321.

20. Smith v. Eureka Flour Mills Co., 6 Cal. 1.

21. Smead v. Indianapolis R. Co., 11 Ind. 104.

22. Mahoney Mining Co. v. Banks, 104 U. S. 192.

23. Hayward v. Pilgrim Society, 21 Pick. 270.

24. Clark v. Farmers' Woolen Mfg. Co., 15 Wend. 256; Commercial Bank v. Newport Mfg. Co., 1 B. Mon. 13; Fay v. Noble, 12 Cush. 1; Ketchum v. City of Buffalo, 14 N. Y. 356; Edward Knapp & Co. v. Tidewater Coal Co. (Conn.), 81 Atl. 1063 (as to a corporation engaged in coal business).

25. Munn v. Commission Co., 15 Johns. 44.

materials;[26] so may a building and loan association borrow money and execute its notes in payment.[27] But it has been held that a hotel company is not a trading or manufacturing corporation, and it is not within the apparent scope of the authority of the secretary of such a corporation to execute a promissory note whether for accommodation or otherwise.[28]

§ 384. Power to take bills and notes and loan funds.—Ordinarily a corporation has implied power to take a bill or note for a debt due it, and what it may receive it may transfer.[29] But, as a general rule, there is no implied power in a corporation to loan out its funds,[30] unless it be a bank, or authorized to conduct banking business, or make loans and discounts, as other corporations are sometimes empowered to do. Therefore, an insurance company prohibited from discounting paper could not lend money on a note and take interest in advance.[31] And prohibition of *banking* powers is a prohibition from making discounts.[32]

But it has been held that an insurance company empowered to make insurances cannot contract debts, or borrow money, and con-

26. Mott v. Hicks, 1 Cow. 513.

27. Bowlley v. Kline, 28 Ind. App. 659, 63 N. E. 723, 60 N. E. 712; Marion Trust Co. v. Crescent Loan, etc., Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257; Bohn v. Building & Loan Ass'n, 135 Iowa, 140, 112 N. W. 199, 124 Am. St. Rep. 263; Davis v. West Saratoga B. Union, 32 Md. 285; Russell v. Cassidy, 122 Mo. App. 565, 99 S. W. 781.

28. First Nat. Bank v. Abilene Hotel Co., 46 Tex. Civ. App. 595, 103 S. W. 1120.

29. Green's Brice's *Ultra Vires* (2d ed.), 256; Lucas v. Pilney, 27 N. J. L. 221; McIntire v. Preston, 10 Ill. 48; Hardy v. Merriweather, 14 Ind. 203; Frye v. Tucker, 24 Ill. 180; Buckley v. Briggs, 30 Mo. 452; § 385. It has been held that even where the corporation takes a note before its certificate of incorporation is recorded, according to the requirements of law, it may enforce payment after it has been duly incorporated. Stofflet v. Strome, 101 Mich. 197, 59 N. W. 411.

30. Madison, etc., Plank Road Co. v. Watertown Plank Road Co., 7 Wis. 59. Held, that a plank road company is not authorized to lend money generally, but might lend an amount to one of its contractors to enable him to build a section. Grand Lodge of Free Masons v. Waddill, 36 Ala. 313. Held, that Lodge of Masons could not lend money. Waddill v. Alabama R. Co., 35 Ala. (N. S.) 323. Held, railroad company could not. See *post*, § 386*a*, as to estoppel; Stewart v. Gould, 8 Wash. 367, 36 Pac. 277.

31. N. Y. Fireman's Ins. Co. v. Ely, 2 Cow. 664. It has been held that a banking corporation engaged in a general banking business has the power to buy notes outright. The Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 S. W. 504.

32. Philadelphia Loan Co. v. Towner, 13 Conn. 249.

sequently could not draw or accept a bill, or make a note; for no such implied power can be deemed necessary to its business, which is to be conducted by subscriptions of stock.[33]

§ 385. Indorsement by corporation.—Corporations having a right to receive bills or notes in payment of debts, have the implied right to indorse them, or to dispose of them by assignment without indorsement, as may suit their purposes.[34] And if authorized to borrow money, they may borrow a bill or note, and indorse it, or assign it.[35] Power to "sell and convey" its bills and notes impliedly authorizes the corporation to transfer them by indorsement or assignment.[36]

§ 386. Presumptions of regularity; accommodation paper; as guarantors or sureties.—When a corporation has a general power, express or implied, to be a party to bills and notes, such instruments will be presumed to have been executed in the legitimate course of its business, and whether so executed or not will be valid in the hands of a *bona fide* holder without notice.[37] Unless the corporation

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33. Bacon v. Mississippi Ins. Co., 31 Miss. 116.

34. Marvine v. Hymers, 12 N. Y. 223; Planters' Bank v. Sharp, 6 How. 301; Hardy v. Merriweather, 14 Ind. 203; McIntyre v. Preston, 5 Gil. 48; Bank of Genesee v. Patchin Bank, 13 N. Y. 309; Green's Brice's *Ultra Vires* (2d ed.), 256. Where notes were payable to a certain railway company, another company took title by articles of consolidation with the payee, and had authority through a proper officer to indorse the notes and to transfer them to an innocent purchaser for value. Kendrick v. Kyle, 78 Miss. 278, 28 So. 951.

35. Lucas v. Pitney, 3 Dutch. 221; Turniss v. Gilchrist, 1 Sandf. 53; Holbrook v. Basset, 5 Bosw. 147. On pledge bonds issued by it, to secure its debts. Hunt v. Memphis Gas Light Co., 95 Tenn. 136, 31 S. W. 1006.

36. Cooper v. Curtis, 30 Me. 488; Savage v. Walshe, 26 Ala. (N. S.) 619.

37. Gold Glen Min., Mill & Tunneling Co. v. Dennis (Colo. App.), 121 Pac. 677; Mitchell v. Rome R. Co., 17 Ga. 574; Supervisors v. Schenck, 5 Wall. 784; Hart v. Missouri, etc., F. & M. Ins. Co., 21 Mo. 91; Barker v. Mechanics' Ins. Co., 3 Wend. 94; Lafayette Bank v. St. Louis Stoneware Co., 2 Mo. App. 294; Main v. Casserly, 67 Cal. 128; National Bank of the Republic v. Young (N. J.) 5 Cent. 115, citing the text. The general rule is not altered by the fact that the same person is president of two corporations having transactions together—the presumption is in favor of the legality and fairness of the transaction. St. Joe Mineral & Mining Co. v. Bank, 10 Colo. App. 339, 50 Pac. 1055; Florence R. & Improvement Co. v. Chase Nat. Bank, 106 Ala. 364, 17 So. 720; Nebraska Nat. Bank v. Ferguson, 49 Nebr. 109, 68 N. W. 370, 59 Am. St. Rep. 522. The burden of establishing the defense of *ultra vires* is on the corporation asserting it. Edward Knapp & Co. v. Tidewater Coal Co. (Conn.), 81 Atl. 1063. Where an agent had

be specially authorized to do so, the execution or indorsement of accommodation paper for the benefit of a third person is an act beyond the scope of its corporate authority;[38] but, according to the principles stated, a *bona fide* holder taking without notice of its character could enforce it.[39] Its endorsement on the paper is pre-

authority to sign the corporate name to checks, the fact he deposited the proceeds of such checks in his own name, which he was not authorized to do, would not debar the bank on which the checks were drawn from recovering from the company, unless the company had lost the proceeds of the checks on account of the act and the bank had knowledge that the agent was unlawfully converting the money to his own use. Stotts City Bank v. T. A. Miller Lumber Co., 102 Mo. App. 75, 74 S. W. 472.

38. Field on Corporations, 306; Green's Brice's *Ultra Vires* (2d ed.), 252; Mapes v. German Bank of Tilden, 176 Fed. 89; Steiner & Lobman v. Steiner Land & Lumber Co., 120 Ala. 128, 26 So. 494; Simmons Nat. Bank v. Dilley Foundry Co. (Ark.), 130 S. W. 162; El Dorado Imp. Co. v. Citizens' Bank, 85 Ark. 185, 107 S. W. 676; Ætna Nat. Bank v. Insurance Co., 50 Conn. 168; National Park Bank v. German Security Co., 22 N. E. 567; Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345; Bacon, Dawson & Co. v. Farmers' Bank, 79 Mo. App. 406; Preston v. Northwestern Cereal Co., 67 Nebr. 45, 93 N. W. 136; Owen & Co. v. Storms & Co., 78 N. J. L. 154, 72 Atl. 441; National Bank of Newport v. H. P. Snyder Mfg. Co., 94 N. Y. S. 982, 107 App. Div. 95; Federal Nat. Bank v. Cross Creek & Pittsburg Coal Co., 220 Pa. St. 39, 68 Atl. 1018; Worthington v. Schuylkill Electric Co., 195 Pa. St. 211, 45 Atl. 927; Cook v. American Tubing, etc., Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731; Pelton v. Spider Lake Sawmill, etc., Co., 117 Wis. 569, 94 N. W. 293, 98 Am. St. Rep. 946. Where a partnership, a member of which owned a majority of stock in a corporation, acted as the financial and sales agent of the corporation, and in the due course of their business relations accepted drafts drawn by the corporation, and the drafts were accepted by the firm either in pursuance of its obligation to provide funds for the use of the corporation, or as a loan of the credit of the corporation to the firm to enable the latter to procure funds for any of its undertakings, the drafts were accommodation paper of the corporation. Cook v. American Tubing, etc., Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193.

39. Stouffer v. Smith-Davis Hardware Co., 154 Ala. 301, 45 So. 621, 129 Am. St. Rep. 59; Wolf Co. v. Bank of Commerce, 107 Ill. App. 58; Johnson v. Johnson Bros. (Me.), 80 Atl. 741; Bird v. Daggett, 97 Mass. 494; Monument Nat. Bank v. Globe Works, 101 Mass. 57; Bank of Genesee v. Patchin Bank, 13 N. Y. 309, 19 N. Y. 312; Morford v. Farmers' Bank, 26 Barb. 568; Bridgeport City Bank v. Empire Stone Dressing Co., 30 Barb. 421; Hall v. Auburn Turnpike Co., 27 Cal. 255; Madison, etc., R. Co. v. Norwich Sav. Society, 24 Ind. 457; National Bank v. Wells, 79 N. Y. 498; Credit Co. v. Howe Machine Co., 54 Conn. 357. But see as to rights of *bona fide* holders, McClellan v. Detroit File Works, 56 Mich. 579; Jacobs Pharmacy Co. v. Trust Co., 97 Ga. 573, 25 S. E. 171; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344, citing text; National Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895; Rockville Nat. Bank v. Citizens' Gas Light

sumably valid, and it cannot be inferred in the absence of proof that it was for accommodation.[40] But it has been held that where the rights of creditors are not involved, a corporation is estopped from setting up a plea of *ultra vires* when it has executed an accommodation note with the consent of all the stockholders.[41] Where a railroad company transferred and guaranteed bonds of another, itself receiving the proceeds, it was held estopped to deny its liability upon the guaranty,[42] and the fact that vendor's lien notes executed by a corporation were really made for the accommodation of the president of the company cannot be urged as an objection to the notes when the company does not offer to reconvey the land for which it executed such notes.[43]

Although the agent or officer of the corporation making accommodation paper exceeded his authority, such holder could not sue him for his tortious act, as the paper is valid as to him, and having a remedy against the corporation, he suffers no damage thereby.[44] The same principle which prohibits corporations from becoming

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Co., 72 Conn. 582, 45 Atl. 361. The fact that notes were issued by a corporation for the accommodation of indorsers who were officers of the company, is no defense against one who had no notice of such fact. National Bank of Commerce in St. Louis v. Sancho Packing Co., 186 Fed. 257. Where a note is taken from the payee, in payment of a debt due from him, indorsed by a corporation the indorsement is *prima facie* an accommodation indorsement, and the person who takes it is chargeable with knowledge that the indorsement is an accommodation indorsement. Brill Co. v. Norton, etc., St. R. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525.

40. Lafayette Bank v. St. Louis Stoneware Co., 2 Mo. App. 299; Fox v. Rural Home Co., 90 Hun, 365, 35 N. Y. Supp. 896.

41. Perkins v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167. In Brill Co. v. Norton, etc., St. R. Co., 189 Mass. 431, 75 N. E. 1090, 2 L. R. A. (N. S.) 525, it was held that a corporation was not liable on an accommodation indorsement in the hands of one who took with knowledge of that fact, and this though it had been authorized by all the directors and the majority of the stockholders.

42. Arnot v. Erie R. Co., 5 Hun, 608; Lyon, Potter & Co. v. First Nat. Bank, 29 C. C. A. 45, 85 Fed. 120, text cited. The rule that a corporation can neither make nor indorse commercial paper for accommodation is not applicable to a case where a corporation assumes an obligation of another for the purpose of protecting its own interests where its property rights or interests might be affected. Bacon v. Montauk Brewing Co., 115 N. Y. S. 617, 130 App. Div. 737.

43. Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co. (Tex. Civ. App.), 111 S. W. 417.

44. Bird v. Daggett, 97 Mass. 494; Texarkana & Fort Smith R. Co. v. Bemis Lumber Co., 67 Ark. 54, 55 S. W. 944; Nebraska Nat. Bank v. Ferguson, 49 Nebr. 109, 68 N. W. 570, 59 Am. St. Rep. 522; Bacon, Dawson & Co. v. Farmers' Bank, 79 Mo. App. 406.

parties to accommodation paper would apply to their becoming guarantors, or sureties for others.[45]

Hence it has been held that power conferred on a city to acquire suitable works and machinery for the generation of electricity did not authorize it to guarantee the bonds of another corporation in which it had no interest, to enable it to furnish electricity.[46]

Under Negotiable Instrument statute.—The provisions of the statute do not affect the question of the want of power of a corporation to indorse a note for accommodation,[47] and an agent or officer of a corporation has no implied authority to bind the corporation by an accommodation indorsement.[48] But when a corporation has power to make bills and notes in the course of its business, the fact that it transcended the power conferred in its charter and executed a negotiable instrument for a matter beyond the scope of its business would not render it void in the hands of an innocent purchaser for value, and notwithstanding it was executed in violation of the public policy of

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45. Madison, etc., Plank Road Co. v. Watertown, etc., Plank Road Co., 7 Wis. 59; Madison, etc., R. Co. v. Norwich Sav. Society, 24 Ind. 457; Lynchburg, etc., R. Co. v. Dameron, 95 Va. 548, 28 S. E. 951. See Rogers v. Jewel Belting Co., 184 Ill. 574, 56 N. E. 1017.

46. Lynchburg, etc., R. Co. v. Dameron, 95 Va. 545, 28 S. E. 951; Bowen v. Needles Nat. Bank, 36 C. C. A. 553, 94 Fed. 925.

47. See appendix, secs. 22, 23, 29, 56, 64, 66. Nat Bank v. H. R. Snyder Mfg. Co., 102 N. Y. S. 478, 117 App. Div. 370; Oppenheim v. Simon Reigal Cigar Co., 90 N. Y. S. 355; Bradley Engineering, etc., Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127.

48. Federal Nat. Bank v. Cross Creek & Pittsburg Coal Co., 220 Pa. St. 39, 68 Atl. 1018. Where one receives the check of a corporation on its private funds in payment of the individual debt of the officer of the corporation who drew the check, or in payment of a debt for which such officer is obligated, he is *prima facie* chargeable with notice that such officer is not authorized to use the corporate funds for that purpose, and is bound to inquire as to the real situation. Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216. See also Lanning v. Trust Co. of America, 122 N. Y. S. 485. Where the agent of an Insurance Company received a check of a municipal corporation in payment of a premium individually due by the treasurer of the municipal corporation, the payee is charged with notice of a possible want of authority of the treasurer, and the knowledge of the agent is the knowledge of the insurance company. Newburyport v. Fidelity Mut. Life Ins. Co., 197 Mass. 596, 84 N. E. 111. Where a salesman for a corporation had without authority indorsed a check payable to the corporation, it cannot be held as a matter of law that his act had been ratified by a delay for more than two years after learning of the wrongful act before making any claim upon the indorsee, when the corporation received no benefit from the act of its salesman. Blum, Jr's. Sons v. Whipple, 194 Mass. 253, 80 N. E. 501, 13 L. R. A. (N. S.) 211, 120 Am. St. Rep. 553.

the state,[49] but when a person receives a note for the debt of another, which bears the indorsement of a corporation not in the chain of title, he is charged with notice that the indorsement is an accommodation indorsement.[50]

§ **386a. Estoppel in dealings with corporations.**—Although it may be illegal for a corporation to loan its funds, yet if it do so, the parties bound to it for payment are generally estopped from setting up the defense that it acted *ultra vires*. Having received its money they are in equity and good conscience bound to repay it; and to allow them to plead the illegality of the act, would subject shareholders to penalties for the breaches of trust committed by their officers, and permit the parties who derived a benefit thereby to take advantage of their own wrong in borrowing from those who had no authority to lend.[51] Upon like principles a corporator,[52] or other party, sued upon a note given to a corporation, cannot plead the illegality of the corporation.[53]

SECTION II

AUTHORITY OF THE AGENT IN LAW AND IN FACT TO BIND THE CORPORATION

§ **387.** (1) When it is settled that the corporation has legal authority to do the act, the next question is, are the parties pretending to act for it the legal agencies by which its authority may be exercised. Not infrequently the charter of incorporation provides that the corporate instruments of debt shall be signed by the president, or signed by its president and countersigned by the cashier, or prescribe some such formality of their execution. In such cases, these being the legal

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49. Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641. See also Willard v. Crook, 21 App. D. C. 237.

50. Appendix, sec. 59. Pelton v. Spider Lake Sawmill & Lumber Co., 117 Wis. 569, 94 N. W. 293, 98 Am. St. Rep. 946.

51. *Ante*, § 93. And the same principle is applicable to the liability of a corporation for its *ultra vires* acts. See German Nat. Bank v. Butchers' Hyde & Tallow Co., 97 Ky. 34, 29 S. W. 882; Seymour v. Cemetery Assn., 144 N. Y. 333; Ditty v. Dominion Nat. Bank, 22 C. C. A. 376, 75 Fed. 769.

52. See *ante*, § 93; Farmington Sav. Bank v. Fall, 71 Me. 49; National P. Bank v. Porter, 125 Mass. 333; Poock v. Lafayette Banking Assn., 71 Ind. 357.

53. McCullough v. Moss, 5 Den. 575, Lott, Senator. See *ante*, § 93.

agencies provided by law to bind the corporation by their acts in a particular way, instruments signed by other officers or agents, purporting to bind the corporation, would bear upon their face evidence of departure from the legal mode, and be notice to all of the irregularity. And it would not be competent for the corporation to bind itself by instruments in any other form, or executed by other agents, than those prescribed by law.[54] Thus, where a bank charter provided that its bills, notes, and other contracts should be binding if signed by the president and countersigned by the cashier, and that the funds of the corporation should not be bound for any contract, unless it was so signed and countersigned, it was held that bank bills signed by the vice-president and countersigned by the assistant cashier were not binding, although the board of directors had authorized the vice-president and assistant cashier to sign them.[55] And this is clearly correct, for when a corporation is limited and restricted to certain defined powers, and also to certain prescribed modes, the ends contemplated by the charter would be practically defeated, as well by a departure from the mode designated as by an exercise of the powers prohibited.[56] So where it was provided that the business of a lead mining company should be conducted by its directors, it was thought that the president and secretary could not bind it by a note unless authorized so to do by the directors, and such authority was not to be presumed.[57] But any officer or agent, acting under authority of directors having power under the charter to bind the corporation, might bind the corporation, and his authority from them might be shown to exist by implication from the course of business, as well as

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54. McCullough v. Moss, 5 Den. 575, Lott, Senator; Dobbins v. Etowah Mfg. Co., 75 Ga. 243. But a note executed by the president to himself as payee carries its invalidity on its face, subject, however, to explanation that it was executed in pursuance of special authority from the board of directors. Smith v. Immigration Co., 78 Cal. 289; Elwell v. Puget Sound R. Co., 7 Wash. 487, 35 Pac. 376.

55. Planters, etc., Bank v. Erwin, 31 Ga. 377, Lumpkin, J.: "If it be said that these bills have got into the hands of innocent holders, our reply is, that they could have protected themselves by looking at the charter, which, in strong phraseology, has exempted the corporation from liability for bills thus signed. The want of power to bind even the corporate funds in this way was patent, and whosoever would, might avoid imposition."

56. Lucas v. San Francisco, 7 Cal. 469.

57. McCullough v. Moss, 5 Den. 575. To same effect, see Cattron v. First Universalist Society, 46 Iowa, 106; Monroe Mercantile Co. v. Arnold, 108 Ga. 449, 34 S. E. 176.

by express resolution,[58] and might be given by parol.[59] Substantial compliance with the statutory requirements is all that is necessary. Therefore, where the statute required that a corporate bill should be accepted by two directors, and that they should express that it was accepted by them on behalf of the corporation, and the two accepting directors wrote "appointed to accept this bill" in their acceptance, it was held sufficient.[60]

Where the directors of an incorporated company authorized its agent to give "a company note," it was held that the term "note" was not employed in its strict sense, but that a due-bill, memorandum, check, or other similar security would fall fairly within the meaning of it.[61]

§ 388. (2) **Whether or not the parties so describing themselves are really officers or agents of the corporation** is next to be determined. The ordinary and most unexceptionable form of proof is made by the production of the records or books of the corporation containing the entry or resolution of appointment, the records being shown to be those of the corporation.[62] But it is not necessary that this mode of proof should be adopted. Nor is it necessary that there should be such record evidence in existence, or that any particular mode of appointment should have been pursued, unless required by statute. It was the ancient doctrine of the common law that a corporation could not express its assent, and, therefore, could not constitute an officer or agent, save by instrument under seal.[63] This doctrine is now completely obsolete in the United States, and here there is no doubt that such a body may, by mere vote, or other appropriate corporate act not under seal, appoint an officer or agent whose acts and contracts within the scope of his authority would bind

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58. Preston v. Missouri, etc., Lead Co., 31 Mo. 45; First Nat. Bank v. Missouri Coal Co., 86 Mo. 125; Thorold Mfg. Co. v. Imperial Bank, 13 Ont. 330; Russell v. Folsom, 72 Me. 436; Grant v. Treadwell Co., 82 Hun, 591, 31 N. Y. Supp. 702.

59. Odd Fellows v. First Nat. Bank, 42 Mich. 463. See §§ 74, 299.

60. Halford v. Cameron's Coalbrook, etc., Co., 3 Eng. L. & Eq. 309.

61. Tripp v. Swanzey Mfg. Co., 13 Pick. 293.

62. Clark v. Benton Man. Co., 15 Wend. 256; Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282; Thayer v. Middlesex Mut. Ins. Co., 10 Pick. 326; Owings v. Speed, 5 Wheat. 424.

63. Angell & Ames on Corporations, chap. IX, § 3, p. 214. The fact that the indorsement of a note does not bear the seal of the corporation is immaterial. Hall & Tyson v. First Nat. Bank (Tex. Civ. App.), 115 S. W. 293.

the corporation.[64] And if a corporation employ a person to discharge official duties—such as a bank, which places a person behind its counter to exercise the duties of cashier—it will be bound by its acts although the formalities of qualification have not been complied with, unless the statute creating the corporation provides that his acts shall be void until such formalities be performed.[65] Indeed, the doctrine is well settled that if officers of a corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognized by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed, and his acts as cashier will bind the corporation, although no written proof is or can be adduced of his appointment. In short, the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty.[66]

§ 389. (3) Whether or not the officer or agent is authorized in fact to do the particular act, is the next question.—Proof of his official character is often sufficient to decide it, for if the acts be done within the scope of his official duties, and the party dealing with him had no notice that the general authority implied by official relation was restricted by private instructions, the corporation would be liable.[67] And here the distinction between general and special agents

64. Bank of Columbia v. Patterson's Admr., 7 Cranch, 305; Fleckner v. United States Bank, 8 Wheat. 387; Washington Times Co. v. Wilder, 12 App. D. C. 62.

65. Bank of United States v. Dandridge, 12 Wheat. 83; Fifth Nat. Bank v. F. S. S. & G. S. F. R. R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712.

66. Bank of the United States v. Dandridge, 12 Wheat. 64, Story, J. See also Wild v. Bank of Passamaquoddy, 3 Mason C. C. 505; Union Bank v. Ridgeley, 1 Harr. & G. 392; Barrington v. Bank, 14 Serg. & R. 421; Merchants' Bank v. State Bank, 10 Wall. 604; Creswell v. Lanahan, 101 U. S. (11 Otto) 352; Morse on Banking, 139; East River Nat. Bank v. Gove, 57 N. Y. 601, distinguishing and questioning Thatcher v. Bank of the State, 5 Sandf. 121; Merchants' Nat. Bank v. Citizens' Gas Light Co., 159 Mass. 505, 38 Am. St. Rep. 453; First Nat. Bank of Birmingham v. First Nat. Bank of Newport, 116 Ala. 520, 22 So. 976; Commercial Nat. Bank v. Brill, 37 Nebr. 626, 56 N. W. 382; National Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895.

67. Tanners & Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 S. E. 902, holding that the burden is upon a bank as plaintiff to show that an

should be observed. If a corporation were to employ a special agent to go to a city and buy a fireproof safe, he could not execute a bill or note, or borrow money in its name, such acts not being within the scope of his special agency, and all dealing with him would be chargeable with notice of his limited authority.[68] But it has been held that where one acting as general agent of a corporation in the sale of lumber collected a check payable to the order of the company, and indorsed the check, this constituted a payment to the company though such agent misappropriated the money.[69] But if a corporation elects a board of directors, a president, cashier, teller, or treasurer, it thereby designates such persons as authorized to exercise all powers which its charter reposes, or the usual course of business in like institutions accords to such officers. They are its general agents within the sphere of official duty and discretion. It can only act by its agents. And they are, in fact, held out to the public as its representatives within these spheres, and are, in fact, so far as the public is concerned, *pro tanto*, the corporation. The corporation is, therefore, bound by their acts done within the range of their official character; and the general principle, as stated by the United States Supreme Court, is, that "where a party deals with a corporation in good faith, the transaction is not *ultra vires*, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the cor-

officer of an insurance company, the defendant, had authority to draw a check in the name of the company. In an action against a corporation on a note, a plea of *non est factum* filed by the corporation calls for proof by the plaintiff of the authority of the officer signing the note in the name of the corporation to sign such name, and without such proof the note is not admissible. Dreeben v. First Nat. Bank (Tex.), 99 S. W. 850. Where the officers of a corporation sign a note in the name of the corporation without authority, they are not individually liable on the note, but they are liable to a claim for damages caused by a breach of their warranty, as they are held impliedly to warrant that they had in fact the authority they assumed to exercise. McDonald v. Luckenback, 170 Fed. 434.

68. McCullough v. Moss, 5 Den. 567.

69. Perry v. Sumrall Lumber Co., 95 Miss. 691, 49 So. 263. If the manager of a corporation purchased a saloon and stock for the company upon due authority, and gave notes in the corporate name for part of the stock, the company would be liable upon the notes. Manhattan Liquor Co. v. Joseph A. Magnus & Co., 94 S. W. 1117, 43 Tex. Civ. App. 463. The fact that instruments were negotiable notes does not estop a corporation from denying the agency of a person to make indorsement, when such person had no authority to use the company's name as indorser, and the company was ignorant of the existence of the notes and of such indorsement of them in its name when the money was paid to the company. Wickersham Banking Co. v. Nicholas, 2 Cal. App. 18, 82 Pac. 1124.

poration is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." And it adds: "The principle has become axiomatic in the law of corporations." [70]

§ **390. Illustrations.**—Applying this principle to particular cases, the courts have enforced the liability of the corporation, where the president of a railroad company, who was also a director and transfer agent, fraudulently overissued certificates of stock; [71] where

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70. Merchants' Bank v. State Bank, 10 Wall. 644 (1870), Swayne, J. See also Supervisors v. Schenck, 5 Wall. 784; Thompson v. Lee County, 3 Wall. 327; Mercer County v. Hackett, 1 Wall. 93; Gelpcke v. Dubuque, 1 Wall. 203; Moran v. Commissioners, 2 Black. 722; Bissell v. Jeffersonville, 24 How. 288; Commissioners of Knox County v. Aspinwall, 21 How. 539; Commonwealth v. Pittsburg, 34 Pa. St. 497; Commonwealth v. Alleghany County, 37 Pa. St. 287; Stoney v. American Life Ins. Co., 11 Paige, 635; Society for Savings v. New London, 29 Conn. 174; Claflin v. Farmers' Bank, 36 Barb. 540 (overruling s. c., 25 N. Y. 293); Safford v. Wyckoff, 4 Hill, 445; De Voss v. City of Richmond, 18 Gratt. 338; Credit Co. v. Howe Machine Co., 54 Conn. 357; Milbank v. de Riesthal, 82 Hun, 538, 31 N. Y. Supp. 522; Bell v. Beller, 40 Nebr. 501, 58 N. W. 941; Commercial Nat. Bank v. Brill, 37 Nebr. 626, 56 N. W. 382; National Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895; Louisville, etc., Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Supp. Ct. Rep. 817; Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 561; United States Nat. Bank v. First Nat. Bank, 13 C. C. A. 472, 64 Fed. 985; Louisville Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. Rep. 817; Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 576, 45 Atl. 361. Where the only officers of a corporation were two directors, a note signed in the corporate name by one of the directors, the other one being present, and being made in the transaction of its ordinary business, was a binding obligation of the company. Buck v. Troy Aqueduct Co., 76 Vt. 75, 56 Atl. 285. Where the secretary of a corporation signed notes on behalf of the company with the authority of the president and himself, and the president and secretary were the only trustees, the company cannot question the authority of the secretary to sign the notes though there may have been no formal action of the trustees. National Bank of Commerce v. Puget Sound Biscuit Co., 61 Wash. 192, 112 Pac. 265.

71. New York, etc., R. Co. v. Schuyler, 34 N. Y. 30; Fifth Nat. Bank v. F. S. S. & G. R. R. Co., 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712. In this case the doctrine of the text was carried to the extent of holding that the issuance of a stock certificate by the treasurer of a railroad company wherein the treasurer forged the name of the president, signed his own as treasurer, then countersigned it, and pressed thereon the corporate seal (the certificate upon its face being perfect and regular in every respect), that the defendant railroad company was liable for the representations of its officer appearing on the face of the certificate and acted

the cashier of a bank issued a false certificate of deposit;[72] where the cashier of a bank certified a check without authority;[73] where the teller of a bank fraudulently certified a check to be good;[74] where the treasurer of a railroad company, whose duty it was to issue certificates of stock, fraudulently issued certificates regular in form, but representing no real stock, and pledged them as security for a loan to himself;[75] where the president and cashier of a bank indorsed paper to another bank which discounted it.[76] But notes issued by authority of a majority of stockholders of a corporation, not for the benefit of the corporation or its creditors but to be used by an officer to the security of his own debt, are issued *ultra vires*.[77]

§ 391. Equitable disposition of loss.—The principle above is based upon the idea that where one or two innocent parties must suffer, the loss should fall upon the one who created the trust which enabled the trustee to mislead.[78] And it applies as well where the controversy is between the original parties, as in favor of indorsers

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upon in good faith by the plaintiff. Railway Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 47 N. E. 249.

72. Barnes v. Ontario Bank, 19 N. Y. 156.

73. Merchants' Bank v. State Bank, 10 Wall. 604; Hitchings v. St. Louis, etc., Co., 68 Hun, 33, 22 N. Y. Supp. 719.

74. Farmers' Bank v. Butchers' Bank, 14 N. Y. 624, 16 N. Y. 133; Mead v. Merchants' Bank, 25 N. Y. 146.

75. Tome v. Parkersburg R. Co., 39 Md. 36.

76. In Auten v. National Bank, 174 U. S. 148, 19 Sup. Ct. Rep. 628, McKenna, J., said: "Under section 5136 of the Revised Statutes, it was competent for the directors to empower the president or cashier or both to indorse the paper of the bank, and under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized, and executed as authorized." In Virginia, the Supreme Court in the case of Davis v. Investment Co., 89 Va. 293, 15 S. E. 547, by Lewis, J.: "The authority to draw checks may be said to be inherent in the office of treasurer, unless taken away or restrained, but the power to bind the company by indorsing negotiable notes is not." City Nat. Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895.

77. American Wood Working Machinery Co. v. Norment, 157 Fed. 801, holding that such a note is not provable against the estate of the corporation.

78. Bank of the United States v. Davis, 2 Hill, 465; F. & M. Bank v. B. & D. Bank, 16 N. Y. 133; Welland Canal Co. v. Hathaway, 8 Wend. 480; N. Y. & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Hern v. Nichols, 1 Salk. 289; Barnes v. Ontario Bank, 19 N. Y. 156; Farmers & M. Bank v. Butchers & D. Bank, 14 N. Y. 624, 16 N. Y. 133; Mead v. Merchants' Bank, 25 N. Y. 146; Merchants' Bank v. State Bank, 10 Wall. 604; Bell v. Beller, 40 Nebr. 501, 58 N. W. 941; National Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895.

and holders without notice of the alleged defect.[79] And it is settled law that a negotiable security of a corporation which appears upon its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in point of fact issued for a purpose, and at a place or in a manner not authorized by the charter of the corporation.[80]

§ 392. What officers have implied powers to bind corporations as parties to negotiable instruments; power of cashier.—The cashier of a bank has *prima facie* authority by virtue of his office to transfer and indorse negotiable paper held by the bank for its use, and on its behalf; and while it is perfectly competent for the bank to depart from the general course of business, it is incumbent on it to show, in order to escape liability on such an indorsement, that it had restricted his power in this regard, and that such restriction was known to the holder.[81] Especially has the cashier authority to indorse negotiable

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79. Savings Co. v. New London, 29 Conn. 174; Tash v. Adams, 10 Cush. 252; Supervisors v. Schenck, 5 Wall. 784.

80. Gelpcke v. Dubuque, 1 Wall. 203; Thompson v. Lee County, 3 Wall. 327; Goodman v. Simonds, 20 How. 365; Florence R. & Improvement Co. v. Chase Nat. Bank, 106 Ala. 364, 17 So. 720; Lamson v. Beard, 36 C. C. A. 56, 94 Fed. 30; Kaiser v. First Nat. Bank, 24 C. C. A. 88, 78 Fed. 281.

81. Auten v. United States Nat. Bank, 174 U. S. 148, 19 Sup. Ct. Rep. 628; West St. Louis, etc., Bank v. Shawnee, etc., Bank, 95 U. S. (5 Otto) 558; Fleckner v. United States Bank, 8 Wheat. 357; Wild v. Passamaquoddy Bank, 3 Mason, 505; Robb v. Ross County Bank, 41 Barb. 586; Cooper v. Curtis, 30 Me. 488; City Bank v. Perkins, 29 N. Y. 554; Kimball v. Cleveland, 4 Mich. 606; Everett v. United States, 6 Port. 166; Harper v. Calhoun, 7 How. (Miss.) 203; Farrar v. Gilman, 19 Me. 440; State Bank v. Wheeler, 21 Ind. 90; Lafayette Bank v. State Bank, 4 McLean, 208; Angell & Ames on Corporations, 245; Morse on Banking, 151, 152, 153; Farmers' Sav. Inst. v. Garresché, 12 Mo. App. 584; Schitman v. Noble, 75 Iowa, 120. In Bissell v. First Nat. Bank, 69 Pa. St. 415, it was held that the bank was bound by indorsement of its cashier, "A. B., cashier," although not made at the bank, but upon the street. In a case in West Virginia, where the cashier of a failing bank, acting beyond the scope of his employment and duties, attempted to transfer its securities to one of its depositors in derogation of the rights of other creditors, Snyder, J., said: "I think it is the practice for the cashier of a bank, in pressing emergencies, to rediscount the bills and notes of the bank to raise money to pay depositors, and meet other demands of the bank. But this is only done on extraordinary occasions, and when the requirements are such as do not admit of delay. It is customary, whenever it can be done, to consult the directors and obtain their consent to make such rediscounts. It is a matter which does not come within the ordinary duties of the cashier, and it is not one of his inherent powers; but inasmuch as it is a power which is exercised

paper for collection merely.[82] But he has no implied power to transfer nonnegotiable paper, judgments, or personal property; and his authority must be proved directly or by usage.[83] So, he has implied authority to draw bills or checks on funds of the bank elsewhere;[84] to certify checks drawn upon the bank;[85] to receipt for and issue certificates of deposit;[86] to borrow money and execute promissory

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by him under some circumstances, a transfer of such bills and notes, made by him in the usual course of business of the bank, to a person who has no reason to doubt the propriety of the transfer, or to question its good faith, will be *prima facie* valid, and vest a good title in the transferee. * * * * The cashier, however, is simply an officer or agent of the bank, and he is bound to act in good faith in the transaction of the business of the bank; and those who deal with him are affected by any bad faith or want of authority of which they have knowledge. If the transaction itself is not in the usual course of business, or is one which requires specific authority on the part of the cashier to perform it, the person dealing with him will be required to show that he in fact had authority to do the act; otherwise it will be held to have been done without authority. If the cashier transfer the notes of the bank to pay his private debt, the transaction will be invalid. No attempted transfer by the cashier of the bills, notes, or other securities of the bank will be valid, when it appears, either from the nature of the transaction, or the facts and circumstances existing at the time, and known to the transferee, that the transfer was made in prejudice of the rights and interests of the bank." Lamb v. Cecil, 28 W. Va. 659, citing Hoyt v. Thompson, 5 N. Y. 320; Hartford Bank v. Barry, 17 Mass. 97; Smith v. Lawson, 18 W. Va. 212; Everett v. United States, 6 Port. 166; Barnes v. Bank, 19 N. Y. 152; Auten v. Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337; Simons v. Fisher, 5 C. C. A. 311, 55 Fed. 905; Lamson v. Beard, 36 C. C. A. 56, 94 Fed. 30.

82. Potter v. Merchants' Bank, 28 N. Y. 641; Elliott v. Abbott, 12 N. H. 549; Corser v. Paul, 41 N. H. 24; Hartford Bank v. Barry, 17 Mass. 94. For the purpose of collecting by suit, he may indorse the paper to himself, where the legal title thereto is in his bank. Young v. Hudson (Mo.), 12 S. W. 632.

83. Barrick v. Austin, 21 Barb. 241; Holt v. Bacon, 25 Miss. 567.

84. Morse on Banking, 150. And it has been held, that where the cashier of a bank having the power to bind it by his checks, for the purpose of converting its funds to his own use, drew checks as cashier upon defendant, with whom his bank has a deposit account, making them payable to persons who were dealers with the bank, but without their knowledge, and then indorsed them in the names of the payees to parties who collected them from defendant, held, that so far as defendant was concerned, the intent of the cashier was the intent of his bank; that the payees were to be considered as fictitious persons, and that said bank was so far concluded by the acts of its cashier as to be estopped from denying the validity of the checks. See Phillips v. Merchants' Nat. Bank, 140 N. Y. 556, 37 Am. St. Rep. 596, 35 N. E. 982.

85. Merchants' Bank v. Bank of Columbia, 5 Wheat. 326; United States v. City Bank, 21 How. 356; Merchants' Bank v. Central Bank, 1 Kel. 418; Morse on Banking, 150.

86. Merchants' Bank v. State Bank, 10 Wall. 604; Morse on Banking, 148.

notes of the bank therefor;[87] also, we should say, to accept bills in the bank's name,[88] although the implication of this power *virtute officii* has been denied.[89] And to buy and sell bills and notes for the bank, indorsing them also when sold, is within the ordinary scope of his office.[90] So, too, in the absence of restrictions, if he has procured a *bona fide* rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business.[91] But he has no power to bind the bank as a party to accommodation paper; and it would be void in the hands of any one taking it (except from a holder without notice) with notice of its character;[92] nor has he power to release a debt,[93] although if he informs a surety that the debt of his principal is paid, and the surety relying on his statement change his position, the bank would be estopped from making claim against him.[94] He has no power to bind the bank, except in the discharge of his ordinary duties, but, unless otherwise provided by the charter of the bank, when his conduct of its affairs has been acquiesced in by the board of directors for a period of time sufficiently long to establish a settled course of dealing, it has been held that he may represent and bind it in matters outside of his ordinary duties; as in

87. State Bank v. Kain, 1 Breese, 45; Morse on Banking, 54, 55; Coats v. Donnell, 94 N. Y. 168; Donnell v. Savings Bank, 80 Mo. 170. But cashier's authority to execute promissory notes is confined strictly to notes executed in payment of obligations contracted within the scope of his employment. Case of North Star Boot & Shoe Co. v. Stebbins *et al.*, 2 S. Dak. 74, 48 N. W. 833.

88. Barnes v. Ontario Bank, 19 N. Y. 152; Sturgis v. Bank of Circleville, 11 Ohio St. 153; Ridgeway v. Farmers' Bank, 12 Serg. & R. 256; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Morse on Banking, 148.

89. Farmers, etc., Bank v. Troy City Bank, 1 Doug. 457. Such is the implication of this case. Morse on Banking, 164; Gray v. Farmers' Bank, 81 Md. 631, 32 Atl. 518. In this case it was held that "A bank cashier has no authority by virtue of his office to accept a new note for an existing indebtedness to the bank so as to discharge a surety on the first note or to make a contract so to do."

90. Pendleton v. Bank of Kentucky, 1 T. B. Mon. 179. *Contra*, Lionberger v. Mayer, 12 Mo. App. 575; Bell v. Beller, 40 Nebr. 501, 58 N. W. 941; Bank of Commerce v. Bright, 23 C. C. A. 586, 77 Fed. 949.

91. West St. Louis, etc., Bank v. Shawnee, etc., Bank, 95 U. S. (5 Otto) 559 (1877); Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 625.

92. West St. Louis, etc., Bank v. Shawnee, etc., Bank, 95 U. S. (5 Otto) 558; Lafayette Bank v. State Bank, 4 McLean, 208; Morse on Banking, 164; Farmers, etc., Bank v. Troy City Bank, 1 Doug. 457; Blair v. Bank, 2 Flip. 111. See Louisville R. Co. v. Louisville Trust Co., 174 U. S. 567, 19 Sup. Ct. Rep. 817.

93. Cocheco Nat. Bank v. Haskell, 51 N. H. 116; Allen v. First Nat. Bank, 127 Pa. St. 51; Ecker v. First Nat. Bank, 59 Md. 303; The State Nat. Bank v. Newton Nat. Bank, 14 C. C. A. 61, 66 Fed. 691.

94. Ibid.

the release and cancellation of liens and securities for debts which have been satisfied and paid.[95] The assistant cashier has no implied power to accept or certify a check,[96] but, while in control and management of the bank, in the absence of the cashier, his transfer to a second bank of a negotiable draft in payment of a balance due passes title thereto.[97]

§ **392a. Power of treasurer, secretary and others.**—The treasurer of a corporation authorized to pay and discharge a debt is not thereby empowered to execute a note for it, being without funds in hand.[98] And the treasurer of a corporation is not such an officer as is vested with implied power to make negotiable paper in its name, though particular circumstances might exist which would create such an implied power.[99] Where such power is expressly conferred upon the treasurer, or other officer, persons dealing with the corporation must take notice of its extent, but are not required to have knowledge of the circumstances under which it is exercised.[1] But it has been held that, where a treasurer has been in the habit of executing notes for the corporation, the company cannot disaffirm a note on the ground of want of authority when it received the consideration for the note, and has recognized its liability by paying part of the principal and paying the discount on renewals.[2]

The treasurers of manufacturing corporations are frequently if

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95. Martin v. Webb, 110 U. S. 14; Rock Springs Nat. Bank v. Luman, 5 Wyo. 159, 38 Pac. 678; North Star Boot & Shoe Co. v. Stebbins, 2 S. Dak. 74, 48 N. W. 833; Savings Bank v. Hughes, 62 Mo. App. 576. See Gale v. Chase Nat. Bank, 43 C. C. A. 496, 104 Fed. 214.

96. Pope v. Bank of Albion, 57 N. Y. 126 (1874); Bank of Commerce v. Bright, 23 C. C. A. 586, 77 Fed. 949.

97. Forbes v. First Nat. Bank, 21 Okl. 206, 95 Pac. 785.

98. Torrey v. Dustin Monument Assn., 5 Allen, 327; Henderson Mercantile Co. v. First Nat. Bank, 100 Tex. 344, 99 S. W. 850.

99. Partridge v. Badger, 25 Barb. 172; Foster v. Reduction & Mining Co., 17 Fed. 130; Gafford v. American Mortgage Co., 42 N. W. 550. If the usage of the corporation is to the contrary and it receives the proceeds it will be bound. Pelton v. Spider Lake Sawmill &c. Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963.

1. Credit Co. v. Howe Machine Co., 54 Conn. 357; *ante*, § 389. A note signed by the treasurer of a corporation, who had authority to sign notes for the company, was held to be binding upon the company though the countersignature of the president had been forged, when for some time previously the notes of the company had been countersigned by the president in blank before they were signed by the treasurer. Eliot Nat. Bank v. Woonsocket Electric &c. Co., 31 R. I. 57, 76 Atl. 782.

2. First Nat. Bank v. American Bangor Slate Co., 229 Pa. St. 27, 77 Atl. 1100.

not ordinarily the custodians of negotiable instruments held by them, and authorized to make the indorsement upon their sale, transfer, or discount. And ordinarily when such officer presents such paper for discount and represents that he has authority to indorse and negotiate it, the party dealing with him may so assume. The authority to make the indorsement follows as a legal conclusion unless other evidence shows want of it.[3]

An allegation that a corporation made a note or accepted a bill, by its treasurer or other officer, is a sufficient averment that such officer had authority to bind the corporation.[4]

Nor has the secretary [5] or general manager [6] of a corporation, by virtue of his office, authority to indorse a note in the name of the corporation, and on introducing the note, his authority must be shown,[7] though it has been held that where a corporation was in the habit of disregarding a provision in its charter requiring notes to be signed by the president and countersigned by the secretary, a note of the corporation signed by the secretary alone is valid.[8]

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3. Standard Cement Co. v. Bank, 71 Conn. 682, 42 Atl. 1006.

4. Credit Co. v. Howe Machine Co., 54 Conn. 357, 8 Atl. 472.

5. Blood v. Maveuse, 38 Cal. 590 (of a mining company); Karsch v. Pottier &c. Mfg. &c. Co., 81 N. Y. S. 782, 82 App. Div. 230; First Nat. Bank v. Hogan, 47 Mo. 472 (of an insurance company).

6. Sanford Cattle Co. v. Williams, 18 Colo. App. 378, 71 Pac. 889; New York Iron Mine v. First Nat. Bank, 39 Mich. 644; Baines v. Coos Bay &c. R. & Nav. Co., 45 Oreg. 307, 77 Pac. 400; Miller v. Reynolds, 36 N. Y. Supp. 61, 92 Hun, 400. See also Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E. 136, 59 L. R. A. 657, 93 Am. St. Rep. 113 (as to a superintendent of a manufacturing corporation), and Bank of Commerce v. Baird Min. Co., 13 N. Mex. 424, 85 Pac. 970 (as to a managing agent of a mining corporation).

7. Where the secretary and general manager was held out by the company as having absolute control of the business, notes executed by such officer on contracts, of which the company received the benefit, are the obligation of the company. Indell v. Goldfield Realty Co. (Nev.), 108 Pac. 455. When the charter of a corporation authorizes the directors to appoint an executive committee to exercise all the powers of the board of directors, the company is liable on an indorsement of a note by the executive committee entered into in the course of the current business. Tilden v. Goldy Mach. Co. (Cal. App.), 98 Pac. 39.

8. Blanc v. Germania Nat. Bank, 114 La. 739, 38 So. 537. The authority intrusted to an assistant secretary of a building corporation, who had been put in charge of building operations in another State and had opened a bank account for the company at the place of the operations, was sufficient to bind the company on notes executed by him for money passed to the credit of the company to settle overdrafts on the bank account. Hennessy Bros. & Evans Co. v. Memphis Nat. Bank, 129 Fed. 557.

Under Negotiable Instrument statute.—Under the statute it has been held that

§ 393. Power of president.—The president of a bank and of other incorporated institutions has implied authority to take charge of their litigation, and to employ counsel to prosecute or defend causes. And the corporation will be bound by his action unless it be known to the party employed that he was acting against the will of the corporation.[9] A bank president has the implied power to receipt for deposits.[10] But the president of a bank is not the executive officer who has charge of its moneyed operations. A recent author says that he has no implied power to draw checks on its behalf, or against its funds,[11] though established usage may confer such power upon him, to be exercised in the cashier's absence, or otherwise.[12]

And so, though the president of a business corporation has not the inherent power to execute negotiable paper for the corporation and such authority must be duly delegated to him,[13] the fact that such authority has been conferred upon him may be implied.[14]

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where a certificate of deposit was issued by a bank to and indorsed by a certain person as "cashier," a holder of such certificate may show that such person was the cashier of the bank, and was acting in that general capacity in transferring the instrument, and as against a *bona fide* holder without notice, it was not competent for the defendant bank to show that as a matter of fact he was making use of his official title and authority in his own individual interest. Appendix, sec. 42. Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 N. W. 165.

9. Alexandria Canal Co. v. Swann, 5 How. 83; American Ins. Co. v. Oakley, 9 Paige, 496; Savings Bank v. Benton, 2 Metc. (Ky.) 240; Mumford v. Hawkins, 5 Den. 355; Hodges' Exr. v. First Nat. Bank, 21 Gratt. 59; Morse on Banking, 128, 129. But in Ashuelot Mfg. Co. v. Marsh, 1 Cush. 507, it was held that a president of a manufacturing corporation cannot bind it by bringing suit without authority. Citizens' Nat. Bank v. Berry & Co., 53 Kan. 696, 37 Pac. 131. See State v. Hardware Co., 147 Mo. 366, 48 S. W. 927; United States Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296; Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083.

10. Sterling v. Marietta, etc., Trading Co., 11 Serg. & R. 179. While under some circumstances the president of a bank may have authority to receive money in payment of obligations due at or to the bank, the payments must be made at the bank and in the usual course of business. See Tulley v. Citizens' State Bank, 18 Ind. App. 240, 47 N. E. 850, 81 Am. Dec. 353.

11. Morse on Banking, 132; Security Bank v. Kingsland, 5 N. Dak. 263, 65 N. W. 697.

12. Neiffer v. Bank of Knoxville, 1 Head, 162.

13. Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077; McCullough v. Moss, 5 Den. 575.

14. Loyd & Co. v. Matthews & Rice, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346 (as to guaranteeing a note payable to the corporation); Houst v. Sioux City Brass Works, 134 Iowa, 484, 110 N. W. 166, holding that a note signed in the name of a corporation by the president and secretary is

§ 394. Power of president to indorse.—If he has a general authority from the directors, the president of a bank may indorse bills or notes payable to it.[15] And it would seem that he has an implied power to indorse and transfer its negotiable paper.[16]

In the case of National banks, the president is authorized by statute to indorse the paper of the bank.

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not invalid because the person signing as secretary had at the time been succeeded in that office by another, as the signature of the secretary was not necessary to give validity to the note. A note purporting to be signed by the president and the secretary of a corporation which was not in existence at the time, does not create any liability as against the corporation as subsequently formed, and which was not ratified by the corporation. Bonanza Mining & Smelter Co. v. Ware, 78 Ark. 306, 95 S. W. 765. The authority of an officer of a corporation to do a particular act may be inferred from proof of his habitual doing of such acts, with the acquiescence of the directors of the corporation, and where no such acts are proven, if any contract of such officer, made without authority, is subsequently ratified by the directors upon full knowledge of all the circumstances of the case, the corporation will be bound thereby as fully as if the officer had been expressly authorized to make the contract. Third Nat. Bank v. Laboringman's Mercantile &c. Co., 56 W. Va. 446, 49 S. E. 544. See also Tuskaloosa Oil Co. v. Perry, 85 Ala. 158. Where the stockholders and directors of a corporation completely abandon to the president the entire management and control over its affairs, the corporation is liable on its promissory note given by the president without any express authority from the board of directors, or subsequent ratification where he uses the proceeds for his own purposes, and the corporation derives no benefit therefrom, and where the note is given to one paying full value without any knowledge of a wrongful intention on the part of such president. Chestnut St. Trust &c. Fund Co. v. Record Pub. Co., 227 Pa. St. 235, 75 Atl. 1067, 136 Am. St. Rep. 874.

15. Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepoon, 11 Mass. 288; Simons v. Fisher, 5 C. C. A. 311, 55 Fed. 905.

16. See Leavitt v. Connecticut Peat Co., 6 Blatchf. 139 (1868). But the president of a bank corporation cannot bind it by the negotiation in its name of notes in which he is payee, as his interest conflicts with that of the bank. City Elec. St. Ry. Co. v. First Nat. Bank, 65 Ark. 543, 47 S. W. 855; United States Nat. Bank v. First Nat. Bank, 24 C. C. A. 597, 79 Fed. 296; Fisher v. United States Nat. Bank, 12 C. C. A. 413, 64 Fed. 710; Rev. Stat., § 5136, and Auten v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 628; Huie v. Allen, 87 Hun, 516, 34 N. Y. Supp. 577; Rockville Nat. Bank v. Gas Light Co., 72 Conn. 576, 45 Atl. 361; Standard Cement Co. v. Bank, 71 Conn. 685, 42 Atl. 1006. The fact that a purchaser knew that the president of a bank, who indorsed the note in its behalf and procured its discount on its account, was also the payee of the note and indorsed it individually, did not put the purchaser upon notice of any irregularity, especially when such purchaser was a correspondent bank frequently loaning money to such bank and having settlements with its president upon representations made by him as to the conditions which made it desirable for such bank to obtain loans. Citizens' Bank & Trust Co. v. Thornton, 174 Fed. 752.

The president of a business corporation has no inherent authority, by virtue of his office, to indorse a negotiable note which will bind the corporation; such authority must be expressly or impliedly conferred.[17] The president of an insurance company may indorse its bills and notes so as to bind it, when it is shown that according to the usual practice of the company its notes were so negotiated, or that by its course of business he had been held out as a proper person to indorse them,[18] but not otherwise, without express authority.[19] And, in general, a corporation will be bound by the act of its president, in the indorsement and transfer of negotiable paper, where it has accepted the benefits thereof, or acquiesced in, or ratified his assumption of authority, or so recognized a course of dealing established by him in that respect, as to estop it from denying its liability.[20] But it

17. Union Iron Works Co. v. Union Naval Stores Co., 157 Ala. 645, 47 So. 652; Elkhart Hydraulic Co. v. Turner, 170 Ind. 455, 84 N. E. 812; Monongahela Nat. Bank v. Harmony Land Co., 226 Pa. St. 440, 75 Atl. 687; Third Nat. Bank v. Laboringman's Mercantile &c. Co., 56 W. Va. 446, 49 S. E. 544. The president of a corporation engaged in a business in which it received notes from its agents and customers, may be presumed to be authorized to discount and transfer the notes of the company. Iowa Nat. Bank v. Sherman & Bratager, 17 S. D. 396, 97 N. W. 12, 106 Am. St. Rep. 778. See also Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650. In Gould v. W. J. Gould & Co., 134 Mich. 515, 96 N. W. 576, 104 Am. St. Rep. 624, the court said that the authority may be implied where the president has been held out as having charge of the business and as authorized to perform such an act, or where the corporation is shown to have received and retained the benefits of the transaction, or where the instrument is under seal of the corporation, or where the president is managing the business and the power is requisite in the conduct of the business carried on.

18. Elwell v. Dodge, 33 Barb. 336. This was the case of an indorsement by a president of an insurance company, but the doctrine stated is inferable from it. Evansville Public Hall Co. v. The Bank of Commerce, 144 Ind. 34, 42 N. E. 1097.

19. Marine Bank v. Clements, 3 Bosw. 600.

20. National Bank v. Navassa Phosphate Co., 56 Hun, 136; Stainback v. Junk Bros., 98 Tenn. 306, 39 S. W. 530; Schreyer v. Turner Flouring Co., 29 Oreg. 1, 43 Pac. 719; *Re* Assignment of Pendleton Hardware Co., 24 Oreg. 330, 33 Pac. 544; Allen v. Olympia Light & Power Co., 13 Wash. 307, 43 Pac. 55; People v. American Steam Boiler Ins. Co., 3 App. Div. 504, 38 N. Y. Supp. 406; Milbank v. de Riesthal, 82 Hun, 538, 31 N. Y. Supp. 522; Grant v. Treadwell Co., 82 Hun, 591, 31 N. Y. Supp. 702; National Spraker Bank v. Treadwell Co., 80 Hun, 363, 30 N. Y. Supp. 77; Grant v. Treadwell Co., 1 App. Div. 367, 37 N. Y. Supp. 392. In this connection it may be instructive to refer to the opinion of Finch, J., in the case of Hoag v. Town of Greenwich, 33 N. Y. 152, 88 Am. Dec. 372, elsewhere more fully noted under § 1537, note 7; Hawkins, Receiver, v. Fourth Nat. Bank of New York, 150 Ind. 117, 49 N. E. 957; Washington Times Co. v. Wilder, 12 App. D. C. 62; Peatman v. Light, Heat & Power Co., 100 Iowa, 245, 69 N. W.

is essential that it should have knowledge of the assumption by the officer of the powers he has exercised.[21] By virtue of his office as vice president of a corporation, a person has no authority to execute a note for the corporation; [22] though such power may be exercised when conferred.[23]

§ 394a. **Ratification by corporation.**—It has been suggested or pointed out in various connections in the foregoing sections that circumstances may fix a liability on a corporation even for unauthorized acts of its officers, as it is generally held that a corporation may be made accountable for acts of its officers *ultra vires* when it has subsequently ratified them,[24] or has received the proceeds or accepted the benefits of the unauthorized act.[25]

541; Bell v. Beller, 40 Nebr. 501, 58 N. W. 941; American Exchange Nat. Bank v. First Nat. Bank, 27 C. C. A. 274, 82 Fed. 961.

21. First Nat. Bank v. Council Bluffs Water Co., 56 Hun, 412; Parsons v. Guarantee Investment Co., 64 Mo. App. 32; Worthington v. Railroad Co., 195 Pa. St. 211, 45 Atl. 927.

22. Sedalia Nat. Bank v. Economy Steam Heating & Elec. Co., 145 Mo. App. 319, 130 S. W. 377; Henderson Mercantile Co. v. First Nat. Bank, 100 Tex. 344, 99 S. W. 850.

23. Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641, holding that when the charter of a corporation authorizes it to issue notes, and the by-laws authorize the president to sign contracts for the company and vest the authority of the president in the vice president in the absence of the president, the company is liable for notes executed by the vice president in the absence of the president. See also Ramboy v. Stansburg, 13 Cal. App. 649, 110 Pac. 472.

24. Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75; Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, holding however that not only must it have been the custom of the company to issue its notes by its president alone, but the company must have ratified his act by acquiescence after knowledge of the fact, or by confirming it without question; custom cannot arise out of a single transaction; nor can it be said that the corporation was in the custom of issuing the notes by the act of the president alone, when in each instance shown it repudiated his act as soon as discovered, and contested its liability on that account. Where a president of a corporation, without authority, has indorsed a note in the name of the corporation and the proceeds of the note have been used for its benefit, a subsequent note by the directors authorizing the borrowing of the money, with knowledge of the facts, was equivalent to an authorization to indorse the note. Beacon Trust Co. v. Souther, 183 Mass. 413, 67 N. E. 345. A nontrading corporation cannot be said to have ratified the act of its general manager in signing notes in its corporate name when it had no knowledge of his fraudulent conduct. Sedalia Nat. Bank v. Economy Steam Heating &c. Co., 145 Mo. App. 319, 130 S. W. 377.

25. Hireen v. R. W. English Lumber Co., 46 Colo. 216, 104 Pac. 84; Marion Trust Co. v. Crescent Loan & Investment Co., 27 Ind. App. 451, 61 N. E. 688,

§ 395. Officer cannot release debt.—It is well settled that neither the president nor the cashier of a bank has authority, *virtute officii*, to give up or release a debt or liability to the bank, or make any admission which would release any party to an obligation, negotiable or otherwise, due to the bank—for such purposes the board of directors only having the power to act.[26]

§ 396. Officer must act within the sphere of his duty.—The decisions upholding the doctrine that certain officers have implied power to bind their corporations, rest upon the view that such acts fall, according to the customs and usages of business, within their spheres of duty. But it is only in such spheres of duty that the implication arises,[27] or where the power is necessarily implied from powers actually or expressly conferred.[28]

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87 Am. St. Rep. 257; Topeka Capital Co. v. March, 10 Kan. App. 40, 61 Pac. 876; Hunt v. Northwestern Mortg. & Trust Co., 16 S. D. 241, 92 N. W. 23; Lyndon Sav. Bank v. International Co., 75 Vt. 224, 54 Atl. 191. Where a note executed by a corporation was invalid because not duly authorized, an estoppel is raised when the corporation received the benefits of the loan evidenced by the note, acquiesced in the contract with knowledge and long continued silence, and never attempted or offered to rescind, and in the answer has made no offer to restore the consideration. Curtin v. Salmon River Hydraulic Gold Min. &c. Co., 141 Cal. 308, 74 Pac. 851, 99 Am. St. Rep. 75. Where the president of a trading corporation had authority to execute notes for the company, and in his absence the secretary executed a note in the company's name to protect the credit of the company, the failure of the president, on learning within a week that the secretary had signed the note and the purpose for which it was given, to notify the payee that the secretary had authority to sign, is a ratification of the act. Wolf Co. v. Bank of Commerce, 107 Ill. App. 58. Though the president of a city railway corporation had no authority to guarantee notes on behalf of the company, yet where he guaranteed notes of a third person given in payment of land conveyed to the company, there was a ratification of the action of the president when the company paid interest on the note and obtained an extension of time in which to pay the principal and retained title to the lots. Lake St. El. R. Co. v. Carmichael, 184 Ill. 348, 56 N. E. 372.

26. Hodges v. First Nat. Bank, 22 Gratt. 59; Olney v. Chadsey, 7 R. I. 225; Merchants' Bank v. Marine Bank, 3 Gill, 96; Bank of the United States v. Dunn, 6 Pet. 51; Bank of the Metropolis v. Jones, 8 Pet. 12; Brouwer v. Appleby, 1 Sandf. 158; Hoyt v. Thompson, 5 N. Y. 320; Spyker v. Spence, 8 Ala. 333; Mt. Sterling Turnpike Co. v. Looney, 1 Metc. (Ky.) 550; Cocheco Nat. Bank v. Haskell, 51 N. H. 116; Moshannon Land Co. v. Sloan, 109 Pa. St. 532; Gray v. Farmers' Bank, 81 Md. 631, 32 Atl. 518; Bank of Ravenswood v. Wetzel, 58 W. Va. 1, 50 S. E. 886, 70 L. R. A. 305, quoting text.

27. Morse on Banking, 66, 76, 86, 89; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88, citing text.

28. Jackson Paper Mfg. Co. v. Commercial Nat. Bank, 199 Ill. 151, 65 N. E.

Where the officer of a corporation executes its paper payable to himself, the party acquiring it would be put upon inquiry, and charged with any equities or defenses available to the corporation as against the signer,[29] and the act of an officer of a corporation in attempting to make the corporation liable by substituting it as indorser in the place of his individual indorsement, without consideration to or authority from the company, is void.[30]

§ **397. Joint authority of officers, how exercised.**—It is not uncommon to authorize the president and cashier to borrow money or obtain discounts, and in such case they must act jointly; and the act of the cashier alone would not bind the bank, unless the party dealing with him believed him to be acting in pursuance of his general authority.[31] But if both agree as to the act, it may be executed by paper signed by one of them.[32]

Where a by-law of a corporation provided that the notes of the company should be drawn by the auditor to the president, and countersigned by the treasurer, it was held that a note executed by the president in pursuance of authority from the directors, in payment of services rendered the company, was not invalidated by the failure to execute in the manner provided by the by-laws.[33]

SECTION III

INTERPRETATION OF THE INSTRUMENT

§ **398.** Unless the name of the corporation for which the officer or agent assumes to act is disclosed upon the face of the instrument, or the officer's or agent's name is adopted by the corporation and used as its own in business transactions, the corporation cannot be bound upon the instrument, and the officer or agent will himself be personally bound if its terms of obligation can be interpreted as referable to

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136, 59 L. R. A. 657, 93 Am. St. Rep. 113; Bank of Commerce v. Baird Min. Co., 13 N. Mex. 424, 85 Pac. 970.

29. Kenyon Realty Co. v. National Deposit Bank, 140 Ky. 133, 130 S. W. 965. Randall v. Rhode Island Lumber Co., 20 R. I. 626, 40 Atl. 763.

30. Triplett v. Fanver, 103 Va. 123, 48 S. E. 875. See also Wheeling Ice & Co. v. Conner, 61 W. Va. 111, 55 S. E. 982.

31. Morse on Banking, 150.

32. Ridgway v. Farmers' Bank, 12 Serg. & R. 256.

33. Railroad Co. v. Tiernan, 37 Kan. 625.

him. The questions of most difficulty on this subject arise when the names of both corporation and of officer or agent appear on the face of the paper; and it has often puzzled courts to determine whether or not it was in legal effect the instrument of the corporation, or the private contract of the officer or agent. Bills, notes, acceptances, and indorsements are each, to some extent, peculiar; at least the different relations of the parties respectively to the paper are circumstances which in themselves throw some light on its interpretation. And we shall, therefore, consider separately the interpretation of the maker's, acceptor's, drawer's, and indorser's contract. Certain general principles of the law of agency apply to all. And where it is manifest from the face of the instrument, that it was executed, for a corporate purpose; where, to use the language of the United States Supreme Court, "the marks of an official character not only exist on the face but predominate," [34] it is, as a general rule, to be regarded as the paper of the corporation, and not as that of the individual officer or agent.[35]

§ **399. Various and adopted names of corporations.**—Corporations may be known by several names as well as natural persons, and, therefore, the misnomer of a corporation in any written contract does not prevent its being bound, provided its identity with that intended by the parties is averred in pleading and sustained by the proof.[36] It is not infrequently the case that a firm is incorporated as a company, and uses sometimes its corporate and sometimes its copartnership title, or sometimes styles itself a company instead of a firm. And sometimes a corporation transacts its business in the name of an agent, adopting his name, in which case it will be bound as effectually as if its corporate title had been used.[37] An action by "The Medway Cotton Manufactory" was sustained in Massachusetts on a note given to "Richardson, Metcalf & Co.;" [38] and against the "Boston

34 Mechanics' Bank v. Bank of Columbia, 5 Wheat. 356; Jackson v. Claw, 18 Johns. 348. The word "we" does not necessarily imply a plurality of makers; it is often used to designate or describe a corporation. Williams v. Harris, 198 Ill. 501, 64 N. E. 988; Derby v. Gustafson, 131 Ill. App. 281; August v. Creque, 72 Ohio St. 551, 74 N. E. 1073; Nunnemacher v. Poss, 116 Wis. 444, 92 N. W. 375. See section 403.

35. See chapter on Agents, § 3.

36. Angell & Ames on Corporations, 169. See § 485.

37. West v. First Nat. Bank, 20 Hun, 408; Devendorf v. West Virginia Oil, etc., Co., 17 W. Va. 172; *ante*, §§ 304–363.

38. Medway Cotton Manufactory v. Adams, 10 Mass. 360. See also Com-

Iron Company" on notes signed "Horace Gray & Co.;" [39] and in New York one on a bond by "The New York African Society, etc.," given to the standing committee of the New York African Society; [40] and on an acceptance in the same State in the name of "H. G. & Co." made by the president of the corporation, that being his copartnership style, and used by the corporation as a convenient mode for raising funds, the corporation was held liable.[41]

§ 399a. In a recent West Virginia case suit was brought against the West Virginia Oil and Oil Land Company, on a draft signed "charge to account of B. S. Compton, Pres.," without any *indicia* upon it that it related to corporate business other than the mere suffix "Pres." It was held that the company of which Compton was president having customarily conducted its business by means of drafts so drawn, and the drafts having been given to the plaintiff for a consideration moving to the company, the circumstances were admissible in evidence, and the company was bound as drawer of the draft.[42] In New York, where certificates of deposit were customarily issued by a national bank with the simple individual signature of the president, the bank receiving the money was held bound on the principle above stated.[43] In Massachusetts, where a note was signed "Forbes Woolen Mills, by G. E. Forbes, Treasurer," there being no legally chartered corporation, and the note being for the benefit of Forbes, he was held personally bound as its maker.[44]

§ 400. In respect to the maker, it is best to sign the corporate name after words which import necessarily, and only, a corporate promise. But it is by no means essential that this form be observed. And if the officer or agent add to his name "for —— Company," it is quite sufficient to indicate that it is the company's promise, and not his.[45] A different view has been taken in some

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mercial Bank v. French, 21 Pick. 486; Minot v. Curtis, 7 Mass. 441; *ante*, § 304.

39. Melledge v. Boston Iron Co., 5 Cush. 158.

40. African Society v. Varick, 13 Johns. 38.

41. Conro v. Port Henry Iron Co., 12 Barb. 27.

42. Devendorf v. West Virginia O. & O. L. Co., 17 W. Va. 172.

43. West v. First Nat. Bank, 20 Hun, 408.

44. Montgomery v. Forbes, 148 Mass. 252.

45. Emerson v. Providence Hat Mfg. Co., 12 Mass. 237; Simpson v. Garland, 76 Me. 203. See *ante*, § 298. When the corporation's name is affixed to the instrument, it is preferable for the agent executing it, in the name of the principal,

cases; [46] but this rule is sustained by reason and by great weight of authority. If the obligatory tenor of the note indicate that the corporation is to be bound, then the official signature will be deemed to be affixed as for the corporation, and the individual will not be liable. It was so held where the note ran, "The Ocean Mining Co. promise to pay," and was signed by "J. H., Trustee," and by "S. N. S.;" [47] where the note commenced, "The Newport Manufacturing Co. promise to pay," and was signed "J. W. T., Treasurer;" [48] where the note ran, "The Patent Cloth Man. Co. promise to pay," and was signed "W. S., Agent;" [49] where the note ran "We promise," and was signed "Belfast Foundry Co.," and under it "W. W. Castle, Pres't," and was payable "at office of Belfast Foundry Co.," it was considered to import the promise of the company, and not to bind the president personally.[50] It was held otherwise, and that the individual was bound, where the note ran, "We promise," and was signed "D. P. L., Treasurer, Hallowell Gas Light Company." [51]

§ **401. Illustrations.**—Where the note ran, "I promise," and was signed "For the Providence Hat Manufacturing Company, A. B. (the agent)," it was held the company's, and not the agent's note, notwithstanding the words "I promise," it being sufficiently indicated that it was done as agent.[52] But where the note commenced, "We, the subscribers, jointly and severally promise," and was signed, "for the Boston Glass Manufactory, A., B. & C.," the joint and several undertaking, and the omission of any designation

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to add his own name as agent, so that the instrument may show by what person the signature is written, but in law, the writing of the name of the principal, *alone* is sufficient. Youngs v. Perry, 42 App. Div. 247, 59 N. Y. Supp. 19.

46. Macbean v. Morrison, 1 A. K. Marsh. 545. When the note ran "I promise to pay, etc., A. B., for value received of C. D., on account of his wages at the Madison Hemp and Flax Spinning Company," and was signed, "For the Madison Hemp and Flax Company, W. Macbean, Pres't," it was held the individual note of Macbean, on the ground, as stated by Rowan, J., that "the law reduces the liability from the obligatory tenor of the note."

47. Shaver v. Ocean Mining Co., 21 Cal. 45. See also Armstrong v. Kirkpatrick, 79 Ind. 527. Compare Vliet v. Simanton, 63 N. J. L. 458, 43 Atl. 738.

48. Commercial Bank v. Newport Mfg. Co., 3 B. Mon. 13.

49. Shotwell v. M'Kown, 2 Southard, 828.

50. Castle v. Belfast Foundry Co., 72 Me. 167; Draper v. Massachusetts Steam Heating Co., 5 Allen, 338, accords. See *ante*, § 307; Liebsche v. Kraus, 74 Wis. 387; Miller v. Roach, 22 N. E. 634; Latham v. Flour Mills, 68 Tex. 130.

51. McClure v. Livermore, 78 Me. 391.

52. Emerson v. Providence Hat Mfg. Co., 12 Mass. 237.

of office or agency were considered together, as showing it to be an individual note.[53] In a later case, where the note began, "We jointly and severally promise to pay," and was signed "Patton & Johnson, for Ira Gove," the words "jointly and severally," as indicating the personal contract of Patton & Johnson, were regarded as overbalanced by the form of the signature, "for Ira Gove," which, it was said, "so clearly manifests the purpose to be the execution of a contract binding solely upon the defendant, that if either is to be rejected as surplusage and of no effect, it should be the words 'jointly and severally.'"[54]

§ **402. Further illustrations.**—Where the promissory terms of the notes are, "The president and directors of the A. B. Company promise to pay, etc.," they are sufficient to import distinctly a corporate obligation, and the signature of the president subscribed will not bind him personally.[55] A different view has been taken in Maine.[56]

But in England, where the directors of a joint-stock newspaper company gave a note for a purchase for the company, running, "On demand, we jointly and severally promise to pay, etc., for and on behalf of the Wesleyan Newspaper Association," and signed their names as directors, it was held that the words "jointly and severally" were equivalent to "jointly and personally," and that they were

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53. Bradlee v. Boston Glass Co., 16 Pick. 347. The plaintiff had proved the agency. Shaw, C. J., said: "The words, 'for the Boston Manufactory,' if they stood alone, would perhaps leave it doubtful and ambiguous whether they meant to bind themselves as promisors to pay the debt of the company, or whether they meant to sign a contract for the company, by which they should be bound to pay their own debt, though the place in which the words are introduced would seem to warrant the former construction. But other considerations arise from other views of the whole tenor of the note. The fact is of importance that it is signed by three instead of one, and with no designation or name of office indicating any agency or connection with the company. No indication appears on the note itself that either of them was president, treasurer, or director, or that they were a committee to act for the company. But the words 'jointly and severally' are quite decisive. The persons are, 'we, the subscribers,' and it is signed Jonathan Hunnewell, Samuel Gore, and Charles F. Kupfer. This word 'severally' must have its effect; and its legal effect was to bind each of the signers. This fixes the undertaking as a personal one. It would be a forced and wholly untenable construction to hold that the company and signers were all bound; this would be equally inconsistent with the terms and the obvious meaning of the contract."

54. Rice v. Gove, 22 Pick. 158.

55. Hamilton v. Newcastle R. Co., 9 Md. 19; Pitman v. Kintner, 5 Blackf. 250.

56. Rendell v. Harriman, 75 Me. 497. See Sturtevant v. Hall, 59 Me. 172.

personally bound.[57] In another case, where the note ran, "We jointly promise to pay, etc.," and was signed by three of the directors of a joint-stock company, and countersigned by the secretary, and purported to be on account of stock of the company, it was held the note of the company.[58]

§ **403. The addition of official character to the signature** at the foot of the note will not of itself be sufficient to indicate an intention to bind the corporation, but will be regarded merely as an earmark or *descriptio personæ*. Thus, where a note was signed "A. B., Prest. Henderson Loan Co.," it was held the individual note of Henderson.[59] The like decisions were rendered where a note commenced "I promise," and was signed "J. S., Trustee of Sullivan Railroad;"[60] where a note began "We promise," and was signed "W. S., Prest. Blannerhasset Oil Company, and W. H., Treasurer;"[61] and where the note

57. Healey v. Story, 3 Exch. 3, 18 L. J. (N. S.) 8.

58. Lindus v. Melrose, 3 H. & N. 177. See Bottomley v. Fisher, 8 Law Times Exch. (N. S.) 688; Price v. Taylor, 6 Jurist, 402; McCormick v. Stockton, etc., Co., 130 Cal. 100, 62 Pac. 267.

59. Burbank v. Posey, 7 Bush, 373. To same effect, Heaton v. Myers, 4 Colo. 62; Chamberlain v. Pacific W. G. Co., 54 Cal. 103; Davis v. England, 141 Mass. 587. In Hobson v. Hassett, 76 Cal. 203, the official designation was held not to relieve the maker of his individual liability; but in Farmers' Bank v. Colby, 64 Cal. 352, the company was held liable in such case; there being no question as to the liability of the maker, he having indorsed the note in his individual capacity. Taylor v. Reger, 18 Ind. App. 466, 48 N. E. 262, 63 Am. St. Rep. 343; Prescott *et al.* v. Hixon, 22 Ind. App. 139, 53 N. E. 391, 72 Am. St. Rep. 291; Savings Bank v. Central Market Co., 122 Cal. 28, 54 Pac. 273.

60. Fiske v. Eldridge, 12 Gray, 474, Dewey, J., saying: "The case of Mann v. Chandler, 9 Mass. 335, may be thought to be favorable to the defense, and contrary to what seems the doctrine of the other cases referred to. * * * That case differs from the others in its facts as to the description annexed to the name. It may be that the signature of the treasurer of a corporation may be thought to be the ordinary mode of executing such contracts on the part of the corporation, and that those words in themselves import a promise of the party whose treasurer he is. We think the present case differs from it, and is more analogous to the other cases cited. In the case of Seaver v. Coburn, 10 Cush. 324, a party signing a contract as 'Treasurer of the Eagle Lodge' was holden personally liable. Such a note as the one in suit we think must be taken to be the personal promise of the signer, and the word 'trustee,' placed after the signature, be held to be a mere *descriptio personæ*, intended to indicate the fund to be charged with the note, or the uses to which the money has been applied.

61. Scott v. Baker, 3 Hag. 285; Rand v. Hale, 3 Hag. 495; Rendell v. Harriman, 75 Me. 497, 46 Am. Rep. 421; McCandler v. Canning Co., 78 Iowa, 161; Heffner v. Brownell, 70 Iowa, 591; Coburn v. Omega Lodge, 71 Iowa, 581. But see

was signed "B. & C., Trustees of Union Religious Society;" [62] where the note was dated "Commercial Bank of Rodney, Rodney, Miss., 8 March, 1839," began "We promise," and was signed "T. F., Prest.," and countersigned "J. L., Cashier;" [63] where the note began, "For value received, on policy No. 11,176, I promise," was signed "A. B., Prest., Dorchester Avenue R. R. Co.," and was proved to have been given in consideration of a policy of insurance issued to that company by the payee; [64] where there was added to the signatures "Trustees of School District No. 1;" [65] where the note was signed "A. B. & C. D., Receivers;" [66] where there was added "Secretary Masonic Female College;" [67] where there was added "Trustees of Baptist Society;" [68] where there was added "Treasurer of St. Paul's Parish;" [69] where the note ran, "We, the trustees of the Seventh Presbyterian Church," and was signed "A. B. C. & D., Trustees;" [70] where there was added "As Trustees of the First Universalist Society," to a note of several signers beginning "I promise;" [71] where the note ran "We," and was signed "G. M., Treasurer of the M. F. D. Association;" [72]

Devendorf v. West Virginia O. & O. L. Co., 17 W. Va. 135, 172; Marshall v. Murphy, 5 Kan. App. 718, 46 Pac. 973; First Nat. Bank v. Wallis, 150 N. Y. 456, 44 N. E. 1038; Albany Furniture Co. *et al.* v. The Merchants' Nat. Bank, 17 Ind. App. 531, 47 N. E. 227, 60 Am. St. Rep. 178.

62. Hovey v. Bannister, 8 Cow. 31.

63. Fitch v. Lawton, 6 How. (Miss.) 371.

64. Haverhill, etc., Ins. Co. v. Newhale, 1 Allen, 130.

65. Fowler v. Atkinson, 6 Minn. 579. To same effect, see Cahokio School Trustees v. Rautenberg, 88 Ill. 219. In a recent Indiana case where three persons signed their names and added "Trustees of Monticello School," they were regarded as public agents, the school being a public one, and not personally bound. School Town of Monticello v. Kendall, 72 Ind. 91. See on this subject, §§ 443, 445; Johnson School Township v. Citizens' Bank, 81 Ind. 515.

66. Towne v. Rice, 122 Mass. 67.

67. Drake v. Flewellen, 33 Ala. 106.

68. Brockway v. Allen, 17 Wend. 41. See Mears v. Graham, 8 Blackf. 144.

69. Sturdivant v. Hull, 59 Me. 172. See Gregory v. Leigh, 33 Tex. 813.

70. Powers v. Briggs, 79 Ill. 493. See to like effect, Hays v. Crutcher, 54 Ind. 260; Hayes v. Brubaker, 65 Ind. 27. But in the case of New Market Savings Bank v. Gillet, 100 Ill. 254, where the corporate name was properly set out in the body of the instrument, and the official description opposite the name of the signers consisted not merely of the single word "trustees," but "Trustees of the First Free-Will Baptist Society of Chicago, Illinois," which was the corporate name, thus distinguishing the case from Powers v. Briggs, *supra*, it was held that the obligation was that of the society, and not of the trustees individually. Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

71. Burlingame v. Brewster, 79 Ill. 515; Sturdivant v. Hull, 59 Me. 172.

72. Mellen v. Moore, 68 Me. 390. A note running "Three months after date

where the note began "We," and was signed "Warrick Glass Company" and J. Price Warrick, President was undersigned, it was considered a company note and was so regarded by the method of the signature;[73] so as to notes beginning, "We promise to pay," and signed, "The Sanitary Milk-Supply Co., T. A. Huston, Trs.,"[74] "The Arkon White Sand & Stone Co., L. K. Mihills, Secy. & Treas., D. B. Aungst, Pres.;"[75] "Double Use Mitten Co., S. O. Derby, Treasurer,"[76] and so as to the notes signed "Northeastern Coal Company, Commodore P. Foye, Secretary; Goodman Wallem, President, Northeastern Coal Company;"[77] "William C. Thompson Co., W. C. Thompson, Pt.;"[78] "Globe Loan & Trust Co., H. O. Devries, Presdt. W. B. Taylor, Secy.;"[79] and so as to notes signed "Omaha Coffin Mfg. Co., C. A. Claflin, Pres., S. L. Andrews, Secy.;"[80] but where the note began "We the trustees of Musconetang Grange, No. 114, known as W. Fleming & Company" and was signed by W. M. S. and I. W., Trustees, the addition of the expression "known as W. Fleming & Company" was regarded as rendering it doubtful

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we promise to pay, etc.," and signed "Wm. T. Wallis, Prest., and George T. Smith, Treas." On the margin of the note: "Wallis Iron Works" creates an individual obligation on the part of Wallis and Smith and is not, in any sense, a corporate note. See First Nat. Bank v. Wallis, 84 Hun, 377, 32 N. Y. Supp. 382.

73. Reeve v. First Nat. Bank, 54 N. J. L. (25 Vroom) 208, 23 Atl. 853, 33 Am. St. Rep. 675, and § 410. A note made upon a blank form, signed by George M. Gibbs, secretary, and George Bieberbach, president, payable "to the order of ourselves," and indorsed," Worcester Brewing Company, George Bieberbach, President. George M. Gibbs, secretary," filled out, and the name of the company indorsed in the handwriting of Gibbs, is the note of the company. Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162. In a note providing that "I or we promise to pay," and signed and sealed in the corporate name "Per C. I. Williams, Sec. George J. Williams, Gen. Mngr.," the word "Per" applies to both officers, and the note is the obligation of the corporation. Williams v. Harris, 198 Ill. 501, 64 N. E. 988.

74. Gleason v. Sanitary Milk-Supply Co., 93 Me. 544, 45 Atl. 825, 74 Am. St. Rep. 370.

75. August v. Creque, 72 Ohio St. 551, 74 N. E. 1075.

76 Derby v. Gustafson, 131 Ill. App. 281, holding further that the omission of the word "by" or "per" does not change the character of the instrument.

77. Northeastern Coal Co. v. Tyrrell, 133 Ill. App. 472.

78. Thompson v. Hasselman, 131 Ill. App. 257.

79. English & Scottish American Mortg. & Inv. Co. v. Globe Loan & Trust Co., 70 Neb. 435, 97 N. W. 612.

80. American Nat. Bank v. Omaha Coffin Mfg. Co., 1 Neb. (Unof.) 322, 95 N. W. 672.

whether the corporation or the individuals were bound.[81] The principles applicable to public agencies are elsewhere considered.[82]

§ **404.** The weight of authority, both English and American, undoubtedly bears out the doctrine of the text, and it is sustained, as we think, by clear, sound reasoning.[83] But Professor Parsons takes a different view of the law in his admirable work,[84] and there are undoubtedly a few cases which sustain him, though by no means so many as those cited by him, many of them containing other indications than mere official designation that they were executed in the business of the corporation.[85]

§ **405. Official designation in body of the instrument.**—Where, in the body of the note, there is the expression, "I, A. B., Treasurer of ——— Company," or, "I, A. B., Cashier of ——— Company, or Bank," or, "I, A. B., President of ———," and it is signed in like manner, there are cases which consider it sufficiently indicated that it is intended to be the note of the corporation, and especially when the signature is likewise accompanied with the official designation; and high authority favors them.[86] Thus it has been held that a note be-

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81. Simanton v. Vliet, 61 N. J. L. (32 Vroom) 595, 40 Atl. 595.

82. §§ 443, 445.

83. See the excellent remarks of Walton, J., in Mellen v. Moore, 68 Me. 390.

84. 1 Parsons on Notes and Bills, 168, in which it is said: "If a corporation certainly authorized to make, sign, accept, or indorse negotiable paper, has an officer authorized to use their name in this way, and this officer writes his own name as drawer of a bill of exchange, with the express addition of his office, it seems that he would be held to do this officially, and to bind the corporation and not himself."

85. Johnson v. Smith, 21 Conn. 627. The promisors signed themselves "Vestrymen of the Episcopal Society." The society received the money for which the notes were given. Church, C. J., quoted the language of Swift, C. J., in Hovey v. Magill, 2 Conn. 680, with approval: "I can see no good reason for the addition of agent but to render the note obligatory on the company, and exclude all idea of individual liability." See also Hovey v. Magill, 2 Conn. 680, note signed "A. W. Magill, agent for the Middletown Manufacturing Company," and running, "I promise." Held, the company's. In Tilden v. Barnard, 43 Mich. 377, the signers of the note added, "Vestrymen of Grace Church." Held, personally bound. In Proctor v. Webber, 1 D. Chipman, 371, the note ran, "I, Christopher Webber, as Agent of the Green Mountain Turnpike Corporation," and was signed "Christopher Webber, Agent of the Green Mountain Turnpike Corporation." Held, the company's. McCall v. Clayton, Busbee L. R. 422; Dispatch Line of Packets v. Bellamy Mfg. Co., 12 N. H. 205.

86. 1 Parsons on Notes and Bills, 169; Taylor v. Reger, 18 Ind. App. 466,

ginning "I, Treasurer of Dorchester Turnpike Corporation," and signed "G. L. C., Treasurer, etc.," was the note of the corporation;[87] but the decision has been criticised and doubted,[88] and, we think, should not be followed. It is true that bank bills are universally signed in this way, as observed by Professor Parsons; and, as to them, the principle may be well applied, as they bear upon their face distinct evidences of their character as representatives of money issued by a bank, and which it would be illegal (in many of the States at least) for an individual to issue. And so other printed securities, such as bonds and coupons, might be couched in similar phrase without exciting a doubt that they were corporate obligations. In respect also to bills drawn and notes signed by the cashier of a bank, the mention of his character as cashier, according to the inclination of the decisions, stamps upon the instrument the obligation of the bank.[89] Farther, we think, neither reason nor authority will permit us to go. In New York it has been held that a note running, "I, John Franklin, Pres't of the Mechanics' Fire Insurance, promise, etc.," was Franklin's and not the company's.[90] So in Maine, where the note ran, "We, the Trustees of the Wayne Scythe Company, promise," and was signed by the individual names.[91] So in Indiana, where the note began, "We, the Trustees of the Methodist Church in Rockport, promise," and was signed "A. B., C. D., etc., Trustees of the M. E. Church."[92] And similar decisions have been rendered in Illinois.[93]

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48 N. E. 262, 63 Am. St. Rep. 352. Promissory notes stipulating that "We, or either of us, the trustees of White school district * * *, promise to pay * * *, it being money this day borrowed of said Temple to build schoolhouse in said district number 6. T. W. Warford, L. F. Green, Trustees," were held not to be the individual notes of the signers. Warford v. Temple (Ky.), 73 S. W. 1023, the court saying that the notes sued on show on their face that the money borrowed was to be used to build a schoolhouse for the benefit of the district, and it appears from the averments both of the petition and answer that the plaintiff knew the purpose for which the money was borrowed, and that it had been so applied.

87. Mann v. Chandler, 9 Mass. 335; Blanchard v. Kaull, 44 Cal. 448, announces same doctrine.

88. Barlow v. Congregational Society, 8 Allen, 460; Fiske v. Eldridge, 12 Gray, 476.

89. See *post*, § 417.

90. Barker v. Mechanics' Ins. Co., 3 Wend. 94. See *ante*, authorities cited in § 262.

91. Fogg v. Virgin, 19 Me. 353. But see Klostermann v. Loos, 58 Mo. 290.

92. Mears v. Graham, 8 Blackf. 144; McClure v. Bennett, 1 Blackf. 189. This interpretation was given because there was no power to bind the corporation.

93. Hypes v. Griffin, 89 Ill. 134; Powers v. Briggs, 79 Ill. 493.

§ **406. Illustrations.**—So in Massachusetts, where a note ran, "We, Trustees of the New Congregational Meeting House, promise,"[94] and another ran, "We, the Prudential Committee for and in behalf of the Baptist Church in Lee, agree to pay, etc.,"[95] and only the individual names of the parties were signed, without official designation, the like view was taken—that the signers were individually bound. The latter case, we do not think, can be sustained, as the words "for and in behalf of the Baptist Church, etc.," sufficiently indicate that the signers did not design to bind themselves personally.[96]

But the decisions are very conflicting and the tendency is to restrain, rather than to enlarge, the constructive liability of corporations. In an English case a note running, "We, the Directors of the Isle of Man Slate and Flag Company," in the body was held the individual note of the directors, although the corporate seal was attached.[97] If the expression were, "We, as Directors," or "as Trustees," the idea of individual liability would be excluded by the use of the restrictive word "as."[98] And in Kentucky, where the note ran, "The President and Directors of the H. & B., etc., Co.," and was signed by those officials, the president adding "Pres't" to his name, it was held clear that they promised on behalf of the company, and bound it alone.[99] But in another case, where the note ran, "The President, by order of the Board" of said company, promises to

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94. Packard v. Nye, 2 Metc. (Mass.) 47. But see Baker v. Chambliss, 4 Iowa (G. Greene), 429, and § 443*a* and notes.

95. Morell v. Codding, 4 Allen, 403, Dewey, J.: "The present case lacks one element which, when it exists, is usually decisive of the character of the promise; that is, the introduction of the name of a principal as a part of the signature, as in the case of Long v. Colburn, 11 Mass. 97, where the form of the signature was 'pro William Gill—J. S. Colburn.'" In Vermont, a note running, "We, in behalf of the First M. E. Society in Middlebury," and signed by simple individual names, was held at least *prima facie* their individual note. Pomeroy v. Slade, 16 Vt. 220.

96. Haskell v. Cornish, 13 Cal. 45. The note ran, "We, the undersigned, Trustees of the First African Methodist Church, in behalf the whole Board of Trustees," and was signed simply with individual names of H. C. C. and J. C. L. Held, that it was the note of the church, though it might be otherwise if the defendants had no authority to execute the note for the church.

97. Dutton v. Marsh, L. R., 6 Q. B. [*361], 359 (1871).

98. Sanborn v. Neal, 4 Minn. 137; Blanchard v. Kaull, 44 Cal. 448. Note began, "We, as Trustees" of A. N. & Co., and was signed A., B. & C., Trustees of A. & N. Co. Held the company's note. See also Yowell v. Dodd, 3 Bush, 581.

99. Yowell v. Dodd, 3 Bush, 581.

pay, and was signed by him and the directors with their simple names, it was held the note of the President,[1] and a note, naming an association in the body and continuing "and we the undersigned promise to pay," was held to be the obligation of the individuals signing their names, as well as that of the corporation.[2]

§ 407. Additional expressions or indicia of corporate obligation.—But there may be some additional expression to the more official designation, which, taken in connection therewith, shows an intention to bind the corporation, and it will then have that effect. Thus, "I, as Treasurer of the Congregational Society, or my successors in office, promise to pay," was held a note of the society; [3] and a note payable "to the Treasurer of the First Parish in Hopkinton, or his successor," was held likewise payable to the parish,[4] it being indicated clearly that the official, and not the individual, was referred to.

So where the promise was to pay "eighty-five dollars for the use of N. E. P. Union Store, No. 607," signed "M., Treasurer," it was held to indicate an attempt to bind the corporation, not the officer; [5] and likewise where the promise was, "We, as trustees, but not as individuals, promise to pay," and signed "A., B. & C., Trustees." [6]

§ 408. Other indicia; corporate seal.—Sometimes there are other indicia to which importance is attached, as evidencing a corporate or individual character. It has been said that the seal of a corporation appearing upon an instrument is *prima facie* evidence

1. Caphart v. Dodd, 3 Bush, 584.

2. Nunnemacher v. Poss, 116 Wis. 444, 92 N. W. 375.

3. Barlow v. Congregational Society, 8 Allen, 460; Cox v. Sloan, 158 Mo. 411.

4. See Hood v. Hallenbeck, 7 Hun, 366, and *post*, § 419; Buck v. Merrick, 8 Allen, 123.

5. Dow v. Moore, 47 N. H. 419. A note signed "F. C. S., Sec'y and Treas." is sufficient to put a purchaser of a note on inquiry as to whether the secretary intended to personally bind himself thereon. See Capital Sav. Bank & Trust Co. v. Swan, 100 Iowa, 718, 69 N. W. 1065. And where the promise was "One day after date for value received we, as commissioners of Racket River Reservoir, promise to pay, etc.," and signed, A., B. & C., Commissioners of Racket River Reservoir, and it appearing that the makers of the note were "Commissioners for improvements on the Racket River," instead of "Commissioners of Racket River Reservoir," held, that the makers were personally liable for the payment of the note. See Allen v. Sisson, 66 Hun, 140, 20 N. Y. Supp. 971.

6. Shoe & Leather Nat. Bank v. Doe, 123 Mass. 151, Ames, J.: "We believe no case can be found in which a promise 'as trustees, etc.,' accompanied with an express disclaimer of personal liability, would fail to exempt him.

of the assent of the corporation and of authority to execute the instrument.[7] In Indiana, where the note commenced "We promise," and was signed "A. B., Secretary," but the corporate seal was attached with the impression, "Neal Manufacturing Co., Madison, Ind.," it was held the corporate note.[8]

But in England, where the note ran, "We, the directors of the Isle of Man Slate and Flag Company," and the corporate seal was attached, it was held differently, Cockburn, C. J., saying that he had some doubt "whether the affixing of the seal might not be taken as equivalent to a declaration in terms on the face of the note that the note was signed by the persons who put their names to it on behalf of the company, and not in behalf of themselves;" but, on consideration, he concurred that that effect could not be given to the placing of the seal of the company upon the note. It might be that that was simply for the purpose of earmarking the transaction.[9]

The two cases are distinguishable in this, that the use of the plural expression "we promise" in the Indiana case, followed by a single signature with the corporate seal, indicated a design to bind the company, who were many, rather than the individual who, had he intended to bind himself, would doubtless have said "I promise," while in the English case the expression "we," used in reference to a number of directors, was consistent with their personal obligation.

Where the note runs, "The President and Directors promise to pay," and is signed "A. B., President," it would be evident that no personal engagement was intended, and the corporation alone would be bound.[10]

§ 409. The drawer; statement of account.—The same general principle applies to the drawer of a bill as to the maker of a note, and

7. Reed v. Fleming, 209 Ill. 390, 70 N. E. 557, holding that a note, signed "William S. Reed, Prest. Mt. Carmel Lgt. & Water Co., with a seal as follows: "The Mt. Carmel Light & Water Company, Mt. Carmel, Illinois, Seal," was not the obligation of the individual but of the corporation. But in Saul v. Southern Seating & Cabinet Co., 65 S. E. 1065, 6 Ga. App. 843, it was held that notes under seal, which do not on their faces disclose any principal for whom the signers could be construed to be acting as agents, are to be taken as the individual acts and deeds of the persons signing, and the words "Pres." and "Secy.," following their respective names will be looked upon as mere *descriptio personæ*.

8. Means v. Swormstedt, 32 Ind. 87; Guthrie v. Imbrie, 12 Oreg. 182; Miller v. Roach, 22 N. E. 634.

9. Dutton v. Marsh, L. R., 6 Q. B. 363 (1871).

10. Mott v. Hicks, 1 Cow. 532 (1823); Pitman v. Kentner, 5 Blackf. 251; Frankland v. Johnson, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

although he designate himself as president, or otherwise, as a corporate official, he will nevertheless be personally liable. And the mere fact that the officer or agent directs on the bill that it be placed to his account as such, will not alter it. Thus where F. & Co. drew a bill upon the insurance company of which they were agents, with the direction to "charge the same to account of F. & Co., agents P. F. & M. Ins. Co.," they were held as drawers, although the bill was delivered by the insurance company to the payee in payment of a loss on one of its policies.[11]

§ **410. Illustrations.**—But the direction to place to account may often indicate, especially when connected with other circumstances, that it is the corporation's draft. Thus, where the direction was, "Place to account of Derby Fishing Co.," signed "A. B., Pres't," it was held that the company was the drawer.[12] So, where a bill which was stamped on the margin "Pompton Iron Works," with the direction, "place to account of Pompton Iron Works, W. Burtt, Agent," [13] the like view was taken, the marginal stamp, and the fact that Burtt signed himself agent, connected with the direction, being regarded as indicative that it was the corporate bill. So, "Charge to account of this company. I. R. Jackson, Agent," was held the company's draft, it being a printed corporate draft, with other marks of official character.[14] But the words, "Charge to account of proprietors Pembroke Iron Works," signed simply "Joseph Burrell," with no mark of corporate liability or agency of Burrell, was considered his personal bill.[15] So, "Place to the account of Durham Bank, as advised," signed simply "Christ'r Farrow," was held to bind Farrow personally, although he was known to be agent of the bank, the expression importing, as said by counsel, "nothing more than that the drawer had a credit with the Durham Bank to the amount, and that the drawees were to look to that credit." [16] So, a

11. Tucker v. Fairbanks, 98 Mass. 101. The contrary doctrine is maintained in New York. In Conro v. Port Henry Iron Co., 12 Barb. 54, Willard, P. J., said: "Adding the title 'agent' to the signature of the drawer of a bill, is notice that the party means not to be personally liable; and when the principal is indorser he alone is responsible."

12. Witte v. Derby Fishing Co., 2 Conn. 435.

13. Fuller v. Hooper, 3 Gray, 334.

14. Slawson v. Loring, 5 Allen, 343. See *post*, §§ 412, 416, as to acceptor.

15. Bank of British North America v. Hooper, 5 Gray, 567.

16. Leadbetter v. Farrow, 5 Maule & S. 345.

bill signed "A. B., Pres't," with direction "to charge as ordered," would be plainly the drawer's individual draft.[17]

§ **411. Further illustrations.**—Where the bill was headed with the name of a banking house, the direction was "Charge same to account of this office," and was signed by the drawer as agent, these three circumstances were considered as definitely fixing it as the banker's and not the agent's draft.[18] Where the bill contained a direction "to charge the same to account of disbursements of bark Dublin," and was signed by the master of the vessel without addition, it was held that the owners were not bound, there being no disclosure of agency.[19] And this seems to us the correct view, for the reasons well stated by the court; but, in Louisiana, where the agent of the owners of a steamboat drew a bill in his own name, and directed the drawee to charge the amount "to account of steamer Walter Scott," it was held that the agency of the drawer was apparent on the face of the bill, in consequence of this direction, which negatived the idea of personal liability.[20] If the bill were in the name of the corporation, and the direction to "charge this institution," signed, "A. B., Cashier," it is plainly the bill of the corporation.[21] If the bill were signed thus: "For the Montgomery Iron Works, A. B. Pres't., C. D., Sect'y," it would be the bill of the corporation.[22]

17. Kean v. Davis, 1 N. J. 683; Falk v. Moebs, 127 U. S. 604.

18. Sayre v. Nichols, 7 Cal. 538; Hitchcock v. Buchanan, 13 Fed. 143.

19. Bass v. O'Brien, 12 Gray, 477, Bigelow, J., saying: "The owners of the vessel were clearly not liable as drawers of the draft. It does not purport on its face to bind them. Peterson did not sign it as master or as agent of the owners, or otherwise indicate that he drew it in a representative capacity. The direction to charge the amount to the disbursements of the bark Dublin was only a designation of the account to which the payment was to be debited, when the draft was taken up by the drawees, but did not in any way disclose the persons who were ultimately responsible for such disbursements. The rule is well settled that when an agent signs negotiable paper in his own name, without disclosing his principal, the agent only is liable, and evidence *dehors* the instrument cannot be resorted to for the purpose of showing that it was given for or on account of some other person. Whoever takes negotiable paper enters into a contract with the parties who appear on the face of the instrument, and cannot look to other persons for payment." Newhall v. Dunlap, 14 Me. 182. The request to charge to "account of cargo of the Hope" was said "to indicate the fund to which it was to be charged, not the character in which the drawer signed." To same effect, see Snow v. Goodrich, 14 Me. 235.

20. Maher v. Overton, 9 La. 115.

21. Safford v. Wyckoff, 1 Hill, 11, 4 Hill, 442.

22. Raney v. Winter, 37 Ala. 277.

§ **412. In respect to the acceptor of a bill.**—There can be but one acceptor of a bill; and that person must be the drawee, unless he be an acceptor for honor. Therefore, when it is sought to determine whether the officer or agent of a corporation, or the corporation itself, is the acceptor of a bill, the question may generally be solved by ascertaining who is the drawee. If the bill be drawn on the drawee as an individual, he cannot, by words of procuration or official description in his acceptance, make it the corporation's. Thus, when the bill was addressed "to Mr. W. C.," and was expressed "for value received in machinery supplied the adventurers in H. Mines," and W. C. wrote upon it," "Accepted for the company, W. C., Purser," it was held W. C.'s individual acceptance.[23] So, where the drawee accepted in form, "Treasurer Neuvitas M. Co.," it was held likewise.[24] And on the other hand, if the bill be drawn on the corporation by name, and accepted by its appropriate officer or agent in his individual name, adding his official designation, the acceptance will bind the company only, and as taken in connection with the address, the agency for the drawee, who alone could accept, would be disclosed.[25] And even if there were no expression indicating office or agency annexed to the acceptor's name, the very fact of acceptance would, we think, imply agency for the drawee. Where a bill is accepted by the

23. Mare v. Charles, 5 El. & Bl. 978. Lord Campbell and Wightman and Coleridge, JJ., concurred, and Coleridge, J., said: "The bill was addressed to the defendant and no one else could accept it. He wrote upon it 'Accepted,' and signed his name. He now says, in effect, that it was not accepted at all, and what he wrote amounted to a refusal to accept; and this, he says, is the effect of the words 'for the company.' The question then is, are we to construe this *ut res magis pereat*, as not an acceptance? No; we must construe it *ut res magis valeat;* and as my Lord (Campbell) has pointed out, it is easy so to construe it."

24. Bruce v. Lord, 1 Hilt. 247 (N. Y. Com. Pl., 1856). In Colorado a bill was worded and signed as follows: "And charge the same to account of Boulevard & Navigation Company. By Wm. Anderson, President," and was addressed to "F. D. Hager, Treasurer," and was accepted by the drawee as addressed "F. D. Hager, Treasurer." Held admissible to show by evidence that Hager was treasurer of the drawer company, and that the acceptance was the company's. Hager v. Rice, 4 Colo. 90.

25. Merchants' Bank v. State Bank, 10 Wall. 604; Alabama Coal Mining Co. v. Brainard, 35 Ala. 479; A. J. Walker, C. J., saying: "The bill of exchange in this case is alleged to have been drawn upon the defendant by the name and style of 'Steamer C. W. Dorrance and owners,' and to have been accepted by the defendant in and by the name and style of 'St'r Dorrance, per G. M. McConico.' The bill of exchange given in evidence corresponds, in the name and style of the address and acceptance, with the description alleged; and if drawn upon the defendant, and by it accepted, as alleged, was admissible in evidence." See § 485.

directors of a corporation having no power to accept bills, the acceptance will render them personally liable; not, indeed, as acceptors upon the bill, for on its face it will appear to be that of the corporation, but in an action upon the warranty and fraudulent representation that they had authority to accept.[26]

§ 413. Official designation added to drawee's name.—In England, it has been long settled that even if the drawee's full official character be added to his name in the address of the bill, his acceptance will bind him personally, although there be expressions of agency in it also. Thus, where the address of the bill was to "H. Bishop, Cashier of the York Buildings Company, at their house on Winchester street, London," and the direction was, "Place the same to account of the York Buildings Company, as per advice," and was accepted thus, "Accepted 13th June, 1732, per H. Bishop," it was considered that the addition to the name was only descriptive, and as an indication where the drawee might be found, and the order to place to account as a direction how the drawee might reimburse himself; that the letter of advice was inadmissible against the plaintiff as indorsee and that Bishop was personally bound.[27] So, where the bill was addressed to "J. D., Purser, West Downs Mining Co.," and was accepted as follows "J. D., Purser, per proc. West Downs Mining Co.," it was held J. D.'s individual acceptance.[28]

And in the United States the same doctrine has been applied,[29] but not without dissent.[30] In New York where the bill was drawn on "J. R. L., President Rosendale M'ng Co., New York," and accepted in like style, it was said, "The bill cannot be deemed the obligation

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26. West London Commercial Bank v. Kitson, 12 Q. B. Div. 157 (37 Eng. Rep. 616) (1883). See § 307.

27. Thomas v. Bishop, Chitty, Jr., 278, 2 Barn. 335, 2 Stra. 955, 7 Mod. 180; Cases, temp. Hardwicke, 1 (1734); approved in Slawson v. Loring, 5 Allen, 345.

28. Nicholls v. Diamond, 24 Eng. L. & Eq. 403, 9 Exch. 154.

29. Moss v. Livingston, 4 N. Y. 208.

30. Shelton v. Darling, 2 Conn. 435. In this case the bill was drawn on "A. B., Agent of the Commission Company," and was accepted by "A. B., Agent, C. C." Held, no action could lie against A. B. individually. Amison v. Ewing, 2 Coldw. 367. Three bills were drawn on John O. Ewing, two designating him "Treasurer of the N. & N. W. R. R. Co.," and the other without any official designation whatever. All of them were accepted thus: "Accepted payable on return of March estimates, John O. Ewing, Treas." And all of them were held binding on the company, and not upon the drawee personally. See also Louisville R. Co. v. Caldwell, 98 Ind. 246.

of the company. It does not purport to have been drawn in their behalf, nor was it addressed to them, or accepted in their corporate name." [31]

§ 414. Address to drawee as agent.—If the drawee be addressed as "A. B., Agent," and accept in like form, "A. B., Agent," he will undoubtedly be personally bound, as there is no disclosure of any principal in the address to which his acceptance could be responsive.[32]

If the drawee be addressed personally, as H., and he write across the bill, "Accepted; Empire Mills, by H., Treasurer," it has been held that it could not be his individual acceptance, as there are no words which could possibly import an obligation on his part; nor could it be the company's, as it is not the drawee.[33] But it has been considered in Maryland in a similar case, where a bill with the direction to charge to account of the L. F. & M. Co., was drawn by it, and addressed to L. S. individually, and by him accepted, with the addi-

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31. Moss v. Livingston, *supra*, Hurlbut, J. In Exchange Nat. Bank v. Third Nat. Bank, 4 Fed. 20, the bill was addressed to "W. M. Conger, Secretary Newark Tea Tray Company," and was accepted simply "Payable at the Newark National Banking Company," and it was held that the agent who took such acceptance was not guilty of negligence, and that in New Jersey, where the transaction occurred, parol evidence was admissible to explain the purport of the instrument, it being there considered ambiguous.

32. Slawson v. Loring, 5 Allen, 341 (1862). The bill was headed "Office Portage Lake Manufacturing Company," was addressed, in capital letters, to "E. T. LORING, AGENT," the address being printed as was the heading on a prepared form for company drafts. It was signed "Charge the same to account of this company, I. R. Jackson, Agent." The court thought it clear that Jackson was not personally liable as drawer, but that Loring, who had accepted by writing "E. T. Loring, Agent," across the face of the bill, was clearly liable as acceptor. After stating that the disclosure of the principal on the heading of the paper was only a disclosure of the drawer's principal, Bigelow, J., said: "What, then, is left on the face of the paper to show that the defendant is not liable as acceptor? Nothing, except the single circumstance that the address to him as drawee is printed in large capital letters at the top of the instrument, with the addition thereto of the word agent. This, certainly, does not necessarily or even *prima facie* indicate that he is the agent of the drawers. It is, to say the least, equally consistent with the idea that he is the agent of some third person not named on the face of the bill. Nor can we give any great effect to the fact that the defendant's name as drawee is printed as part of the blank used by the company. A draft or bill in like form might be used, if their course of business was to deal with him as the agent of some other person or company." The bill was sued on by an indorsee.

33. Walker v. Bank of State, 9 N. Y. 582. But see Amison v. Ewing, 2 Coldw. 361.

tion of the words to his acceptance, "Treasurer L. F. & M. Co.," that parol evidence was admissible as between the payee and acceptor, to show the true intention of the parties.[34] We regard this and similar cases as departures from the earlier and better rules which have already been set forth in the text, and which are calculated to preserve certainty in commercial paper.

§ **415. In respect to the payee and indorser.**—As the designation of the drawee generally indicates who is bound as acceptor, so the designation of the payee generally indicates in what character the first indorser signs. If a note be payable to an individual, with the mere suffix of his official character, such suffix will be regarded as mere *descriptio personæ,* and the individual is the payee. This view has been taken of a note payable to "J. G. M., Treasurer R. I., etc., R. R. Co.;" [35] of a note payable to "A. B. for value received of the Providence Hat Man. Co., as agent thereof," [36] and of a note payable to "D. A. Robinson, G. M. U. B. F. & S. M. T.," the evidence showing that these letters stand for "Grand Master United Brothers of Friendship and Sisters of the Mysterious Ten." [37]

In New York a different doctrine prevails. There, where a note was payable to, and indorsed by, "R. Beman, Treasurer," and was delivered by Beman to the plaintiff on account of a debt due by the manufacturing company of which he was treasurer, it was held that he was not individually bound.[38]

Under Negotiable Instrument statute.—Under the provision declaring that the mere addition of the words describing the person signing an instrument as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability,[39] it has been held that where a maker of a note added to his signature the words "Pastor of S. Church," with nothing to show that he signed for and in behalf of any one else as principal, he was personally liable.[40]

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34. Laflin & Rand Powder Co. v. Sinsheimer, 48 Md. 411.

35. Chadsey v. McCreery, 27 Ill. 253. To same effect, see Vater v. Lewis, 36 Ind. 288; McNeil v. The Shober, etc., Co., 144 Ill. 238, 33 N. E. 31; Hately v. Pike, 162 Ill. 241, 44 N. E. 441, quoting text, 53 Am. St. Rep. 304.

36. Buffum v. Chadwick, 8 Mass. 103.

37. Luster v. Robinson, 76 Ark. 255, 88 S. W. 896.

38. Babcock v. Beman, 11 N. Y. 209. See Hager v. Rice, 4 Colo. 90; Falk v. Moebs, 127 U. S. 597.

39. Appendix, sec. 20.

40. Schumacher v. Dolan, (Iowa) 134 N. W. 624.

§ 416. Indorsement by agent of note payable to corporation.— Where a note is payable to a corporation by its corporate name, and is then indorsed by an authorized agent or official, with the suffix of his ministerial position, it will be regarded that he acts for his principal who is disclosed on the paper as the payee, and who, therefore, is the only person who can transfer the legal title.[41] It was so held where a note payable to the Berkshire Bank was indorsed "Simon Larned, Attorney," Larned being president of the bank, and authorized as its attorney to indorse it.[42] So likewise where a note was payable to the "Globe Mutual Insurance or order," and was indorsed "L. Gregory, President." [43] And the United States Supreme Court has followed the doctrine of the text and of these cases.[44]

§ 417. Exception as to bank cashiers.—An exception to the general rules of interpretation, which have been stated, has been made in respect to the cashiers of banks. They are the chief financial agents of their institutions, and when a bill or note is made payable to an individual with the suffix of "Cas.," "Cash.," or "Cashier," to his name, it has been generally decided to be really payable to the corporation of which such party is the cashier, and so to import upon its face, the officer's name being used as that of his principal, which may not be disclosed on the face of the paper. It has been so held where a bill was drawn payable to the order of "D. C. C., Cashier," no corporation being named.[45] So where a bill was drawn payable to the order of "S. B. Stokes, Cas.," and was in like manner indorsed, the undisclosed bank was held bound by the indorsement.[46] So where a note was indorsed "P. H. Folger, Cashier," Wilde, J., saying: "As to the objection that the indorsement is not made in the name of the corporation, we think that the indorsement by the cashier in his official capacity sufficiently shows that the indorsement was made in

41. Lay v. Austin, 7 So. 142, citing the text; Anderson & Co. v. Stapel, 80 Mo. App. 115; Hately v. Pike, 162 Ill. 241, 44 N. E. 441, quoting text, 53 Am. St. Rep. 304.

42. Northampton Bank v. Pepoon, 11 Mass. 288.

43. Elwell v. Dodge, 33 Barb. 336 (1861).

44. Falk v. Moebs, 127 U. S. 597.

45. Bank of New York v. Bank of Ohio, 29 N. Y. 619 (1864); First Nat. Bank v. Hall, 44 N. Y. 395 (1871); Hodge *et al.* v. The Farmers' Bank of Frankfort, Ind. 7 Ind. App. 94, 34 N. E. 123, quoting text; Maguire v. Eichmier, 109 Iowa, 301, 80 N. W. 395.

46. Bank of Genesee v. Patchin Bank, 19 N. Y. 313 (1859), 13 N. Y. 309 (1855).

behalf of the bank, and if that is not sufficiently certain the plaintiffs have the right now to prefix the name of the corporation." [47] And where a note was indorsed "Pay to E. O., Cashier, or order," and was signed "E. C. K., Cashier," it was held a sufficient indorsement by one bank to another.[48] So where a bill was drawn on "John A. Welles, Cashier Farmers', etc., Bank," and the acceptance was "John A. Welles, Cashier," the bank alone was held bound.[49]

§ 418. **When parol or other extraneous evidence is admissible.**—While it is true, as a general rule, that the liability of the principal or agent must be gathered from an inspection of the paper itself, there are nevertheless some cases in which doubtful expressions are used, or the instrument is so inaptly put together, that the precise meaning to be collected from its face is left so ambiguous or obscure as to render its interpretation, *per se*, too difficult and uncertain for just and sound construction. When the instrument is of this description, that is, when its language or terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but, on the contrary, are equivocal and uncertain, extraneous proof, parol or written, may be admitted, as between the original parties, to show the true character of the instrument, and what party—the principal, or the agent, or both—is liable.[50] Thus where a due-bill was expressed to be "in full of labor performed on cottage lot of the R. R. Co.," saying nothing of

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47. Folger v. Chase, 18 Pick. 67.

48. Watervliet Bank v. White, 1 Den. 609.

49. Farmers, etc., Bank v. Troy City Bank, 1 Doug. 473.

50. *Ante*, § 81*b*; Schmittler v. Simon, 114 N. Y. 176; Martin v. Smith, 65 Miss. 2, citing the text; La Salle Nat. Bank v. Tolu Rock & Rye Co., 14 Ill. App. 141; Swarts v. Cohens *et al.*, 11 Ind. App. 20, 38 N. E. 536; Merrill v. Sypert, 65 Ark. 51, 44 S. W. 462; Richmond Locomotive & Machine Works v. Moragne, 119 Ala. 80, 24 So. 834; Simanton v. Vliet, 61 N. J. L. (32 Vroom) 595, 40 Atl. 595; Thompson v. Thorne, 83 Mo. App. 241; Knippenberg v. Greenwood Min. & Mill Co., 39 Mont. 11, 101 Pac. 159. Though the language of a note executed by directors of a corporation imports a personal obligation, it may be shown by parol evidence, on an issue of reformation, that the intention of both the makers and the payee was to execute an instrument binding the corporation only, and that, though the language was that which they intended, it did not express their true purpose. Western Wheeled Scraper Co. v. McMillen, 71 Nebr. 686, 99 N. W. 512. Where a note appears upon its face to have been executed by the signer as president of a corporation, under the seal of that corporation and it therefore appears upon its face to be the obligation of the corporation, the burden is upon the plaintiff to allege and prove an individual promise of the signer. Reed v. Fleming, 209 Ill. 390, 70 N. E. 667.

what company, and was signed by the president with the simple signature "Ed. Robinson," parol evidence was held admissible to show that it was really the company's obligation; [51] and so where a promissory note read, "We, the President and Directors of the Delancey's Valley and Sweet Air Turnpike Company, promise, etc.," and was signed by C. T. H., "President," I. N. H. and J. G. D., "Directors," and R. E. S., "Secretary," the same rule was applied to admit evidence to show that the note was signed and accepted as the note of the company.[52] So in Missouri where the note ran, "I promise to pay A. & B. $645 for building a school-house in School District No. 3, township 51, range 21," signed "P. T. Reynolds, Local Director." [53] So where a bill drawn by a corporation with direction to charge to its account was signed by "Wm. Anderson, President," and addressed to and accepted by "F. D. Hager, Treasurer." [54] So where a client drew on his attorney who accepted as agent of the drawer.[55] So in New York where the note ran, "We promise," and was signed by five persons who added: "Trustees of St. John's Ev Lutheran Church, Hudson, N. Y.," and attached the corporate seal, the court saying: "The case was within the authorities admitting of proof of the circumstances under which it was given with a view to determine the defendant's liability. In addition to what appeared on the face of the paper, it was proved that the corporation was indebted to the payee, that the latter made claim therefor to the corporation; that it was recognized and allowed by the trustees, its only officers; he requested a note, and the note in suit was given him. * * * The plaintiffs here stand in no better position on this question than would the payee, inasmuch as the note on its face disclosed the fact that this defense here interposed existed, or that the proof to establish it was admissible." [56] In Wisconsin, a note reading "We promise to pay, etc.," and signed "San Pedro Milling and Mining Company, F. Kraus, President," was held to be the note of the company only,

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51. Richmond, Pot & Fred. R. Co. v. Snead, 19 Gratt. 354. See Hager v. Rice, 4 Colo. 90; Hypes v. Griffin, 89 Ill. 134.

52. Haile v. Peirce, 32 Md. 327; Neptune, Admr. v. Paxton, Recr., 15 Ind. App. 284, 43 N. E. 276; Swarts v. Cohen, 11 Ind. App. 20, 38 N. E. 536; Benham v. Smith, 53 Kan. 495, 36 Pac. 997; Kline v. Bank of Tescott, 50 Kan. 91, 31 Pac. 688, 34 Am. St. Rep. 107.

53. McClellan v. Reynolds, 49 Mo. 314. See also Pratt v. Beaupre, 13 Minn. 190.

54. Hager v. Rice, 4 Colo. 90.

55. Hardy v. Pilcher, 57 Miss. 18.

56. Hood v. Hallenbeck, 7 Hun, 367 (1876).

and parol evidence inadmissible to show that the president did not sign the name of the company, but signed his own name as a joint maker.[57]

Under Negotiable Instrument statute.—The rule that where there is any ambiguity or uncertainty as to whether the signature of an individual was made in his personal capacity or in his representative capacity as agent or officer of a corporation, parol evidence may be received to explain it, has been recognized under several provisions of the statute.[58] This has been permitted in the case of a note signed: "The Kansas City & Olathe Electric Ry. Co., Wm. Lackman, Pres., D. B. Johnson, Sect.," [59] and where a paper was indorsed in an individual name with the qualifying word "cashier." [60] And so in the case of a note reading "Four months after date the Northwestern Straw Works promise to pay" and signed "The Northwestern Straw Works, E. R. Stillman, Treas. John W. Mariner," it appeared in the action that the note was given for a loan to the corporation and that

57. Liebscher v. Kraus, 74 Wis. 387; Mathews & Co. v. Dubuque Mattress Co., 87 Iowa, 246, 54 N. W. 225. But in Briel v. Exchange Nat. Bank (Ala.), 55 So. 808, it was held that where a note is signed in the name of a corporation, followed by the names of individuals with the designation "Prest." and "Mgr." appended, such note imposes, *prima facie* a personal liability upon the individuals, subject to parol proof, the court saying that this does not contradict the other rule that the use of the words "president," "manager," and the like, following individual signatures, there being nothing to indicate of what or of whom they are officers or agents, does not open the way for evidence aliunde, but such words are to be understood as purely descriptive and in such cases the individuals are unequivocally responsible.

58. Appendix, secs. 17, 20, 42, 63. Where a draft was made payable to "Frank La Rue, Pt.," who was president of a bank, the presumption is not that the draft was payable to the bank of which he was president; the abbreviation of "Pres." for "president" is in such common use that the courts will take judicial notice of its meaning, and evidence that "Pt." was so understood among bankers was competent as tending to explain what was intended. Griffin v. Erskine, 131 Ja. 144, 109 N. W. 13.

59. Western Grocer Co. v. Lackman, 75 Kan. 34, 83 Pac. 527.

60. First Nat. Bank v. McCullough, 50 Oreg. 508, 93 Pac. 366, 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758, wherein the court said that this statute, and the decisions which have been embodied therein are based upon the theory that the employment of the qualifying word "cashier" or other designation of a fiscal office, appended to the name of a payee or indorsee of commercial paper, creates an ambiguity as to the real party intended, to explain which parol evidence is admissible to show who is the principal for whose benefit such agent received or accepted the promise to pay. But when no official designation is added to the name of an indorsee, no uncertainty is apparent from an inspection of the indorsement, and parol evidence is inadmissible to control or vary the terms of the writing.

Mariner was Secretary, and it was held that parol evidence would not be admissible to show that Stillman was joint maker, but there being an ambiguity as to Mariner, parol evidence might be introduced to show that his signature was attached simply in his representative capacity and as agent of the corporation.[61]

§ 419. The Supreme Court of the United States has gone very far in admitting parol evidence to ascertain whether the principal or agent was intended to be bound, and the course of dealing between the parties, and the particular circumstances of the case were allowed to come before the court.[62]

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61. Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574, the court saying that section 64 has no application to such a note as John W. Mariner did not place his signature on the note in blank.

62. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326. The check in this case was as follows:

"No. 18. MECHANICS' BANK OF ALEXANDRIA,
"*Cashier of the Bank of Columbia,* June 25, 1817.
"Pay to the order of P. H. Minor, Esq., ten thousand dollars.
"$10,000. WM. PATON, JUN."

It was proved that the payee, Minor, was the teller of the Mechanics' Bank; that the check was an official check cut out of the check-book of the bank, and noted on the margin; that the money was drawn in behalf of and applied to the use of the Mechanics' Bank; and that other checks had been drawn by the cashier on behalf of the bank in the like form, in all respects save that he usually added "Cas." or "Ca." to his name.

Johnson, J., said: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing, on the face of them, to have been done in the exercise of their agency. In the more solemn exercise of derivative powers, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts: 1, that the act was done in the exercise, and 2, within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principle contended for could apply), but to any act, with or without writing, within the scope of the power or confidence reposed in the agent; as, for instance, in the case of money credited in the books of a teller, or proved to have been deposited with him, though he omits to credit it." Kline v. Bank of Tescott, 50 Kan. 91, 31 Pac. 688, 31 Am. St. Rep. 107; Richmond Locomotive & Machine Works v. Moragne, 119 Ala. 80, 24 So. 834.

CHAPTER XIV

MUNICIPAL CORPORATIONS AS PARTIES TO NEGOTIABLE INSTRUMENTS

§ **420. As to public or municipal corporations.**—In a subsequent portion of this work the subject of the power of public corporations to execute negotiable instruments will be considered in detail, in connection with the matter of coupon bonds, which constitute by far the most important branch of public obligations.

There is no doubt, however, that public corporations may have the power conferred on them to execute bills, notes, checks, and indeed all varieties of negotiable instruments. But the better opinion is, that such power does not exist, unless expressed or clearly implied.[1] The ordinary orders, warrants, certificates of indebtedness, and obligations to pay, issued by municipal corporations, if negotiable in form, will in general enable the holder to sue in his own name. But they are not negotiable instruments so as to exclude inquiry into the legality of their issue, or preclude defenses which are available as against the original payees.[2] To invest such instruments with the character and incidents of commercial paper, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, would be an abuse of their true character and purpose.[3] Powers conferred on municipal corporations which cannot be carried into execution without borrowing money,

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1. Knapp v. Mayor of Hoboken, 39 N. J. L. 394; City of Williamsport v. Commonwealth, 84 Pa. St. 487; Dively v. Cedar Falls, 21 Iowa, 566; Clarke v. Des Moines, 19 Iowa, 200; Mayor of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Blackman v. Lehman, 63 Ala. 519; Brown v. City of Newburyport, 209 Mass. 259, 95 N. E. 504.

2. Knapp v. Mayor of Hoboken, 39 N. J. L. 397; 1 Dillon on Municipal Corporations, § 406. See *post*, §§ 427, 435; First Nat. Bank v. Cook, Treasurer, 43 Nebr. 318, 61 N. W. 693; Thompson v. Searcy County, 6 C. C. A. 674, 57 Fed. 1030.

3. District of Columbia v. Cornell, 130 U. S. 661; Mayor v. Ray, 19 Wall. 468; Wall v. Monroe County, 103 U. S. 74; Claiborne County v. Brooks, 111 U. S. 400; Pacific Improvement Co. v. City of Clarksdale, 20 C. C. A. 635, 74 Fed. 528; Brown v. City of Newburyport, 209 Mass. 259, 95 N. E. 504.

and giving obligations payable in future, have been considered sufficient to carry implied power to issue negotiable instruments; but such powers are not implied from the usual powers of administration conferred in specific matters, and the power to levy taxes to defray necessary corporate expenditures,[4] and when a statute gives that power in certain cases, notes given to raise money for general purposes are invalid.[5] It is thought in Pennsylvania, that whenever the municipality has authority to contract a debt by borrowing money or otherwise, so that the legislature must have contemplated its giving securities of some sort in payment, it has then by implication authority to evidence the same by bill, note, bond, or other negotiable instrument.[6] But we do not perceive that mere authority to contract a debt carries with it necessarily the idea that money must be borrowed, or the authority to execute negotiable instruments.[7] Munic-

4. Police Jury v. Britton, 15 Wall. 572; *post*, § 422; Clemens on Corporate Securities, 26, 27. See also Mayor v. Ray, 19 Wall. 468, and *post*, § 427. Where a municipal corporation has authority by the laws of the state to issue negotiable notes for money borrowed in anticipation of taxes, notes executed by the mayor and city treasurer are valid obligations of the city when duly authorized by a municipal ordinance. Citizens' Sav. Bank v. Newburyport, 169 Fed. 766. In Tyler v. L. L. Jester & Co., 97 Tex. 344, 78 S. W. 1058, it was held that when there is no provision of law which requires a city to enact an ordinance to enable its officers to execute contracts for current charges, such authority may be found in the minutes of the council. Under a constitutional provision declaring that no municipality shall incur any debt, except for a temporary loan or loans to supply casual deficiencies of revenue, without the assent of two-thirds of the qualified voters thereof, at an election for the purpose, to be held as may be prescribed by law, a municipal corporation cannot lawfully purchase a fire engine and apparatus and give negotiable promissory notes therefor, payable annually through a series of years; nor can a resolution passed at a mass meeting of citizens authorize such contract. Wadley v. Lancaster, 124 Ga. 354, 52 S. E. 335.

5. McCurdy v. Sheawassee County, 154 Mich. 550, 118 N. W. 625.

6. City of Williamsport v. Commonwealth, 84 Pa. St. 501.

7. See *post*, vol. II, § 1530; Bangor Sav. Bank v. City of Stillwater, 46 Fed. 899. The powers given by statute to a municipal corporation to borrow money and to secure the payment by notes are distinct powers, and when the statute provides that the notes with all renewals thereof shall not run for a longer period than one year, there is the authority to issue commercial paper subject to the statutory limitation as to time, and if paper is issued in a manner not a compliance with the statute, it is not effective as a negotiable note but is none the less effective as a certificate of indebtedness. Ford v. Washington Tp., 71 J. L. N. 49, 58 Atl. 79. The power to contract debts for municipal purposes should be restricted to such debts as the council could reasonably expect to pay from the ordinary revenue of the town for the current fiscal year, and a note given for money borrowed to build a town hall and guard-house is not a valid obligation of the town. Luther v. Wheeler, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746.

ipal corporations in order to exercise municipal functions, such as opening streets, etc., must come under obligation to pay those who do the work. Taxation is the ordinary method of raising revenue for such purposes, and debts so contracted should be paid out of the municipal revenues raised by taxation. This subject is elsewhere discussed in this work, and it is not necessary here to elaborate it.[8] The views of Judge Dillon, as expressed in a recent essay on the Law of Municipal Bonds, seem to us eminently sound, and worthy of approbation.[9]

§ 421. Officers empowered to act for public corporations.—The common council of a city or town is the legislative branch of the municipal government; and when the city or town has the power to execute the instrument, that body would be the proper agency, by whom, or under whose directions, it should be exercised, and would have the implied authority to execute the power of the corporation. But the executive officers of cities and towns, and the supervisors, trustees, or representative officers of a county, parish, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power to levy taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities of such a kind as to be unimpeachable in the hands of *bona fide* holders.[10]

§ 422. Illustrations.—Thus, it has been held that the mayor of a city should not execute the bond of the city, although he had received express authority from the council to borrow money from a bank, and to execute a note therefor.[11] So it has been held that county supervisors had no implied power to execute negotiable

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8. See *post*, vol. II, § 1527 *et seq.*

9. See Dillon on Municipal Bonds, § 6, pp. 12, 13 *et seq.*, where it is said: "There is no resemblance between private and public or municipal corporations in this regard. The latter are not organized for trading, commercial or business purposes. They have in general but one mode of meeting their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. For hundreds of years in England, such corporations have existed, without it ever being contended that they could, without express authority, issue commercial paper. * * * We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the implied power to borrow money for its ordinary purposes, and as incidental to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is toward the view above indicated."

10. Claiborne County v. Brooke, 111 U. S. 400.

11. Little Rock v. State Bank, 3 Eng (Ark.) 277.

instruments, Field, J., saying: "Were it otherwise, it is easy to see that the county would be entirely at the mercy of the board." [12] Nor have the trustees or supervisors of towns, villages, and townships; [13] nor the treasurers; [14] nor the selectmen of towns and villages; [15] nor the auditors of cities, who are mere executive

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12. People v. Supervisors El Dorado County, 11 Cal. 175. To same effect, see Hubbard v. Town of Lyndon, 28 Wis. 675; Chemung Canal Bank v. Supervisors, 5 Den. 517; Scipio v. Wright, 101 U. S. 665; Wells v. Supervisors, 102 U. S. 625; Ohio County, Ky., v. Baird, 181 Fed. 49; McCurdy v. Sheawassee County, 154 Mich. 550, 118 N. W. 625. Where a county was authorized by statute to build a court house and to issue bonds or county script not exceeding a certain amount, the county was without authority to issue notes for the cost of the court house in excess of the amount authorized, and the county commissioners are not estopped by the fact that the work contracted for has been performed and accepted, and notes in payment therefor issued, to deny their validity. Burgin v. Smith, 151 N. C. 561, 66 S. E. 607. Lake v. Trustees, 4 Den. 520; Hubbard v. Town of Lyndon, 28 Wis. 674.

13. Inhabitants v. Weir, 9 Ind. 224.

14. Lovejoy v. Inhabitants of Foxcroft, 91 Me. 372, 40 Atl. 141.

15. Rich v. Errol, 51 N. H. 350. In Smith v. Inhabitants of Cheshire, 13 Gray, 318, it was held that an order or draft of the selectman of Cheshire on the treasurer of the town, payable to Westcott or bearer, was not negotiable; and that an action could not be brought in any name but that of the party to whom it was issued. Bigelow, J., after saying that such orders were common, but the right of the holder to sue depended on the question whether the selectmen had power by virtue of their office, and without special authority from the town, to issue to persons having claims on the town negotiable notes, bills of exchange, or orders, on which a town can be held liable to indorsers or holders other than those to whom they were originally issued, continued: "The powers and duties of selectmen are not very fully defined by statute. Many of the acts usually performed by them on behalf of towns, and which are recognized as within their appropriate sphere, have their origin and foundation in long-continued usage. The management of the prudential affairs of towns necessarily requires the exercise of a large discretion, and it would be quite impossible by positive enactment to place definite limits to the powers and duties of selectmen to whom the direction and control of such affairs are intrusted. Speaking generally, it may be said that they are agents to take the general superintendence of the business of the town, to supervise the doings of subordinate agents, and the disbursement of money appropriated by vote of the town to take care of its property and perform other similar duties. But they are not general agents. They are not clothed with the general powers of the corporate body for which they act. They can only exercise such powers and perform such duties as are necessarily and properly incident to the special and limited authority conferred on them by their office. They are special agents empowered to do only such acts as are required to meet the exigencies of ordinary town business. * * * The rule of law is well settled that a special agent has no authority to bind his principal by a promissory note, bill of exchange, or other negotiable paper. Such power can be conferred only by the

agents.[16] And it has been held by the United States Supreme Court that there was no implied power to execute a negotiable bond in the police jury of a parish, Bradley, J., saying: "It would be an anomaly justly to be deprecated, for all our limited territorial boards charged with certain objects of necessary local administration, to become fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities." [17] "It is one thing," said the same judge in another case, "for the county or parish trustees to have the power to incur obligations for work actually done in behalf of the county or parish and to give the proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent." [18] This is undoubtedly the correct and general view.[19] So there is no such implied power in the clerks of county courts, though such courts constitute the auditing boards of the counties; [20] nor in the clerks of boards of supervisors to issue a negotiable warrant; [21] nor in county judges, who are special limited agents; [22] nor in a special agent appointed by the county court; [23] nor in the mayor and recorder of a city; [24] nor in the mayor alone.[25] Renewal of a note legally executed by a town treasurer was held void, a statute having been enacted. in the meantime, depriving such official of authority.[26]

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direct authority of the party to be bound." Taft v. Pittsford, 28 Vt. 289 (which seems to overrule Dalrymple v. Whittingham, 26 Vt. 245). But see Andover v. Grafton, 7 N. H. 302, and Great Falls Bank v. Farmington, 41 N. H. 33.

16. Dana v. San Francisco, 19 Cal. 486; People v. Gray, 23 Cal. 125; Keller v. Weeks, 22 Cal. 460.

17. Police Jury v. Britton, 15 Wall. 566 (1872). To same effect, see Bearman v. Board of Police, 42 Miss. 238; Wells v. Supervisors, 102 U. S. 625; Hill v. City of Memphis, 134 U. S. 198; Glass v. Parish of Concordia, 113 La. 544, 37 So. 189.

18. Claiborne County v. Brooke, 111 U. S. 400.

19. See State v. Glover, 155 U. S. 517, 15 Sup. Ct. Rep. 186; State v. Hawes, 112 Ind. 322, 14 N. E. 87; Bloomington School v. National School Furnishing Co., 107 Ind. 43, 7 N. E. 760; Merrill v. Monticello, 138 U. S. 673, 11 Sup. Ct. Rep. 441.

20. Parcel v. Barnes, 25 Ark. 261.

21. Clark v. Polk County, 19 Iowa, 248.

22. Hyde v. County of Franklin, 27 Vt. 186; Daviess County Court v. Howard, 13 Bush, 102.

23. Exchange Bank v. County of Lewis, 28 W. Va. 273.

24. Clarke v. Des Moines, 19 Iowa, 200.

25. Short v. City of New Orleans, 4 La. Ann. 281; Goldschmidt v. New Orleans, 5 La. Ann. 436.

26. Abbott v. North Andover, 145 Mass. 455.

§ **422a.** The "towns" in New England are territorial divisions created by the legislatures for the more convenient and effectual administration of certain functions of political government. In the absence of statutory or constitutional restrictions, they have the power to borrow money for legal town purposes. But this power to borrow money is regarded as strictly limited to money necessary for the discharge of legal liabilities. It is limited in amount as in purpose and must be exercised by the town in town meeting upon proper warrant and by vote either authorizing the act of borrowing beforehand or afterward ratifying the prior act. It is not enough that the money was paid to some town officer and by him used in discharging some legal duty or liability of the town. There must be legal action in the town meeting.[27]

§ **423. Difference between public and private corporations.**—If private corporations, to increase their profits, embark in enterprises not authorized by their charter, still, as to third persons, and when necessary for the advancement of justice, the stockholders will be presumed to have assented, since it is in their power to restrain their officers when they transgress the limits of their chartered authority.[28] But municipal corporations stand upon a different ground. They are

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27. Lovejoy v. Inhabitants of Foxcroft, 91 Me. 368, 40 Atl. 141; Otis v. Stockton, 76 Me. 506; Brown v. Winterport, 79 Me. 305, 9 Atl. 844; Hurd v. St. Alban, 81 Me. 443, 7 Atl. 168; Dickinson v. Conway, 12 Allen, 487; Railroad Nat. Bank v. Lowell, 109 Mass. 214; Bank v. Hadley, 128 Mass. 503; Brown v. Melrose, 155 Mass. 587, 30 N. E. 87.

28. Lloyd v. West Branch Bank, 15 Pa. St. 174. It was held that, although a bank had no authority to receive certain notes on deposit, yet, if received, it was liable for them. Coulter, J., said: "The recognized and known functionaries, and especially the officers of a bank, are held out to the world as having authority to act according to the general usage, practice, and course of the business of such institutions. If it were otherwise, there would be no safety for the public in doing business with any one of such institutions; because their charters differ in some respects, and individuals cannot be presumed to carry these documents in their pockets as a *vade-mecum.* Their acts, therefore, within the scope of such usage, practice, and course of business, will bind the corporation in favor of third persons transacting business with them, and who did not know at the time that the officer was acting beyond and above the scope of his authority. The property of stockholders is not bound by the irregular, unauthorized transaction or declarations of their officers, beyond the just sphere of their legal action. But if stockholders, without objection or interference, witness a course of business, usage, and practice on the part of their officers, this justifies third persons in believing that such usage of the officers is sanctioned by the principal and authorized by law." Bradley v. Ballard, 55 Ill. 420.

not organized for gain, but for the purpose of government; and debts illegally contracted by their officers cannot be made binding upon the taxpayers from the presumed assent of the latter.

The principle is applicable to both public and private corporations, as it is to individuals, that where they borrow money from a bank or other institution, it does not lie in their mouth to show that the transaction was of a character prohibited by the charter of such bank or other institution.[29]

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29. Township of Pine Grove v. Talcott, 19 Wall. 619, and cases therein cited.

CHAPTER XV

DRAFTS OR WARRANTS OF ONE CORPORATE OFFICER UPON ANOTHER

SECTION I

DRAFTS OR WARRANTS OF PRIVATE CORPORATIONS

§ 424. **In the first place, as to drafts, orders, or warrants of private corporations.**—Sometimes, in dealing with corporations, one agent or officer draws upon another, and in respect to private corporations the doctrine may be regarded as settled by weight of authority, and by principle, that, provided the act be not *ultra vires*, an instrument so drawn is, in effect, the draft of the corporation upon itself, and may be treated either as an accepted bill, or as a promissory note. Such drafts come within a statutory provision respecting "bills and notes for the direct payment of money." [1] They are frequently given for mere convenience in keeping accounts, and providing concurrent vouchers; and as it is not necessary, when bills and notes are drawn payable at a particular place, to aver or prove presentment there as a condition precedent to binding the acceptor or maker, so it is considered that it is not necessary to aver or prove presentment to the drawee in person, or at his place of business or residence, or to give notice of nonpayment, before suing the corporation, which is regarded as acceptor or maker.[2] This view has been applied in numerous cases: where the president and secretary of a water company drew upon its treasurer, and the corporation executed a mortgage signed in like manner to secure the draft; [3] where the secretary of a railroad company drew upon its treasurer; [4] where the

1. Gilstrah v. St. Louis, etc., R. Co., 50 Mo. 491.

2. See 1 Parsons on Notes and Bills, 63; Rio Grande Extension Co. v. Coby, 7 Colo. 301, citing the text; Hazard v. Cole, 1 Idaho Ter. 289.

3. Dennis v. Table Mountain Water Co., 10 Cal. 369 (1858). A similar case is Hasey v. White Pigeon Beet Sugar Co., 1 Doug. 193 (1843).

4. Indiana, etc., R. Co. v. Davis, 20 Ind. 6 (1863); Maux Ferry Gravel R. Co. v. Branegan, 40 Ind. 361, overruling earlier cases.

president of a railroad company drew upon its treasurer for a specified sum, stated as being amount due the payee for work done as contractor;[5] where the agent of a trading corporation drew upon its treasurer, who accepted the draft.[6]

§ **425.** The contrary doctrine to that of the text at one time prevailed in Indiana,[7] but was subsequently overruled by the cases already quoted. It has prevailed also in Alabama, where it is held that a company draft of the railroad corporation, on the treasurer, signed by the president, must be presented, and notice given of dishonor (unless such precedent steps be excused) before action can be sustained.[8]

§ **426.** In England, where the directors of an assurance company drew on its cashier, Wilde, C. J., said: "The company indicate that they mean to pay, by a direction to their officer to pay, and they point out to whom payment is to be made. It appears to me that the instrument contains all that is essential to constitute a promissory note."[9]

Under Negotiable Instrument statute.—Under the provisions of the statute,[10] it has been held that where a bill of exchange is drawn by a

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5. Fairchild v. Ogdensburgh, etc., R. Co., 15 N. Y. 337 (1857); approved in Mobley v. Clark, 28 Barb. 391 (1858).

6. Shaw v. Stone, 1 Cush. 256, Shaw, C. J.: "The right of the holders to proceed against the company as drawer was perfect, without demand on the acceptor or notice to the indorsers. Walwyn v. St. Quintin, 1 Bos. & P. 652. Nor, supposing them to be foreign bills, would a protest be necessary."

7. Marion, etc., R. Co. v. Dillon, 7 Ind. 404 (1856). The president of a railroad company drew upon its treasurer. There was no allegation of presentment. Perkins, J., said: "If a man drew a bill or order directly upon himself payable immediately, it is his promissory note, and may be sued on accordingly. In such case he is the payor as well as the drawer, and by the very act of drawing admits he is to pay, and that he has not then the money with which to make payment. But where the debt is due from a company, and it is the duty of one officer or set of officers to allow demands, and draw upon another officer who has the custody, and is charged with the duty of the disbursement of the company's funds for payment, such order must, as a general rule, be presented in a reasonable time for payment." See also the overruled cases, Marion v. Logansport R. Co., 7 Ind. 648 (1856); English v. Trustees, 6 Ind. 438 (1855); Marion etc., R. Co. v. Hodge, 9 Ind. 163 (1857).

8. Wetumpka, etc., R. Co. v. Bingham, 5 Ala. 663 (1843).

9. Allen v. Sea Fire & Life Assurance Co., 9 C. B. 574.

10. Appendix, sec. 130.

corporation upon itself, the instrument may be treated as an accepted bill or as a promissory note at the election of the holder.[11]

SECTION II

DRAFTS OR WARRANTS OF MUNICIPAL CORPORATIONS

§ 427. **In the second place, as to municipal drafts, orders, or warrants.**—Frequently a draft, order, or warrant is drawn by one officer of a municipal corporation upon another; or by the selectmen of a town, or supervisors of a county, upon an officer, for the payment of corporate indebtedness to the payee. The intention in such case is, as a general rule, to furnish vouchers to the proper disbursing officer, and not to put negotiable instruments in circulation. And it has been generally, and as we think justly, considered that such drafts, orders, or warrants are not negotiable instruments, and cannot be regarded either as bills of exchange or promissory notes, cutting out equities as against the corporation—on the ground that there is no implied authority in such officers to execute negotiable instruments.[12] It has been so held where the selectmen of a town drew an order on the treasurer payable to bearer;[13] where the auditor of a county drew upon the treasurer;[14] where the auditor of the city of San Francisco drew a warrant upon the treasurer, purporting on its face to be for a certain sum "as ordered by the board of supervisors;"[15] where county judges drew a warrant upon the treas-

11. Pavenstedt v. New York Life Ins. Co., 96 N. E. 104, 203 N. Y. 91, affirming order 99 N. Y. S. 614, 113 App. Div. 866, and answering question certified, 104 N. Y. S. 1135.

12. Camp v. Knox County, 3 Lea, 199; People v. Johnson, 100 Ill. 544, citing the text; Miner v. Vedder, 66 Mich. 101; People v. Hall, 8 Colo. 485; People v. Stupp, 49 Hun, 546; Jerome v. Commissioners, 18 Fed. 873; Shakespear v. Smith, 77 Cal. 638; Bank of Santa Cruz v. Bartlett (Cal.), 20 Pac. 682; Heth Township v. Lewis, 17 N. E. 113; Gibson v. Rains, 11 Lea, 20. See cases cited *post;* Laplace v. Laplace *et al.*, 43 La. Ann. 284, 8 So. 914; Bartley v. State, 53 Nebr. 311, 73 N. W. 744; Thompson v. Searcy County, 6 C. C. A. 674, 57 Fed. 1030; Watson v. City of Huron, 38 C. C. A. 264, 97 Fed. 449.

13. Smith v. Cheshire, 13 Gray, 318; *ante*, § 1; Davis v. Steuben School Township, 19 Ind. App. 694, 50 N. E. 1.

14. People v. Gray, 23 Cal. 125. To same effect, see Clark v. Polk County, 19 Iowa, 248; Keller v. Hicks, 22 Cal. 460.

15. Dana v. San Francisco, 19 Cal. 490, Baldwin, J., saying: "We think that the plaintiff, counting alone upon the county scrip or warrants, as negotiable instruments, evidencing of themselves an indebtedness on the part of the county,

urer; [16] where the mayor and recorder of a city drew a warrant on the treasurer payable to "A. H. W., or bearer, out of any moneys in the general fund not otherwise appropriated;" [17] where the supervisors of a county drew upon the treasurer; [18] where the clerk of the township board of education drew upon the township treasurer; [19] where the directors of a school district drew upon the township treasurer; [20] and where a town treasurer accepted an order drawn upon him by the highway board.[21] And special assessment vouchers, issued in favor of a contractor, are not negotiable instruments.[22]

So it has been held that the mayor and recorder of a city have no implied power to execute negotiable warrants.[23] In a recent case where the clerk of a county drew upon the treasurer for a certain amount payable to bearer, the United States Supreme Court, speak-

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cannot maintain his pretensions. This seems to be decided by the case of The People v. Supervisors of El Dorado County, 11 Cal. 170. The reason is, that the auditor had no authority to draw a bill of exchange, but he can only, in certain cases, issue warrants upon the order of the supervisors, or the allowance by the board, of an account which is chargeable as a debt upon the county. The warrant is not intended to constitute a new debt, or evidence of a new debt, against the county, but is the prescribed means the law has devised for drawing money from the county treasury. It may be very true, that the warrant, as an open account, may be assigned, and the assignee be protected as a holder of a claim against the county. But this would be, not because the indorsement of the warrant carried with it the legal title of the scrip to the assignee, as an indorsee under the law merchant, but because the transaction would be, in equity, the assignment of the debt on which the scrip issued, and an authority to the assignee to receive the money. The question here is, not whether the county had the power to make a bill of exchange, but whether the auditor, when under the statute he issues a warrant, has the power to give it the form and qualities of such an instrument. We think he has not, and that the paper, as here presented has no such effect, if indeed it was so designed." "If the plaintiff has a valid claim upon the county, it ought to be paid; but he must proceed to enforce it in some other mode." National Bank v. Herold, 74 Cal. 603; Wright v. Kinney, 123 N. C. 618, 31 S. E. 814; McPeeters v. Blankenship, 123 N. C. 651, 31 S. E. 876.

16. Hyde v. County of Franklin, 27 Vt. 186; Goodwin v. East Hartford, 70 Conn. 18, 38 Atl. 876, citing text; Goose River v. Willow Lake School Township, 1 N. Dak. 26, 44 N. W. 1002, 26 Am. St. Rep. 605.

17. Clark v. Des Moines, 19 Iowa, 200.

18. Chemung Canal Bank v. Supervisors, 5 Den. 517; Leach v. County of Wilson, 62 Tex. 331.

19. Steinbeck v. Treasurer, etc., 22 Ohio St. 144. See State v. Huff, 63 Mo. 288.

20. School Directors v. Fogleman, 76 Ill. 189.

21. Goodwin v. East Hartford, 70 Conn. 18, 38 Atl. 876.

22. First Nat. Bank of Chicago v. Elgin, 136 Ill. App. 453.

23. Clark v. Des Moines, 19 Iowa, 201.

ing of county warrants, said: "The warrants being in form negotiable are transferable by delivery, so far as to authorize the holder to demand payment of them, and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that when held by a *bona fide* purchaser, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee." [24]

§ 428. Draft of municipal officer phrased in negotiable words.— It has been held, however, in a number of cases that where corporate authorities are empowered by law to draw warrants, or orders in payment of debts, that they will be deemed negotiable if phrased in negotiable words, and may be sued upon by a transferee, like any other negotiable instrument. Thus, where the charter of the city of Brooklyn required an order or warrant of the common council on the treasurer, for drawing money from the treasury, a draft on the treasurer running, "Pay Alexander Lynn, or order, fifteen hundred dollars for award No. 7, and charge to Bedford Road Assessment," and signed by the mayor and the clerk of the common council, was held to be a negotiable bill of exchange.[25]

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24. Wall v. County of Monroe, 103 U. S. (13 Otto) 77. See Mayor v. Ray, 19 Wall. 468, and *ante*, § 420; County Ouachita v. Wolcott, 103 U. S. (13 Otto) 559; National Bank v. Herold, 74 Cal. 603; Erskine v. Steele County, 4 N. Dak. 339, 60 N. W. 1050; Bartley v. State, 53 Nebr. 311, 73 N. W. 744.

25. Kelly v. Mayor of Brooklyn, 4 Hill, 265, Cowen, J.: The draft was signed and countersigned according to the statute, by the mayor and clerk. There is nothing in the statute expressing or implying an inhibition to make the warrants negotiable." "Independently of any statute provision, a corporation may issue negotiable paper for a debt contracted in the course of its proper business. Moss v. Oakley, 2 Hill, 265. This is a power incident to all corporations, and no provision in its charter or elsewhere, merely directing a certain form in affirmative words, should be so construed as to take away the power. The draft in question was issued by the agents of the defendants, acting according to the usual course in such matters. A disavowal by the corporation, if allowed, might operate as a fraud upon plaintiff, and upon others. The money, when drawn for, or soon after, was in the possession of the corporation; and it stood a debtor to the plaintiffs *pro tanto*." But see *contra*, Clark v. Des Moines, 19 Iowa, 290; Short v. New Orleans, 4 La. Ann. 281; Goldschmidt v. New Orleans, 5 La. Ann. 436. In the case of Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499, it was held that warrants issued by a city are not negotiable in the sense of excluding inquiry into the legality of their issue or of excluding defenses thereto, and a subsequent holder does not occupy the position of an innocent purchaser.

So, where the clerk, under the order of court, drew a warrant payable to A. B., or bearer, according to statutory form, it was held that it was negotiable by delivery, and the creditor could not recover against the county without producing it.[26]

§ **429. Indorsements.**—When a municipal corporation warrant is deemed a commercial instrument, negotiable like an ordinary bill of exchange, the party who transfers it with his indorsement is subject to the liabilities and entitled to the privileges of an ordinary indorser of a negotiable instrument.[27] But when such an instrument is regarded as a mere voucher, and not a bill or note, the transferrer by indorsement is not deemed an "indorser," in the commercial sense of the term, and could not be held liable as such, though the form of the paper be negotiable.[28] He would be liable, however, to refund the consideration if the instrument were not valid and legal according to its purport.[29]

§ **430. Presentment.**—In the case of municipal corporations, it has been considered that an order by an officer or representative upon the disbursing authorities must be presented before the corporation can be sued, though, perhaps, no notice of dishonor would be necessary. This view was applied in Maine and Vermont, where the selectmen of a town drew upon its treasurer.[30]

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26. Crawford County v. Wilson, 7 Ark. 219. But see this case explained in Wall v. County of Monroe, 103 U. S. (13 Otto) 79. See Sweet v. Carver County, 16 Minn. 107; Commissioners of Floyd County v. Day, 19 Ind. 451.

27. Bull v. Sims, 23 N. Y. 571.

28. Keller v. Hicks, 22 Cal. 460.

29. Keller v. Hicks, 22 Cal. 460.

30. Varner v. Nobleborough, 2 Greenl. 126 (1822), Mellen, C. J.: "The selectmen were the agents of the town, drawing the order on their account on the town's banker. The case may be justly compared to that of a draft by a man on his banker, or a note payable at his banker's, or by his agent. In which cases it seems settled that the draft or note must be presented at the place appointed. But, in addition to the authority of decided cases, so nearly resembling this in principle, a strong argument against the present action arises out of the general—perhaps we may say universal—mode of conducting the affairs of a town in the settlement of accounts and payment of debts due from the corporation to individuals. Persons transacting business according to an established and well-known usage, are presumed to assent to such usage and contract in reference to it. Now, it is universally understood that selectmen, who draw an order on behalf of the town in favor of any of their creditors, have not the funds of the town in their hands, but that they are in the possession of the treasurer. When any creditor of the town receives an order on the treasurer for the amount due to

But other authorities, following the analogies of private corporations, regard such orders like bills of exchange drawn by a party upon himself, and which may be treated either as accepted bills or as promissory notes; and hold, therefore, that the corporation is bound absolutely for the debt without either presentment or notice.[31]

§ **431. Suit on original indebtedness.**—When the warrant or order has been refused payment, the creditor may sue upon the original indebtedness of the corporation.[32] Where there was no express or implied power in the officer who executed it to issue the warrant, the plaintiff cannot make it even the *prima facie* ground of recovery, and must resort to the original consideration;[33] but when issued by an officer having a general power to issue warrants, it will be presumed to be upon a consideration, and if there be any defense, it must be pleaded and proved by the defendant.[34]

§ **432.** It is not incumbent upon a creditor to take a town order in discharge of a debt due him, although it is the usage of the town to settle its indebtedness by giving an order of its selectmen on the treasurer, similar to that offered.[35] But if he takes such order he cannot recover the amount of the debt, as it seems, without producing

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him, he must be considered as understanding these facts and assenting to this mode of receiving payment, and as accepting the order under an implied engagement to conform to the established usage, and present the order to the treasurer for payment. Good faith requires him to do this, and the law considers him as promising so to do. If, on presenting the order, payment be refused, the town which drew the order on itself must be answerable instanter, for the reason before assigned. But no sound reason can be given why a town should be subjected to the perplexity and costs of an action, before the payee of an order will give himself the trouble to do his duty and request payment of the money due him according to the terms of it. We have no reason to believe but that the contents of the order would have been promptly paid on application at the treasury. Justice, as well as law, are against the plaintiffs according to the facts before us." Pease v. Cornish, 19 Me. 193; Dalrymple v. Whittingham, 26 Vt. 346. See Kelly v. Mayor of Brooklyn, 4 Hill, 265.

31. Steel v. Davis County, 2 G. Greene (Iowa), 469.

32. Short v. City of New Orleans, 4 La. Ann. 281; Goldschmidt v. The Same, 5 La. Ann. 436.

33. Allison v. Juniata County, 50 Pa. St. 353. See Dana v. San Francisco, 19 Cal. 491.

34. Commissioners of Floyd County v. Day, 19 Ind. 451.

35. Benson v. Carmel, 8 Greenl. 110; Willey v. Greenfield, 30 Me. 452; Dillon on Municipal Corporations (1st ed.), § 410, p. 398.

it.[36] And if once paid, it cannot be the subject of recovery even by a *bona fide* holder, at least where it is not deemed a negotiable instrument.[37]

When such warrants or orders are issued as vouchers, they do not bear interest after demand and refusal to pay; [38] but some of the authorities which regard them as negotiable instruments, hold that interest is recoverable after dishonor.[39]

§ 433. Payable out of particular fund.—Where a warrant or order is made payable out of a particular fund, it creates no general charge against the corporation, but only against the fund which is designated.[40] It has been so held where the order contained the memorandum, "and charge the same to account of Union avenue;" [41] and where it was payable out of "the road and canal fund." [42]

But if the memorandum merely indicate the consideration, or the source of reimbursement, it would be different. So held where there was written, "it being his proportionate part of the surplus revenue fund;" [43] so where it ran, "for award No. 7, and charge to Bedford Road Assessment;" [44] so where it was payable "out of any funds belonging to the city not before specially appropriated." [45]

§434. Suit by transferee.—Whether or not the indorsee or assignee of a corporation warrant or order drawn by one officer upon another, can sue the county or city in his own name, is another question which has frequently arisen. Where such papers are deemed negotiable, an indorsee or transferee may of course sue upon them as upon any other negotiable instrument.[46] But where they are re-

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36. Sweet v. Carver County, 16 Minn. 107; Crawford County v. Wilson, 7 Ark. 219.

37. Chemung Canal Bank v. Supervisors, 5 Den. 517.

38. Allison v. Juniata County, 59 Pa. St. 353 (1865); Dyer v. Covington Township, 19 Pa. St. 200 (1852).

39. Commissioners of Leavenworth v. Keller, 6 Kan. 518.

40. Lake v. Trustees, 4 Den. 520; Kinsberry v. Pettis County, 48 Mo. 207; Travellers' Ins. Co. v. Denver, 11 Colo. 438, citing the text.

41. Lake v. Trustees, *supra*.

42. Kingsberry v. Pettis County, *supra*.

43. Pease v. Cornish, 19 Me. 191.

44. Kelly v. Mayor, 4 Hill, 263.

45. Bull v. Sims, 23 N. Y. 570.

46. Kelly v. Mayor, 4 Hill, 263; Dalrymple v. Town of Whittingham, 26 Vt. 345 (but see Hyde v. County of Franklin, below); Crawford County v. Wilson,

garded as mere vouchers drawn by one officer upon another for convenience in disbursing funds, the contrary view has generally prevailed—that the transferee cannot sue upon them in his own name.[47] The views of the United States Supreme Court on this question have been already referred to.[48] It must in general be solved by the law of the Forum.

§ 435. Right of transferee of county warrant to sue in his own name.—By some authorities it is considered that though town or county orders payable to bearer, or payable to order and indorsed, are not commercial paper in the hands of *bona fide* indorsees or transferees for value, so as to exclude evidence touching the legality of their inception, or so as to cut out defenses which would be good against the payee; yet they may be sued upon by the indorsee or transferee in his own name, in like manner as the assignee of a non-negotiable instrument.[49]

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7 Ark. 219; Commissioners of Leavenworth v. Keller, 6 Kan. 510. See Great Falls Bank v. Farmington, 41 N. H. 33.

47. Hyde v. County of Franklin, 27 Vt. 185; Snyder v. Bovaird, 122 Pa. St. 444; Allison v. Juniata County, 50 Pa. St. 353, Thompson, J.: "It was distinctly said in that case (Dyer v. Covington Township, 7 Harr. [19 Pa. St.], 200), that an action does not lie on such paper, and in this I entirely concur. It is neither a bill, note, check, nor contract, nor is it a satisfaction of the original indebtedness, and the suit should ordinarily be on that." See Smith v. Cheshire, 13 Gray, 318.

48. See *ante*, § 427.

49. Emery v. Mariaville, 56 Me. 316; Sturtevant v. Liberty, 46 Me. 459; Clark v. Polk County, 19 Iowa, 248; Andover v. Grafton, 7 N. H. 303, overruled by Great Falls Bank v. Farmington, 41 N. H. 33. This view is taken by Judge Dillon. Dillon on Municipal Corporations (1st ed.), § 406, p. 394. See *ante*, §§ 420, 427.

CHAPTER XVI

THE FEDERAL AND STATE GOVERNMENTS AS PARTIES TO NEGOTIABLE INSTRUMENTS

SECTION I

GENERAL PRINCIPLES AS TO GOVERNMENTAL LIABILITY, AND LIABILITY OF AGENTS

§ **436.** There is no doubt that when an officer of the government, Federal or State, who is authorized to bind the government as drawer, maker, or acceptor of a negotiable instrument, draws or accepts a bill, or makes a note in behalf of the United States, or the State which he represents, its validity cannot be questioned when it has passed into the hands of a *bona fide* holder for value, without notice of any defect. The government would then be bound by its negotiable paper just as an individual. This doctrine was laid down by the United States Supreme Court in a case where the Bank of the Metropolis, being sued for a balance due the United States, pleaded as a set-off a draft drawn by Edwin Porter on Richard C. Mason, treasurer of the Post-Office Department, at ninety days, and accepted by him as treasurer; and also four drafts, at ninety days, drawn by James Reeside on Amos Kendall, Postmaster-General, and "accepted on condition that his contracts be complied with." The right of the officers to accept, on behalf of the government, was not questioned, and the court held them valid, declaring that): "When the United States, by its authorized officer, becomes a party to a negotiable paper, they have all the rights, and incur all the responsibilities, of individuals who are parties to such instruments;" and that all the bank had to look to "was the genuineness of the acceptance and the authority of the officer to give it." [1] At the present time there seems to be no officer of the

1. United States v. Bank of Metropolis, 15 Pet. 377 (See this case explained in The Floyd Acceptances, 7 Wall. 666); McCann v. Randall (Mass.), 17 N. E. 81; Broadway Sav. Institution v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402.

Federal government who has authority to bind it as a party to a bill or note.[2] The government being affected by the same rules as affect individuals in commercial transactions, will be barred from recovery of money paid on a forged indorsement, when it delays too long to give notice.[3] The United States were held liable by the Supreme Court to a *bona fide* holder of interest-bearing treasury notes, printed by the Treasury Department from genuine plates, and perfect in form, never issued, however, by any authorized officer, but fraudulently or surreptitiously put in circulation. Much stress was laid upon the fact that the notes were perfect, as ready for circulation and use as coins from the mint, leaving nothing to be done to fix their character as money, except the mere act of placing them in circulation.[4]

§ 437. The Floyd Acceptances.—In the case of The Floyd Acceptances, 7 Wall. 667, before the United States Supreme Court, the authority of government officers to draw or accept bills was discussed in a suit upon the following instrument:

"Washington, November 28, 1859.

"$5,000.

"Ten months after date, for value received, pay to our own order, at the Bank of the Republic, New York city, five thousand dollars, and charge to account of our contract for supplies for the army in Utah.

"RUSSELL, MAJORS & WADDELL.

"Hon. J. B. Floyd, Secretary of War.

"[Indorsement.]

"Russell, Majors & Waddell.

"[Acceptance.]

"War Department, November 28, 1859.

"Accepted:

"John B. Floyd,

"Secretary of War."

Suit was brought by a *bona fide* indorsee for value, but the court held that he could not recover, although it was proved that the army in Utah was in imminent danger from cold and starvation at the time when the secretary accepted the bill in order to secure supplies to save it, on the ground that there was no usage or practice by which

2. The Floyd Acceptances, 7 Wall. 666.

3. United States v. Central Nat. Bank, 6 Fed. 134.

4. Cooke v. United States, 91 U. S. 389. But see District of Columbia v. Cornell, 130 U. S. 655.

the Secretary of War was authorized to accept such bills in behalf of the United States; and that although it was then and had been the practice of the heads of departments to accept drafts or bills for the transmission of funds to disbursing officers, or for the payment of those serving in distant stations, or for services rendered—such practice did not extend to cases of this kind, and there was no express authority to any officer of the government to draw or accept bills of exchange.[5]

§ **437a. Capacity of State to contract.**—The State has capacity to enter into contract, incurring liability absolute or contingent, as a principal debtor, or as indorser, guarantor, or surety, when appropriate to the just exercise of its powers, save so far as capacity may be restrained by constitutional limitation. When it enters into contracts, while it obtains all the rights, it incurs all the obligations of individuals who are parties to like contracts. Its contracts are of the same obligation, of the same incidents, measured and governed by the same principles of law as are the contracts of individuals. The contract may be of the class known as negotiable or commercial paper; and the State may be drawer, acceptor, indorser, or guarantor of such paper.[6]

§ **438. Warrants of government officers.**—A warrant issued by the auditor of a State upon the treasurer for an amount due a creditor is not a negotiable instrument,[7] nor is a warrant drawn by the comptroller of a State upon the treasurer.[8] And it has been held by the

5. The Floyd Acceptances, 7 Wall. 666. Nelson, Grier, and Clifford, JJ., dissented. Miller, J., who delivered the opinion of the court, said: "The United States v. Bank of Metropolis is the case mainly relied on as establishing the doctrine contended for by plaintiffs, and is confidently asserted to be conclusive of the cases under consideration, unless overruled. * * * The opinion of the court, after stating the facts, opens with the declaration that 'when the United States, by its authorized officer, becomes a party to negotiable paper, they have all the rights, and incur all the responsibilities, of individuals, who are parties to such instruments.' And further on it is said, that 'an unconditional acceptance was tendered to it (the bank) for discount; * * * all it had to look to was the genuineness of the acceptance, and the authority of the officer to give it.' If this language has any significance, it is that the authority of the officer, like the genuineness of the signature, is always to be inquired into at the peril of the party taking an acceptance purporting to bind the government."

6. State *ex rel.* Plock v. Cobb, 64 Ala. 156, Brickell, C. J.

7. State v. Dubuclet, 23 La. Ann. 267.

8. National Bank v. Herold, 74 Cal. 603. See *ante*, § 427.

United States Supreme Court that an order drawn by the government of the United States upon the government of France, for an amount due by treaty stipulation, was not a bill of exchange in the sense of the law merchant.[9]

§ 439. **Foreign governments** may also be parties to negotiable instruments. In a case before the United States Supreme Court the bills in suit were signed: "Le Tombe, Le Consul Général," and directed: "Au citoyen Payeur Général des defenses du Departement de———. A la Trésorerie Nationale a Paris." They bore a certificate showing that they had been registered at the consulate of France for the port of Philadelphia, and a declaration by Adet, the minister plenipotentiary of the French Republic, that the faith of the French nation was pledged for their payment, and requesting the proper officer of the treasury to pay them. The court was unanimously of opinion that the bills were drawn upon account of the French government, and that Le Tombe was not personally bound.[10]

§ 440. **Governmental and private agents.**—In dealing with the officers and agents of government, whether Federal or State, it is important to remember that they stand in a different relation to their principals from private agents. Private agents, who are held out as such by their principals to the public, will bind them whenever they act within the apparent scope of their authority. And although they violate instructions, it will be no defense to the principal, who, having clothed them with the semblance of authority, cannot deny its reality. But with public agents it is entirely different. Their powers and duties are defined by statute, which is notice to the world of the limitations to their authority; and no pretension of authority, or customary action, can amplify that authority beyond the statutory limitation.[11] This rule is absolutely necessary to protect the public interest against losses and injuries arising from the fraud, mistake, or rashness, or indiscretion of public agents.[12] "It is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury

9. United States v. Barker, 12 Wheat. 559.

10. Jones, Indorsee, v. Le Tombe, 3 Dall. 384.

11. Pierce v. United States, 1 N. H. 270; The Floyd Acceptances, 7 Wall. 666; Broadway Sav. Inst. v. Town of Pelham, 83 Hun, 96, 31 N. Y. Supp. 402.

12. State of Missouri v. Bank of Missouri, 45 Mo. 528, Wagner, J.

of the public." [13] The difference in the statement of the rule as applicable to public and private agents is, however, rather a difference arising from the customary difference of fact in the circumstances under which they act, than in the principle applicable to them. For even as to private agents, the principal is not bound by their acts in excess of authority, when the party dealing with them has an opportunity to inspect that authority, and observe its limitations. This opportunity is rarely afforded in private agencies; whereas the statute of public record is a conspicuous notice to the world of the public agent's power.

§ **441. Public bonds and treasury notes.**—Coupon bonds issued by the Federal [14] and State governments [15] are established as in all respects negotiable instruments; and the rights of parties are ascertained, as a general rule, by the same principles which apply to like instruments issued by corporations. The treasury notes of the United States are deemed negotiable instruments, and their negotiability is not affected by the fact that they are issued under the treasury seal, nor by the fact that when issued the name of the payee is left blank.[16] A clause in such a note giving the holder the option, upon maturity, to convert it into bonds, does not destroy its negotiability so long as the option is not exercised, nor is negotiability destroyed by a clause reserving the option to the government to pay in coin or in paper money. But when the holder exercises the option given him, as by indorsing on the note, "Pay Secretary of the Treasury for redemption," the negotiability of the note is destroyed.[17] In a recent case involving these questions, Dwight, Commissioner, said: "There is nothing to prevent the holder from taking bonds at any time, though the notes cannot be actually converted into bonds until maturity. Until an election is exercised they remain treasury notes; when that occurs their function is at an end, and the holder has only

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13. Whiteside v. United States, 93 U. S. (3 Otto) 257; Mayer v. Eschback, 17 Md. 282.

14. Texas v. Hardenberg, 10 Wall. 58; Texas v. White, 7 Wall. 700; Morgan v. United States, 113 U. S. 476; Seybel v. National Currency Bank, 54 N. Y. 288; Spooner v. Holmes, 102 Mass. 503.

15. State of Illinois v. Delafield, 8 Paige Ch. 527; Arents v. Commonwealth, 18 Gratt. 750; Railroad Companies v. Schutte, 103 U. S. 118; State *ex rel.* Plock v. Cobb, 64 Ala. 128.

16. Dinsmore v. Duncan, 57 N. Y. 573; Vermilye v. Adams Express Co., 21 Wall. 138.

17. Ibid.

a claim against the United States for the proper amount of bonds. This is a chose in action, and not negotiable." [18] If the government, instead of the holder, had the option to pay or convert notes into bonds, they would not be negotiable.[19] The United States Supreme Court has described the character of these notes; and held that after maturity the purchaser took them subject to the rights of antecedent holders, to the same extent as in other dishonored commercial paper.[20]

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18. Dinsmore v. Duncan, 57 N. Y. 580.

19. Vermilye v. Adams Express Co., 21 Wall. 138.

20. Vermilye v. Adams Express Co., 21 Wall. 138, Miller, J., saying: "The first thing which presents itself on the state of facts is to determine the character of those notes as it affects the law of their transferability at the time they were purchased by appellants, for notwithstanding some testimony about the erasure of an indorsement on some of the notes, we are of opinion that it was so skillfully done as not to attract attention with the usual care in examining such notes given by bankers. They were the ordinary form of negotiable instruments, payable at a definite time, and that time passed and they were unpaid. This was obvious on the face of the paper. The fact that the holder had an option to convert them into other bonds does not change their character. That this option was to be exercised by the holder, and not by the United States, is all that saves them from losing their character as negotiable paper; for if they had been absolutely payable in other bonds or in bonds or money at the option of the maker, they would not, according to all the authorities, be promissory notes, and they can lay claim to no other form of negotiable instrument. As it is, they were negotiable promissory notes nine months overdue when purchased by appellants. They were not legal tenders, made to circulate as money, which must, from the nature of the functions they are to perform, remain free from the liability attaching to ordinary promises to pay after maturity. Nor were they bonds of the class which, having a long time to run, payable to holder, have become by the necessities of modern usage negotiable paper, with all the protection that belongs to that class of obligations. These were simply notes, negotiable, it is true, having when issued three years to run, which three years had long expired, and the notes were due and unpaid. We cannot agree with counsel for appellants, that the simple fact that they were the obligation of the government takes them out of the rule which subjects the purchaser of overdue paper to an inquiry into the circumstances under which it was made, as regards the rights of antecedent holders. The government pays its obligations according their to terms with far more punctuality than the average class of business men. The very fact that when one of its notes is due the money can certainly be had for it, if payable in money, should be a warning to the purchaser of such an obligation after its maturity to look to the source from which it comes, and to be cautious in paying his money for it. In the case of Texas v. White, 7 Wall. 700, the bonds of the government issued to the State of Texas were dated July 1, 1851, and were redeemable after the 31st day of December, 1864. This court held that after that date they were to be considered as overdue paper, in regard to their negotiability, observing that in strictness, it is true, they were not payable on the day when they became redeemable, but

If a treasury note be drawn payable to order, and indorsed specially to a certain person, a thief or finder cannot acquire, or pass a title valid against the indorser, or the true owner—as every person taking it would have notice by the special indorsement, that only the indorsee could give title.[21]

§ **442. Diversion of pledged funds by State; sales of bonds at less than par value.**—When a State borrows money on bonds issued for that purpose, and pledges a certain fund for the interest to accrue thereon, such pledge has been deemed a part of the contract with the holders of the bonds, and that to divert it would impair the obligation of the contract—which it is beyond the power of the State to do.[22] If the legislature of a State authorize its officers to borrow money and sell its bonds or stocks for that purpose at par value, a sale at a rate less than par value would be void; and a sale of bonds or stocks which draw interest from the day of sale, but which are to be paid for in future instalments, only, and without interest, is a sale at less than par value.[23]

§ **443. Presumption as to act being official.**—Whenever a public officer makes a contract or engagement which is fairly within the scope of his authority, the presumption of law is that he made it officially, and in his public character, unless the contrary appears by satisfactory evidence.[24] Accordingly, where bills, notes, or other evidences of debt are made payable to an officer of the United States, and it appears, either from their face or extraneous evidence, that they were for the benefit of the United States, the action should be brought in the name of the United States, and, under like circumstances, if payable to a State officer, suit should be brought in the name of the State. These doctrines were enforced where a bill, payable to "Thomas T. Tucker, Treasurer of the United States," was

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the known usage of the United States to pay all bonds as soon as the right of payment accrues, except when a distinction between redeemability and payability is made by law and shown on the face of the bonds, requires the application of the rule respecting overdue obligations to bonds of the United States which have become redeemable, and in respect to which no such distinction is made."

21. Myers v. Friend, 1 Rand. 13. See *post*, § 441.

22. State v. Cardozo, 8 Rich. 71. See *post*, §§ 446, 448; 28 Am. Rep. 275.

23. State of Illinois v. Delafield, 8 Paige Ch. 527.

24. Park v. Ross, 11 How. 374; Balcombe v. Northrup, 9 Minn. 176; Burroughs on Public Securities, § 3, p. 10; Story on Agency, § 303.

sued on in the name of the United States; [25] where a note was payable to "I. E. F., U. S. Indian Agent, his successors in office, or order, for the use of the Winnebago Tribe, etc.;" [26] where a note was payable to "James Irish, Land Agent of Maine." [27]

§ **443a. Who are to be deemed public agents?**—It is observed by the editor of the American Reports that "the books are singularly destitute of cases precisely in point," as to the liability of public agents as parties to negotiable instruments; [28] but it may be more accurately said that many of the cases have failed to note the distinction between public and private agents, and to define who are public and private agents. Those who are in the performance of official functions, whether for the Federal or State governments, or for any of the municipal subdivisions of the State governments, seem clearly to come under the classification of public agents; and when they sign themselves as parties to negotiable instruments for the *bona fide* purpose of discharging official fiscal duties, they should be deemed to be acting in their public character and not to undertake a personal obligation. The cases which arise upon drafts or orders of one municipal officer or agent upon another have been already considered, and many of them can only rest upon this theory, although it is not expressly so stated in the decisions.[29]

In a recent Indiana case negotiable notes in the ordinary form customary in that State were signed by several persons adding to one note, "Trustees of Monticello School," and to another simply "School Trustees," and it was contended that these words were simply *descriptio personæ*, and that the parties were individually bound. But the Supreme Court said: "It is clear that a school town or township is a purely public corporation, and the trustees thereof public agents. These notes, therefore, which were confessedly executed upon con-

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25. In Dugan v. United States, 3 Wheat. 172, Marshall, C. J., said: "If it be generally true that when a bill is indorsed to the agent of another for the use of his principal, an action cannot be maintained in the name of such principal (on which point no opinion is given), the government should form an exception to such rule, and the United States be permitted to sue in their own name, whenever it appears not only on the face of the instrument, but from all the evidence that they alone were interested in the subject-matter of the controversy." See also United States v. Boyce, 2 McLean, 352.

26. Balcombe v. Northrup, 9 Minn. 173.

27. State v. Boies, 2 Fairf. 474; Irish v. Webster, 5 Greenl. 171.

28. 37 Am. Rep. 142.

29. See *ante*, § 427 *et seq.*

sideration moving only to the use and benefit of the appellant (the school town), are binding upon no one unless upon the appellant."[30] And there are several cases which accord with these views, and which seem to us sound and just, and in accordance with the broad principles applicable to public agencies.[31] But the individual signers of similar notes have been held liable in a number of decisions, the attorneys and the courts seeming to lose sight of the distinction between public and private agents.[32]

In doubtful cases parol evidence is, in general, admissible to show by surrounding circumstances that the contract was made on behalf of the public.[33] The inquiry in all such cases, and especially as be-

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30. School Town of Monticello v. Kendall, 72 Ind. 208, 37 Am. Rep. 139, 142, and notes. But it has also been held in Indiana that a township trustee cannot be held personally liable for the amount of a township order, by reason of a written statement made by him to the purchaser thereof that the order was all right, where such order was on its face void. See First Nat. Bank of Elkhart v. Osborne, 18 Ind. App. 442, 48 N. E. 256.

31. In Hodges v. Runyan, 30 Mo. 491, the note purported that the president of the board of school trustees promised in their behalf, and it was held that the signers were not personally bound. In Baker v. Chambers, 4 Iowa, 429, the note was given by "the undersigned Directors of School District No. —" and it was held that they were only bound officially as directors, and parol evidence to bind them personally was excluded. In Fox v. Drake, 8 Cow. 191, the action was on an instrument signed by A. & B. as "Commissioners for building the Court House at Owego Village," and the expressed consideration was "for work and labor on the Court House in the village of Owego," Savage, C. J., said: "This is a case in which the defendants are not personally liable, unless it was clearly their intention to assume personal responsibility, which does not appear."

32. See *ante*, § 403; Cahokia School Trustees v. Rautenburg, 88 Ill. 219. The note commenced, "I promise," and was signed by "A. & B., School Trustees," and the parties were held personally liable. In accord, see Fowler v. Atkinson, 6 Minn. 579. In Wing v. Gluck, Iowa, S. C., June, 1881, cited 37 Am. Rep. 142, it was held that the school trustees were individually liable on a note similar to that in the case of School Town of Monticello v. Kendall, above cited, and parol evidence to show the real principal was excluded; but the question whether the township was liable was not discussed. The court said: "Most clearly such distinct township cannot be said to be a party to the contract, so far as its terms are concerned. It follows that unless the contract can be held to be the contract of the defendants, it is the contract of no one." American Ins. Co. v. Stratton, 59 Iowa, 696. In Bayliss v. Peterson, 15 Iowa, 279, the signers were held liable where the promise was made as "Committeemen for the Erection of a Schoolhouse in District No. 1." See *ante*, § 305. Committeemen, who are the mere subagents of official boards, may perhaps be distinguishable from the officials themselves in respect to the principles applicable to their liability.

33. Walker v. Christian, 21 Gratt. 291; Burroughs on Public Securities, p. 10.

tween privy parties, is, to whom was the credit given? and the matter then becomes a mere question of evidence.[34]

§ **444. Ratification of assumed public authority.**—No official or agent of the government, Federal or State, can ratify a contract, save one capable of making it for the government. Thus, the legislature of Illinois, having authorized the issue of bonds in a particular way, the recognition by the governor of the validity of bonds issued in a different way could impart no validity to them. "For," said the court, "no person can confirm an unauthorized agreement, made by another, unless he had himself the power to authorize the making of such an agreement. As the sovereign power of the State, by a legislative act, had prohibited any of its officers or agents from selling its stocks below their par value, it follows, of course, that nothing short of a law of the State, proceeding from the same authority, can legalize such a transaction." [35] But if the legislature had the power to authorize their issue, its ratification subsequently would be equivalent.[36] And such ratification might be absolute, or conditioned upon a future event, in which case, the condition being fulfilled, it would become absolute.[37]

§ **445. As to the liability of public agents,** a different rule (as already seen) prevails from that applicable to private agents. In the ordinary course of things, an agent contracting on behalf of the government or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be presumed either that the public agent means to bind himself personally in acting as a functionary of the government, or that the party dealing with him in his public character means to rely on his individual responsibility.[38] If, however, a functionary of the government, without disclosing his official character, or the public nature of the transaction in the instrument, issued a negotiable

34. 2 Kent Com. (7th ed.), 810. See Biddle on Stockbrokers, 97, 99.

35. State of Illinois v. Delafield, 8 Paige Ch. 542.

36. Opinion of Court to the Governor, 49 Mo. 225.

37. Butler, Treasurer, v. Dubois, Auditor, 29 Ill. 105.

38. Walker v. Christian, 21 Gratt. 297; Hodgson v. Dexter, 1 Cranch S. C. 345; 2 Kent Com. (7th ed.) 810; Story on Agency, § 302; Macheath v. Haldimand, 1 T. R. 172; Story on Agency, §§ 306–312. See Edwards on Bills, 90. Parol proof is admissible to establish the fact that the maker signed as a public agent. Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co., 5 Okl. 32, 47 Pac. 484.

instrument in his own name, it would seem clear that a *bona fide* holder without notice might hold him individually responsible. And it is thought that an intention should be imputed to him to incur personal liability whenever he draws a bill or note in his simple individual name.[39]

§ **445a. Liability of public agent exceeding authority.**—Not being bound by the contract made officially, the question remains, is the public agent bound in an action of tort for assuming, without authority, to bind his principal, as is the case with private agents? [40] Where such agent has acted in good faith, and there has been no fraud or imposition, it would seem that he is not, for those who deal with him ordinarily have notice of the extent of his authority from the statutes under which it is derived, and must judge at their peril of its extent and limitations.[41]

SECTION II

STATE SECURITIES MADE RECEIVABLE FOR TAXES

§ **446.** By section 10, article 1, of the Constitution of the United States, it is provided that no State shall pass any law "impairing the obligations of contracts." This provision was intended to prevent interferences by State legislatures with the relations of debtors and creditors; and it has been urged with great force, that it was not designed to apply to undertakings of States themselves, and that one legislature could not pass any act which a subsequent one could not repeal, although such repeal would abrogate or impair engagements entered into under pre-existing legislation. But it has been decided that a State may be a contracting party within the meaning of the Constitution, and that, if a legislative body make a contract on behalf of the State, no subsequent session, and no new legislative body, can repeal the law by which it was made, so as to impair the obligation contracted.[42]

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39. Story on Agency, § 306.

40. *Ante*, § 306.

41. See Burroughs on Public Securities, 11, 12; Dillon on Municipal Corporations (1st ed.), § 177 and notes. See Story on Agency, § 319 *et seq.*, as to liability of public agents for negligence and misfeasance.

42. New Jersey v. Wilson, 7 Cranch, 164.

§ **447. Cases from Arkansas and Tennessee.**—These principles have an immediate bearing on State and corporation securities, and have been applied to them in a number of cases. In 1836, the legislature of Arkansas chartered "The Bank of the State of Arkansas," the whole capital of which belonged to the State. Its charter provided "that the bills and notes of said institution shall be received in all payments of debts due to the State of Arkansas," but this provision was repealed by the legislature in 1845. At the time of its repeal a large amount of the issues of the bank were in circulation, and a judgment debtor of the State, after the repeal, tendered the amount due by him in bank notes to the collecting officer, who refused to receive them. The Supreme Court of the United States held that the legislation aforesaid constituted a contract which no subsequent legislation could impair; and that the collecting officer might be compelled by mandamus to receive the notes tendered.[43] In a subsequent case which went up from Tennessee, a similar decision was rendered by the same tribunal, which held the contract of the State to receive the bank notes for all public dues irrepealable. This guaranty was thought in no sense a personal one, but attached to the notes themselves as much as if written on the back thereof; that it went with them everywhere as long as they existed, and was a standing invitation to all persons to receive them, even though, after the notes were issued, the law declaring their receivability should be repealed. "The quality of negotiability is annexed to the notes in words that cannot be misunderstood, and which indicate the purpose of the legislature, that they should be used by every one indebted to the State." [44]

§ **448. Virginia decisions.**—In Virginia, the decisions of the United States Supreme Court have been followed. It appeared in the case presented that the State of Virginia, by her legislature, had undertaken to issue coupon bonds for two-thirds of her entire indebtedness, the remaining third being assumed to be the proportion which should be discharged by West Virginia, which State had been forcibly, and without Virginia's consent, torn out of her boundaries. It was provided in the act of the Virginia Assembly that the coupons of the new issue of bonds should be receivable "at and after maturity for all taxes, debts, and demands due the State." Some of her creditors accepted this adjustment of their bonded debt, and a holder of

43. Woodruff v. Trapnall, 10 How. 190.

44. Furman v. Nichols, 8 Wall. 44. See also Keith v. Clark, 97 U. S. (7 Otto) 454, and Tennessee v. Sneed, 96 U. S. (6 Otto) 69.

some of the coupons tendered them to the sheriff of Richmond in payment of taxes. In the meantime, the law authorizing the receipt of the coupons for taxes and other demands had been repealed, and the Assembly had passed an act prohibiting the collecting officers of the State from receiving the coupons in discharge "of taxes or other demands of the State now due, or that shall hereafter become due." The Supreme Court of Appeals held that the prior act constituted a contract between Virginia and her creditors who accepted its terms, and was upon sufficient considerations; and that no subsequent legislative act could repeal the provision that the coupons issued should be receivable for taxes; and, accordingly, sustained the peremptory mandamus which had been awarded compelling the sheriff to receive them.[45] But in subsequent cases the court held that the legislature had full power to repeal the funding act as against all creditors who had not accepted its terms at the time of such repeal. And in still more recent cases (there being a change meantime in the

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45. Antoni v. Wright, 22 Gratt. 833. Bouldin, J., with whom concurred Moncure and Christian, JJ., delivered the opinion of the court, which is a model of judicial style. Staples, J., dissented. The current of decisions is so strong in favor of the views stated in the text that they may be regarded as settling the law. Many learned lawyers believe, however, that they rest upon a mistaken notion—that States were never contemplated as contracting parties, in that clause of the Constitution which prohibits the passage of laws by States which impair the obligation of contracts; and we can but think that the decisions quoted have sacrificed the spirit to the letter of the law, and shorn States of their sovereignty, under color of a constitutional provision only designed to exact good faith from individuals in their dealings with one another. In Clarke v. Tyler, Sergeant, 30 Gratt. 134, it was held that coupons attached to bonds issued under the Virginia Funding Act, were receivable for fines. In Williamson v. Massey, Auditor, 33 Gratt. 237, the above decisions were reaffirmed, and it was held that an act exempting coupons from taxation was valid under the Constitution of Virginia. In Hartman v. Greenhow, 102 U. S. (12 Otto) 672, the Virginia decisions were approved; and a statute of that State requiring the tax on the bonds of the State to be deducted from the coupons held by a different owner was held void. Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91; Virginia Coupon Cases, 114 U. S. 269, 5 Sup. Ct. Rep. 903, 923–925, 928, 931, 932, 962, 1020; McGahey v. Virginia, 135 U. S. 662, 10 Sup. Ct. Rep. 972; McCullough v. Virginia, 172 U. S. 106, 19 Sup. Ct. Rep. 134; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Rep. Ct. 903, 962; Marye v. Parsons, 114 U. S. 325, 5 Sup. Ct. Rep. 932, 962; Carter v. Greenhow, 114 U. S. 117, 5 Sup. Ct. Rep. 928, 962; Moore v. Greenhow, 114 U. S. 338, 5 Sup. Ct. Rep. 1020; Chappin v. Taylor, 116 U. S. 550, 6 Sup. Ct. Rep. 518; Royal v. Virginia, 116 U. S. 572, 6 Sup. Ct. Rep. 510; Sand v. Edmonds, 116 U. S. 585, 6 Sup. Ct. Rep. 516; Stewart v. Virginia, 117 U. S. 612, 6 Sup. Ct. Rep. 922; *In re* Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164; Wise v. Rogers, 24 Gratt. 169; Maury v. Rogers, 24 Gratt. 169.

personnel of the court) the earlier decisions were reversed, and the doctrine maintained that the State could annul the receivability of coupons for taxes.[46] If the States are to retain their autonomy, their sovereign control of taxation is indispensable.

And they may require the holders of coupons on State bonds to prove their genuineness.[47]

46. Vashon v. Greenhow, 81 Va. 336; Commonwealth v. McCullough, 90 Va. 598, 19 S. E. 114; McGahey v. Commonwealth, 85 Va. 519, 8 S. E. 244.

47. McGahey v. Commonwealth, 85 Va. 519; Lambe v. Commonwealth, 85 Va. 530.

BOOK III

THE NEGOTIATION OF THE INSTRUMENT

CHAPTER XVII

PRESENTMENT FOR ACCEPTANCE

SECTION I

NATURE OF AND NECESSITY FOR PRESENTMENT FOR ACCEPTANCE

§ **449.** It is the right of the holder of a bill to present it for, and insist on its acceptance, even so late as the day before it falls due. If not presented for acceptance until the day it falls due, the right to demand acceptance becomes merged in the right to demand payment. If the bill be presented for acceptance before it falls due, it becomes dishonored if acceptance be refused; and notice must be forthwith given to the parties whom it is intended to charge.[1] And suit may at once be instituted against the drawer, and against the indorsers.[2] This rule of commercial law is so general and binding that a statute of a State which forbids a suit from being brought in such a case until after the maturity of the bill, can have no effect upon suits brought in the United States courts. The requisition of a State statute like this would be a violation of the general commercial law, which a State has no power to impose, and which the courts of the United States would be bound to disregard.[3] So also if the State

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1. Chitty on Bills (13th Am. ed.), 309; Goodall v. Dolley, 1 T. R. 712. See chapter XXIX, on Notice, vol. 2; Bank of Washington v. Triplett, 1 Pet. 25; Townsley v. Sumrall, 2 Pet. 170; Smith v. Roach, 7 B. Mon. 17; Landrum v. Trowbridge, 2 Metc. (Ky.) 281.

2. Ibid.; Woodward v. Row, Keb. 132 (1666). See also Lucas v. Ladew, 28 Mo. 342; Edwards on Bills, 387; Pilkinton v. Woods, 10 Ind. 432; Kinney v. Heald, 17 Ark. 397; National Bank of Chester v. Gunhouse, 17 S. C. 496, citing the text. By the express provisions of Rev. St. 1895, art. 306, the drawer of a bill of exchange, which is not accepted when presented, immediately becomes liable. Vaughn v. Farmers' &c. Nat. Bank (Tex. Civ. App.), 126 S. W. 690.

3. Watson v. Tarpley, 18 How. 517.

statute seeks to make the right of recovery, in a suit brought in case of nonacceptance, dependent upon proof of subsequent presentment, protest, and notice for nonpayment.[4]

§ 450. When drawer of bill requiring presentment for acceptance, bound without such presentment.—Presentment to the drawee, it has been held, is necessary, even though the drawer has requested him not to accept; [5] but the holder is not bound to present again after refusal to accept and notice given, even though the drawer requests him to do so, and promises that the bill shall be honored.[6]

The only cases in which the holder of a bill which, according to its tenor, should be presented for acceptance, can charge the drawer without presenting it for acceptance, arise when the relations between the drawer and drawee are such as to constitute the drawing of the bill a fraud upon the holder.[7] When the bill is presented the acceptance must be according to its tenor to pay in money. If it be to pay by another bill, it is no acceptance, and the bill should be protested.[8]

§ 451. Effect of acceptance.—Before acceptance the drawee is under no liability to accept, unless he has specially contracted to do so, and the holder, as it is generally held, cannot sue him, even though he have funds of the drawer in his hands.[9] But an acceptance operates as a full legal assignment of the amount to the holder, and the acceptor is bound to pay it.[10] It has been much debated whether or not a bill before acceptance operates as an assignment when drawn upon funds of the amount it calls for; and it seems to be settled by the authorities that if drawn for the whole amount it operates as an equitable assignment, which will take precedence of any subsequent lien or charge upon them; [11] and that after notice to the drawee it will

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4. Ibid.

5. Hill v. Heap, Dowl. & R. N. P. 57. See 1 Parsons on Notes and Bills, 338.

6. Hickligg v. Hardey, 7 Taunt. 312.

7. Smith on Mercantile Law (Holcombe & Gholson's ed.), 304; Bank of Washington v. Triplett, 1 Pet. 25.

8. Russell v. Phillips, 14 Q. B. 891.

9. Mandeville v. Welch, 5 Wheat. 277; Schimmelpennich v. Bayard, 1 Pet. 264; Tiernan v. Jackson, 5 Pet. 580. The case of Corser v. Craig, 1 Wash. C. C. 424, has been overruled. Luff v. Pope, 5 Hill, 413, 7 Hill, 577; New York and Virginia State Bank v. Gibson, 5 Duer, 574; Harris v. Clark, 3 N. Y. 93.

10. See vol. 1, §§ 15, 78 *et seq.*

11. Mandeville v. Welch, 5 Wheat. 277; Anderson v. De Sœr, 6 Gratt. 364; Gibson v. Cooke, 20 Pick. 15. See *ante*, chapter 1, section III, § 15 *et seq.*

bind him.[12] And it has been so held of a draft nonnegotiable.[13] But when a bill is for only a part of the drawer's funds, it is said that it does not operate as an assignment against the drawee, unless he accepts, for the reason that the creditor cannot be permitted without the debtor's assent to split up one cause of action into several.[14] Where the draft is not negotiable, the weight of authority is to this effect.[15] This subject has been fully discussed in a previous portion of this work.[16]

§ **452. Effect of failure to present for acceptance.**—Whenever it is incumbent on the holder to present the bill for acceptance or payment, if he fails to do so at the proper time, he will lose not only his remedy on the bill, but also on the consideration or debt in respect of which it was given or transferred.[17] This doctrine is well settled, and was well expressed in an Arkansas case, where Scott, J., said: "In case a plaintiff has lost by his own laches his legal recourse against the defendant upon the bill or note, it is in vain that he brings it into court and offers to cancel it, with the expectation of being allowed, after cancellation, to proceed to recover on the original consideration. As well might he hope, by such means, to revive a cause of action that had been barred by the statute of limitations." [18]

SECTION II

FORMALITIES OF PRESENTMENT FOR ACCEPTANCE

§ **453.** In order that every step in the procedure may be properly taken, it is important to consider: (1) What bills must be presented for acceptance; (2) By and to whom such presentment should be made; (3) The place where such presentment should be made; and (4) The manner of making presentment for acceptance.

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12. Ibid.

13. Cutts v. Perkins, 12 Mass. 209; Morton v. Naylor, 1 Hill, 583.

14. Story, J., in Mandeville v. Welch, 5 Wheat. 277; Gibson v. Cooke, 20 Pick. 15.

15. 1 Parsons on Notes and Bills, 334.

16. Section 15 *et seq.*

17. Adams v. Darby, 28 Mo. 182; Smith v. Miller, 43 N. Y. 171 (1870), 52 N. Y. 546 (1873); Cambidge v. Allenby, 6 B. & C. 373; Darrach v. Savage, 1 Show. 155 (1691); Benjamin's Chalmers' Digest, 149. See §§ 971, 1276.

18. Gracie v. Sandford, 9 Ark. 238 (1848); Adams v. Boyd, 33 Ark. 33.

§ 454. In the first place, as to what bills should be presented for acceptance.—Bills payable on demand (which are immediately payable on presentment), or payable at a certain number of days after date, or after any other certain event, or payable on a day certain, need not be presented for acceptance at all, but only for payment. And the fact that such bills are payable at a bank, or other particular place, does not alter the rule on the subject.[19] But it is usual and best, when the bill is payable at a future day, to present it for acceptance, in order to ascertain whether it will certainly be honored, and to procure the assurance of the acceptor's liability.[20] And in such cases, if acceptance be refused, the holder must make protest, and give notice in the same manner as if the bill were payable at so many days after sight.[21]

Bills payable at sight, or at so many days after sight, or after demand, or after any other event not absolutely fixed, must be presented to the drawee for acceptance and payment, or for acceptance only, without unreasonable delay, or the drawer and indorsers will be discharged, for they have an interest in having the bills accepted immediately in order to shorten the time of payment, and thus put a limit to the period of their liability; and also enable them to protect themselves by other means before it is too late, if the bill is not accepted and paid within the time originally contemplated by them.[22]

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19. Bank of Washington v. Triplett, 1 Pet. 25; Townsley v. Sumrall, 2 Pet. 170; Allen v. Suydam, 20 Wend. 321; Batchellor v. Priest, 12 Pick. 399; Bank of Bennington v. Raymond, 12 Vt. 401; Smith v. Roach, 7 B. Mon. 17; Carmichael v. Bank of Pennsylvania, 4 How. (Miss.) 567; Glasgow v. Copeland, 8 Mo. 268; Orr v. Maginnis, 7 East, 362; Dunn v. O'Keefe, 5 Maule & S. 282; Walker v. Stetson, 19 Ohio St. 400; Story on Bills, § 228. It not being necessary to present a bill payable on a day certain for acceptance, an agreement not to present it for acceptance will not discharge an indorser, although the drawee says it will not be accepted or paid. Fall River Bank v. Willard, 5 Metc. (Mass.) 216. An order or draft, having no time of payment expressed, is payable on demand, and does not need to be presented for acceptance. Westberg v. Chicago Lumber & Coal Co., 117 Wis. 589, 94 N. W. 572, citing text.

20. United States v. Barker, 4 Wash. C. C. 464; Story on Bills, § 228.

21. Glasgow v. Copeland, 8 Mo. 268; Allen v. Suydam, 20 Wend. 321; United States v. Barker, 4 Wash. C. C. 464; Landrum v. Trowbridge, 2 Metc. (Ky.) 281; Philpott v. Bryant, 3 Car. & P. 244, in which case Park, J., said: "I should destroy half the trade of the city of London, if I were to hold that bills made payable so many days after date must be presented for acceptance."

22. Allen v. Suydam, 20 Wend. 321; Aymar v. Beers, 7 Cow. 705; Robinson v. Ames, 20 Johns. 146; Wallace v. Agry, 4 Mason, 336, 5 Mason, 118; Mitchell v. Degrand, 1 Mason, 176; Bell v. First Nat. Bank, 115 U. S. 379; Story on Bills, § 228. Whether or not bills payable at sight are entitled to grace, is a question

When the words "acceptance waived" are embodied in a bill, the ordinary proceedings in acceptance are dispensed with, and merged into those of payment or nonpayment.[23]

§ 455. In the second place, as to the person by and to whom presentment for acceptance should be made.—The bill must be presented by the holder or his authorized agent, and to the drawee or his authorized agent.[24] The party in possession of the bill is with ostensible legal title thereto, presumed to be the holder, and to have the right to make presentment for acceptance or payment.[25] The drawee may accept without risk, and if he refuse, the protest will inure to the benefit of the rightful holder.[26] If the drawee cannot be found, and any person has been indicated to be resorted to in case of need (*au besoin*), the bill should be presented to that person.[27]

If the bill be drawn upon two persons not partners, it seems that it must be presented to both, if not paid by the first; [28] but this has been doubted, for the reason that the holder would not be bound to take the single acceptance of the other; and if he did, it would be at his own risk, if the bill were not protested.[29] But if the bill be drawn upon a firm, presentment to any partner is sufficient,[30] and the fact

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about which authorities differ, though preponderating in favor of the allowance of grace. See, on this subject, chapter XX, on Presentment for Payment, section IV, § 617; Benjamin's Chalmers' Digest, 149; Citizens' Nat. Bank, etc., v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

23. Webb v. Mears, 9 Wright, 222; Deneyre v. Milno, 10 La. Ann. 324; English v. Wall, 12 Rob. (La.) 132; Liggett v. Weed, 7 Kan. 276; Carson v. Russell, 26 Tex. 472.

24. Hofrichter v. Enyeart, 71 Nebr. 771, 99 N. W. 658.

25. Bank of Utica v. Smith, 18 Johns. 230; Freeman v. Boynton, 7 Mass. 483; Agnew v. Bank of Gettysburg, 2 Harr. & Gill, 478. See chapter XX, on Presentment for Payment, section I, § 572 *et seq.* A presentment made by the lawfully authorized agent of the rightful holder is a legal one, and if he was not the authorized agent, the presentment would inure to the benefit of the rightful holder, whoever he might be. Milin's Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345 (1909).

26. Chitty on Bills (13th Am. ed.), 311.

27. Story on Bills, § 229; Edwards on Bills, 402.

28. Willis v. Green, 5 Hill, 232; Story on Bills, § 229. See Union Bank v. Willis, 8 Metc. (Mass.) 504; Arnold v. Dresser, 8 Allen, 435; Gates v. Beecher, 60 N. Y. 523; Am. Law Reg., July, 1875, p. 440.

29. Story on Bills, § 229, note 9. See, on this subject, Harris v. Clark, 10 Ohio, 5; and Greenough v. Smead, 3 Ohio St. 415.

30. Greatlake v. Brown, 2 Cranch C. C. 541; Story on Notes, § 239; 1 Parsons on Notes and Bills, 135; Holtz v. Boppe, 37 N. Y. 634.

that the firm has been dissolved by bankruptcy does not render it necessary to present the bill to both.[31]

§ 456. Presentment for acceptance to agent.—The holder must be careful, when he does not find the drawee in person, to assure himself that the party to whom he presents the bill for acceptance is his authorized agent. And though in the case of a presentment for payment it may suffice to demand payment at the residence of the acceptor, yet in case of a presentment for acceptance, the holder must endeavor to see the drawee or his authorized agent, personally. And, therefore, where in an action against the drawee on a refusal to accept, it appeared that the witness had carried the bill to a place which was described to him as the drawee's house, and that he offered it to a person in a tanyard, who refused to accept it, and the witness did not know the drawee's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so, it was held that the evidence of presentment to the drawee for acceptance was insufficient.[32]

§ 457. Presentment to clerk in counting-room.—There is no doubt that a clerk found at the drawee's counting-room is a competent party for the bill to be presented to, and to refuse acceptance of it; and it seems that it is not necessary to show that such clerk was the clerk of the drawee authorized to accept or refuse acceptance of bills; but parol evidence is admissible to prove that the clerk was authorized to refuse acceptance.[33]

§ 458. Presentment for acceptance in case of drawee's death.—Chitty says, and Byles quotes his words with approval, that "if on presentment it appear that the drawee is dead, the holder should inquire after his personal representative, and, if he live within a reasonable distance, should present the bill to him." [34] Story states that the drawee's death will be "no excuse for the omission of presentment of the bill for acceptance," [35] and Roscoe considers that

31. Gates v. Beecher, 60 N. Y. 523.

32. Cheek v. Roper, 5 Esp. 175.

33. Nelson v. Fotterall, 7 Leigh, 180; Stainback v. Bank of Virginia, 11 Gratt. 260.

34. Chitty on Bills (13th Am. ed.), [*280], 318, citing Molloy, chap. 2, c. 10, § 34; Pothier Pleadings, 146; Byles (Sharswood's ed.), [*177], 303; Story on Bills, § 236.

35. Story on Bills, §§ 230, 236.

"the cases with regard to presentment of bills where the party is dead, etc., apply also to presentment for acceptance." [36] But it has well been observed on this subject by Edwards that "upon principle, it is not easy to see upon what ground the holder is bound to present a bill drawn upon the deceased to his executor or administrator for acceptance. An acceptance by the representative, binding himself personally, is not according to the tenor of the bill; neither is an acceptance qualified so as to render him responsible to pay out of the assets that may come into his hands." [37] The holder could not be bound to take the representative's acceptance in either form, and it would be reasonable to hold that where the drawee was dead the bill might be protested, and recourse had against the other parties.

§ **459. In the third place, as to the place where presentment for acceptance may be made; Sergeant Onslow's act.**—It was at one time a question much litigated in England, whether, if a bill payable generally—that is, without specification of a place of payment—was accepted payable at a particular place, such an acceptance was a qualified one. It was decided in the House of Lords (contrary, however, to the opinion of eight of the twelve judges to whom the question was referred), that such an acceptance was a qualified one, and that a demand at the particular place named was a condition precedent to a recovery against the acceptor, as well as against the drawer and indorser.[38] This decision led to the passage of the statute of 1 and 2 Geo. IV., c. 78 (called Sergeant Onslow's act), in which it was recited that the practice and understanding of merchants had been different; and enacted that an acceptance payable at a particular place without further expression, should not be deemed a conditional acceptance; but if it were payable at a specified place "only, and not otherwise, or elsewhere," it should be deemed conditional.

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36. Roscoe on Bills, 146, 147.

37. Edwards on Bills, 401. See also Edwards on Bills, 454, note 2. In Thompson on Bills, 282, it is said: "It has been said that if the drawee is dead the holder should present it to his nearest heirs, and protest it on their refusal to accept, though they have not yet taken up his succession. This should certainly be done where the drawee's heirs have taken up his succession. But otherwise, there is no person representing him, as to the bill, and the presentment of it then appears as futile as if made to a stranger. In such a case, it seems necessary that a holder should, within a reasonable time, notify to the other parties the drawee's death, by which presentment has become impossible."

38. Rowe v. Young, 2 Brod. & B. 165, 2 Bligh, 391.

§ 460. American statutes and decisions as to place of presentment for acceptance.—In many of the States of the United States the English statute has been substantially enacted; and the courts, with few exceptions, have, independently of statute, followed the judgment of the eight judges against the House of Lords. Therefore, by the American law, it is settled that demand of payment at the place specified need not be averred by the plaintiff; but if the acceptor was at the place at the time specified, and ready to pay the money, it was a matter of defense to be pleaded on his part; which defense, however, is no bar to the action, but goes only in reduction of damages, and in prevention of costs.[39] This subject will be more fully discussed when we come to consider presentment for payment.

But at any rate, the presentment of the bill or note for acceptance should be at the place of the domicile of the drawee, whether it be payable generally, or at a particular place—the place of payment being immaterial until after acceptance.[40] If the drawee has removed his residence from the place to which it is addressed—or really resided at a different place—the bill should be presented at his new or real place of domicile, if the holder can ascertain it by diligent inquiries.[41] If by such inquiries the drawee's place of domicile cannot be ascertained, or if he has absconded, the bill may be treated as dishonored.[42]

§ 461. Presentment for acceptance may be either at the dwelling or the place of business of the drawee.—If the drawee has his dwelling-house in one part of the town or city, and his place of business at another, it may be made at either place; and if the drawee resides in one town, and has his place of business at another, the holder may present the bill at either.[43]

§ 462. How presentment for acceptance should be made.—The holder of the bill should have it in his possession, make an actual exhibit of it to the drawee, and request its acceptance.[44] "The term

39. See 1 Parsons on Notes and Bills, 305–311; Story on Bills, §§ 355–357; Byles on Bills (Sharswood's ed.), 318, 319, and 341–346; Edwards on Bills, 426, 428; Bayley, 115. In Indiana, the House of Lords has been followed. See Presentment for Payment, chapter XX, section V.

40. Chitty on Bills (13th Am. ed.), 316.

41. Anderson v. Drake, 14 Johns. 114; Freeman v. Boynton, 7 Mass. 483; Bateman v. Joseph, 12 East, 433.

42. Ibid.; Chitty, 316.

43. Story on Bills, § 236.

44. 1 Parsons on Notes and Bills, 348.

'presentment' imports not a mere notice of the existence of a draft which the party has in his possession, but the exhibiting of it to the person on whom it is drawn, that he may see the same, and examine his accounts or correspondence, and judge what he shall do; whether he shall accept the draft or not." [45] But while it is better in all cases to avoid all question by observance of the formality indicated, the drawer and indorsers may be charged by due protest and notice where the bill is not thus actually exhibited to the drawee, but he is enabled by seeing it or otherwise to give, and does give, an intelligent response to the request to accept it.[46]

§ **463. Production of bill.**—If the holder does not produce the bill, the drawee may require him to do so, and decline accepting, save in the proper form by writing his name on its face; and then unless the holder produces it the drawer cannot be charged with the penalties of nonacceptance; but if the drawee makes no such requirement and does what is equivalent to acceptance he cannot afterward refuse to be held on the ground that he did not see the bill.[47]

If the holder leave the bill with the acceptor, and by his negligence enable a third party to get possession of it, he cannot hold the acceptor liable in an action of trover.[48]

Either one of a set of bills may be presented and accepted; and the indorsement of one of a set carries all, and indorsee may maintain trover for the rest.[49]

SECTION III

TIME OF PRESENTMENT FOR ACCEPTANCE

§ **464.** In connection with the time of presentment for acceptance, we shall consider (1) the time of day for such presentment, and (2) the period of time within which such presentment must be made.

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45. Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216; Edwards on Bills, 505.

46. Fisher v. Beckwith, 19 Vt. 31; Carmichael v. Bank of Pennsylvania, 4 How. (Miss.) 567; First Nat. Bank v. Hatch, 76 Mo. 22, citing the text.

47. Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216; Golsen v. Golsen, 127 Ill. App. 84.

48. Morrison v. Buchanan, 6 Car. & P. 18.

49. Downes & Co. v. Church, 13 Pet. 205; Walsh v. Blatchley, 6 Wis. 422; Perreira v. Jopp, cited in 10 B. & C. 450; Chitty, Jr., 1477; Edwards on Bills, 304 and 165.

§ 464a. Time of day for presentment for acceptance: business hours.—And in the first place: presentment for acceptance should in all cases be made during the usual hours of business, and such hours, except where presentment must be at a bank, generally range through the whole day to hours of rest in the evening.[50] Eight o'clock in the evening would not be too late to present a bill for acceptance to a tradesman.[51] And it matters not at what hour it is made, provided an answer be given by an authorized person.[52] But it is a mere nullity if made at an unreasonable hour—after bedtime or business hours—if no such answer be given.[53] If there is a known custom or usage in a town or city, which regulates business hours, that should govern in determining the proper hour for presentment at the drawee's place of business.[54]

§ 465. Within what period of time presentment for acceptance must be made.—It seems to be the general commercial law of the civilized world, that when a bill is payable at a day certain—as, for instance, on a day named, or a fixed day after date—it need not be presented until the day of payment, in order to charge the drawer or an indorser.[55] The reason of this is that the drawer, by fixing a day certain for payment, assumes the responsibility of providing funds at that time, whatever may have been his previous credit with the drawee. And as to the indorser, by the very act of indorsement, he draws a new bill on the same terms; and, besides, he waives his right of immediate acceptance by not enforcing it himself, but putting his bill into circulation without acceptance.[56] There are, however, two exceptions to this general rule that it is not necessary to present a bill payable at a fixed time for acceptance, but only at maturity for payment: First, when there is an express direction to the payee or holder

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50. Elford v. Teed, 1 Maule & S. 28, 6 Maule & S. 44; Parker v. Gordon, 7 East, 385; Cayuga County Bank v. Hunt, 2 Hill, 635. See chapter XX, on Presentment for Payment, section III; Edwards on Bills, 399.

51. Chitty on Bills [*313].

52. Chitty on Bills [*316].

53. Story on Bills, § 237.

54. Story on Bills, §§ 236, 349; Story on Notes, § 135.

55. Townsley v. Sumrall, 2 Pet. 178; Goupy v. Harden, 7 Taunt. 159; Bachellor v. Priest, 12 Pick. 399. Presentment for payment and presentment for acceptance are two different acts, and presentment for acceptance must be made before the instrument presented for acceptance is due. First Nat. Bank of Omaha v. Whitmore, 177 Fed. 397.

56. Verplanck, Senator, in Allen v. Suydam, 17 Wend, 368, 20 Wend. 321.

of a bill; and, second, when it is put into the hands of an agent for negotiation. If payable at sight, or at a certain time after sight, or on demand, the only rule which can be laid down is that it must be presented within a reasonable time,[57] unless there be some well-established usage of trade which fixes a definite time for such presentment, in which case such usage would control.[58] If the bill be not presented within a reasonable time, the drawee is discharged, although all the parties continue solvent, and there is no damage caused by the delay.[59]

Under Negotiable Instrument statute.—Under the provisions of the statute,[60] it has been held that though the date of payment of a bill of exchange is fixed, it may be presented at any time, and if the drawee refuses to accept it, the bill may be treated as dishonored.[61]

§ 466. General rule as to reasonable time; when question of law and when question of fact.—"What reasonable time is," said Story, J., in a case before the United States Circuit Court,[62] "depends upon the circumstances of each particular case, and no definite rule has been as yet laid down, or indeed can be laid down to govern all cases. The question is a question of fact for the jury, and not of law for the abstract decision of the court. Such, I take it, is the doctrine of the authorities."[63] A more accurate statement of the rule, as we conceive, is that of Bigelow, J., in a Massachusetts case:[64] "Ordinarily," says he, "the question whether a presentment was within a

57. Wallace v. Agry, 4 Mason, 336; Mullick v. Radakissen, 9 Moore P. C. 66; Bridgeport Bank v. Dyer, 19 Conn. 136.

58. Mellish v. Rawdon, 9 Bing. 416.

59. Mullick v. Radakissen, 9 Moore P. C. 66, 28 Eng. L. & Eq. 86; Carter v. Flower, 16 M. & W. 743; Thornburg v. Emmons, 23 W. Va. 333, citing the text.

60. Appendix, secs. 159, 150, 151.

61. National Park Bank v. Saitta, 111 N. Y. S. 927, 127 App. Div. 624, affirmed 196 N. Y. 548, 89 N. E. 1106, the lower court quoting from Allen v. Suydam, 17 Wend. (N. Y.) 368: "Although, when such bill is made payable at a day certain at a fixed time after its date, presentment for acceptance before that time is not necessary in order to charge the drawer or indorsers, it is to the owner's interest that the bill should be so accepted, as only by accepting it does the drawee become bound to pay it, and until such acceptance the owner has for his debtor only the drawer, and the step is one which a prudent man of business, ordinarily careful of his own interests, would take for his protection."

62. Wallace v. Agry, 4 Mason, 336.

63. Fry v. Hill, 7 Taunt. 397; Goupy v. Harden, 7 Taunt. 159; Muilman v. D'Eguino, 2 H. Bl. 565; Fernandez v. Lewis, 1 McCord, 322; Nicholas v. Blackmore, 27 Tex. 586.

64. Prescott Bank v. Caverly, 7 Gray, 217.

reasonable time, is a mixed question of law and fact, to be decided by the jury, under proper instructions from the court. And it may vary very much, according to the particular circumstances of each case. If the facts are doubtful or in dispute, it is the clear duty of the court to submit them to the jury. But when they are clear and uncontradicted, then it is competent for the court to determine whether the time required by law for the presentment has been exceeded or not." [65]

"In this State" (New York), says Edwards on Bills, 391, "the question is considered one of law to be decided by the court," quoting Aymar v. Beers, 7 Cow. 705. The cases cited in Aymar v. Beers in support of this doctrine related to notice. The principle of the text seems to us far more reasonable.

§ 467. Due diligence must be exercised.—It is not necessary for the holder to take the first opportunity to present for acceptance,[66] though to avoid question in case of loss it is advisable to do so—due diligence—that is, presentment within a reasonable time, is all that is necessary. "The distinction is," as was said by Gibbs, C. J., "between bills payable at a certain number of days after date, and bills payable at a certain number of days after sight. In the former, the holder is bound to use all due diligence, and present the bill at maturity; but in the latter case, he has a right to put the bill into circulation before he presents it, and then, of course, it is uncertain when it will be presented to the drawee. It is to the prejudice of the holder if he delays to do it, and he loses his money and interest." [67]

§ 468. Circumstances affecting reasonable time for presentment for acceptance.—There are certain circumstances which may affect

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65. The rule as stated by Professor Parsons (Notes and Bills, 340 [vol. I]) is substantially this: He says, "Where the facts are few and simple and the acts or admissions of parties clear and unequivocal, the question is one of law for the court. But where the rights and liabilities of the parties depend on contracts, and a variety of transactions and dealings arising therefrom, or where the facts are contradictory and complicated, it is a question for the jury to determine." See also Shute v. Robins, 3 Car. & P. 80 (Eng. C. L.); Straker v. Graham, 4 M. & W. 721; Mullick v. Radakissen, 28 Eng. L. & Eq. 86; Chambers v. Hill, 26 Tex. 472; Northwestern Coal Co. v. Bowman, 69 Iowa, 153, citing the text; Dyas v. Hanson, 14 Mo. App. 368, citing the text.

66. Muilman v. D'Eguino, 2 H. Bl. 565; Prescott Bank v. Caverly, 7 Gray, 217; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

67. Goupy v. Harden, 7 Taunt. 159.

the question of reasonable time, such, for instance, as: (1) The passing of the bill into circulation; (2) The fluctuations of the rate of exchange and (3) The facilities of communication between the parties.

§ 469. **Passing of bill into circulation.**—And in the first place, a larger latitude is allowed for presentment for acceptance when the holder transfers the bill and it passes into circulation. In such cases a long delay, say of a year or more, would not be negligence; but if the transferrer came again in possession of the bill, a more stringent rule would be applied to him than to transferees.[68] But if the holder retains possession of the bill for an unreasonable time, and thus locks it up from circulation, he makes it his own, and will have no remedy against antecedent parties from or through whom he derived title.[69]

§ 470. **As illustrations.**—Where A., of Calcutta, drew a bill, payable sixty days after sight, on B., of Hong Kong, and indorsed it to C., of Calcutta, and the latter, finding bills on China unsalable, without the prospect of improvement, kept the bill five months, and then indorsed it to C., who forwarded it for acceptance, which was refused, it was held that the drawer was discharged by the unreasonable delay, although the parties were solvent, and he had suffered no damage.[70] In South Carolina,[71] it appeared that a bill drawn in Charleston, South Carolina, on New York, at three days was not presented for two and a half months. The holder lived several days in the same house with the drawee; and it was held that the drawer was discharged by the delay. In another case, one month's delay was held too much, the distance between the residence of the drawer and the drawee being only eighteen miles, with communication three times a week between them.[72]

In Louisiana, it appeared that a bill drawn in New Orleans on Liverpool, at thirty days, was sent by way of New York, and a delay of two and a half months in presentment was held no laches; and it

68. Muilman v. D'Eguino, 2 H. Bl. 565; Angaletos v. The Meridian Nat. Bank of Indiana, 4 Ind. App. 573, 31 N. E. 368.

69. Byles (Sharswood's ed.) [*176], 302; Bayley on Bills, 227; Chitty [*275-276], 312; Story on Bills, § 231; Robinson v. Ames, 20 Johns. 146; Cowan v. Jackson, 20 Johns. 176; Fry v. Hill, 7 Taunt. 397; Thornburg v. Emmons, 23 W. Va. 334, citing the text.

70. Mullick v. Radakissen, 28 Eng. L. & Eq. 86, 9 Moore P. C. 66; Parker v. Reddick, 65 Miss. 246.

71. Fernandez v. Lewis, 1 McCord (S. C.), 322.

72. Bolton v. Harrod, 9 Mart. 326. Dumont v. Pope, 7 Blackf. 367.

has been frequently held that, while a holder would hardly be warranted in sending the bill to a remote place wholly out of the course of trade, yet he may put it in circulation, or send it to any other place within reasonable mercantile regulations for remittance or sale. A bill drawn in Havana on London may be forwarded by way of the United States; one drawn in London by way of Paris and Genoa; and one drawn in New Orleans on Liverpool by way of New York.[73]

§ **471. Further illustrations.**—Bills drawn in London on Calcutta at ninety days were circulated seventy-eight days in England, and the delay was held no laches;[74] and like decisions were rendered where a bill was drawn in London on Lisbon at thirty days, circulated through Paris and Genoa, and presented after a delay of three months and ten days;[75] where a bill was drawn in Plymouth on London at twenty days' sight, and was not presented for nine days;[76] where one was drawn in Windsor on London, and was not presented for four days (Sunday intervening);[77] where a bill was drawn at sixty days at Augusta, Georgia, on New York, and was put in circulation and not presented for two months and a half;[78] and where

73. In Wallace v. Agry, 4 Mason, 333, Story, J., said: "It has been said that the plaintiff was bound to send it (the bill) directly from Havana to England by some regular conveyance, and had no right to remit it to Boston for sale. I am of a different opinion. The party who receives a negotiable bill payable after sight has a right to sell it in the market where he resides, or to send it to any other place for sale. He is not bound personally to make a remittance of it, or to send it directly to the country on which it is drawn. He is at full liberty to put it in circulation, or to send it to any other place for sale or remittance; and the only limitation upon this right is, that he shall have it presented within a reasonable time, be the conveyance direct or indirect. To be sure, the usage of trade is to be consulted on this as on other occasions. The holder of such a bill is not at liberty to send it to very remote places, wholly out of the course of trade, if there be unreasonable delay thereby, in the presentment for acceptance; and thus to fix the drawer with an indefinite responsibility. But, on the other hand, the transmission in a direct trade is not necessary. No one can doubt that, by the course of trade, many bills of exchange drawn in Havana on England are sent to the United States for remittance or sale. The very testimony in this case establishes this fact. It would be a most inconvenient rule to hold that such a negotiation of bills was at the sole peril of the holder. I know of no rule of law reaching to such extent. In my judgment, the remittance of the bill to Boston for sale was not a discharge of the defendants."

74. Muilman v. D'Eguino, 2 H. Bl. 565.

75. Goupy v. Harden, 7 Taunt. 397.

76. Shute v. Robins, Moody & M. 133, 3 Car. & P. 80.

77. Fry v. Hill, 7 Taunt. 397.

78. Robinson v. Ames, 20 Johns. 146; Edwards on Bills, 389.

a bill drawn in Antigua on London at ninety days, was circulated for six months—a packet leaving Antigua for London once a month.[79]

§ 472. Where a sight draft on New York was indorsed to the plaintiff in Wisconsin, and was not mailed to New York for presentment for fourteen days, it was held *prima facie* evidence of laches, but might be rebutted.[80] But presentment in Boston on Wednesday, during banking hours, of a bill at sight, indorsed to the holder in Lowell after banking hours the previous Saturday, and forwarded by the holder to Boston on Tuesday, was held sufficient to charge an indorser.[81] Delay of twenty-one days to forward sight drafts received at Detroit, Michigan, on Chicago, Illinois, was held too long.[82]

Where a draft was drawn on New York by a bank in Erie, Pennsylvania, in favor of a traveling agent who, in pursuance of his business, did not return to his home in New Jersey, where he had the first opportunity to negotiate it, until ten days after its date, it was held that the delay was not unreasonable under the circumstances.[83] In an Illinois case where an inland bill drawn at sight on a Chicago bank was mailed on the day of its date to the payee's address in Dakota Territory, and was received by him after some delay in the mail, and by him at the first opportunity put in circulation, and no delay was suffered other than that incident to the transaction of business in a sparsely-populated territory; and the bill was presented for payment thirty-five days after date, and protested for nonpayment—it was held that the drawer, who was duly notified, was bound, the bank having failed in the meantime.[84]

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79. Gowan v. Jackson, 20 Johns. 176.

80. Walsh v. Dart, 23 Wis. 334.

81. Prescott Bank v. Caverly, 7 Gray, 217.

82. Phœnix Ins. Co. v. Allen, 11 Mich. 30; Phœnix Ins. Co. v. Gray, 13 Mich. 191. See Chambers v. Hill, 26 Tex. 586, where two and a half years was held a fatal delay.

83. National Newark Banking Co. v. Second Nat. Bank, 63 Pa. St. 404.

84. Montelius v. Charles, 76 Ill. 305, Scott, J., saying: "Bills both inland and foreign, having the quality of negotiability, are intended, in some degree, to be used as a part of the circulation of the country, and are indispensable in the conduct of extended commercial transactions. They afford a safe and convenient mode of making payments of indebtedness between distant points. Banking-houses that for a consideration issue such bills, must be understood to do so in accordance with the known custom of the country—that they will be put in circulation for a limited period. If this were not so, their value would be greatly depreciated, and their utility in commercial transactions would be destroyed." See also Shute v. Robins, 3 Car. & P. 80; Jordan v. Wheeler, 20 Tex. 698; Nichols v. Blackmore, 27 Tex. 586.

§ 473. **In the second place: The falling or rising of the rate of exchange** in the place of residence of the drawee, should be taken into consideration in determining whether or not there was unreasonable delay; and if exchange were steady, without prospect of change, or were rising, a shorter and less extended period of time would be thought reasonable; while if the exchange fell immediately after the sale of the bill, the jury might then think a more extended period might fairly and reasonably be allowed the holder, in order to enable him *bona fide* to endeavor to make a fair profit, or, at all events, to endeavor to secure him from loss.[85] In an English case the bill was drawn in Calcutta on Hong Kong, at sixty days, and the indorsee kept the bill five months. *Held*, that there was laches. Parke, B., saying: The court "thought that the evidence proved that, for the whole of the time, a period of more than five months, bills on China were altogether unsalable in Calcutta; that such was the permanent and regular state of the market; and that although, if there was a reasonable prospect of the state of things being better in a short time, the holder would have had a right, with a view to his own interests, to keep the bill for some time, he had no such right when there was no hope of the amendment of that state of things; and we are of opinion that the evidence fully justified this conclusion from it, and that the court, deciding on facts as a jury, were perfectly right." [86]

§ 474. **In the third place: The facility of communication between the places** should be considered in determining the question of laches, when the party who presents the bill has had it in his possession for some length of time; [87] as also the distance between the places.[88] In an English case,[89] the bill was drawn in Carbonear, Newfoundland-on-Poole, England, at ninety days, and was not presented until three months after date. Carbonear is twenty miles from, and was in daily communication with, St. Johns, from which the mails were sent to England three times a week. The average length of the voyage was eighteen days. No excuse being shown for delay, it was held that the bill was not presented in a reasonable time.

85. Mellish v. Rawdon, 9 Bing. 416, 2 Moore & S. 500; Wallace v. Agry, 4 Mason, 336; Mullick v. Radakissen, 28 Eng. L. & Eq. 86.

86. Mullick v. Radakissen, 28 Eng. L. & Eq. 86.

87. Shute v. Robins, Moody & M. 133, 3 Car. & P. 80; Straker v. Graham, 4 M. & W. 721; Mullick v. Radakissen, 9 Moore P. C. 66, 28 Eng. L. & Eq. 86; Dumont v. Pope, 7 Blackf. 367.

88. Nichols v. Blackmore, 27 Tex. 586.

89. Straker v. Graham, 5 M. & W. 721.

§ **475. The question not affected by solvency of the drawer.**—But the continued solvency of the drawer, and the want of proof of actual loss by laches, are not circumstances to be considered in answer to the objection of delay in presentment; the simple question being, whether or not the delay was reasonable under the circumstances of the case. In an English case, where this subject was considered, it was said:[90] "It remains to consider only one point, which was insisted on in the court below and also argued at the bar before us, namely: that as the drawers remained perfectly solvent from the date of the bill to the present time, the rule as to presenting in a reasonable time did not apply, and that there was no laches which would constitute a defense by the drawers unless they had incurred a loss by that laches. The court below decided that the solvency of the drawers, and the want of actual loss by laches, constituted no answer to the objection of laches. We think they were right. * * * This point was fully considered in the case of Carter v. Flower, 16 M. & W. 743, and we believe admits of no doubt; and we agree with the court below, that the continued solvency of the drawers does not prevent the application of the rule that the bill must be presented in a reasonable time, with reference to the interest of the drawer to put the bill into circulation, or the interest of the drawee to have the bill speedily presented."

§ **476. Agent's duty in presenting for acceptance.**—It has been already seen that there are two exceptions to the general rule that it is not necessary to present a bill payable at a time certain for acceptance before it becomes due—the first arising when there is an express direction to the payee or holder of the bill, and the second, when the bill is put in the hands of an agent for negotiation. In Allen v. Suydam, 17 Wend. 368 (confirmed in 20 Wend. 321), it was held that an agent who received a bill, payable after date, for collection, and which had not been accepted, was bound to present it without unreasonable delay; and having delayed for seventeen days to do so, he was liable to his principal for all damages he might have sustained by his delay. This is a leading case, and was decided upon thorough argument and consideration. It is, however, criticised and dissented from by Professor Parsons,[91] on the ground that as it would not be negligence in the principal to delay, it would be unjust to

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90. Mullick v. Radakissen, 9 Moore P. C. 46, 28 Eng. L. & Eq. 86.

91. 1 Parsons on Notes and Bills, 346–347.

consider it such in the agent, and the latter should not be held responsible without some express or implied instruction to present immediately. But we are inclined to coincide with the case cited,[92] which is supported by the analogy of the Scotch law,[93] and by English authority.[94]

§ 477. A case remarkable for its similarity to the New York case above quoted was decided by the Scotch Court of Session in like manner. A bill, payable at Glasgow three days after date, was sent to agents at that city for collection. Before the day of payment the drawer failed, and the Glasgow bank refused to accept. It was not clear whether the bank would have accepted the draft if it had been immediately presented, for the bank had no funds of the drawer, and the practice had been to make provision for such drafts at the day of payment. In an action against the agents, the court held "that, as agents, they were bound immediately to present the bill for acceptance." [95]

§ 478. Effect of war, sickness, inevitable accident, and other reasonable causes of delay.—Any reasonable cause, such as sickness,[96] inevitable accident, or intervention of war, or other circumstances beyond the holder's control, will excuse delay in presentment for acceptance.[97] But these and other circumstances, excusing delay or failure to make the presentment for acceptance, will be hereafter considered in connection with the consideration of the excuses which may be made for like delay or failure in respect to presentment for payment, and giving notice of dishonor.

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92. See Redfield & Bigelow's Leading Cases, 34, 35, and *ante*, § 330.

93. Thompson on Bills (Wilson's ed.) 277.

94. Vanwart v. Wooley, 3 B. & C. 439, 5 Dowl. & R. 374; Chitty on Bills (13th Am. ed.), 311; Byles (Sharswood's ed.), 299; Roscoe on Bills, 141, note 26; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text.

95. Bank of Scotland v. Hamilton, 1 Bell Com. 409.

96. In Aymar v. Beers, 7 Cow. 705, the defendant sought to excuse delay in presenting for acceptance on account of the payee's sickness. The court below rejected the evidence; but the court above held that sickness was an excuse, and ordered a new trial. See Byles on Bills (Sharswood's ed.) [*176], 302.

97. United States v. Barker, 1 Paine C. C. 156. In this case, a bill drawn in the United States on Liverpool was presented three months from date. War existing between the two countries, it was held no laches. The decision in this case as to the validity of the bill cannot be sustained. See *ante*, chapter VIII, section II, § 217.

CHAPTER XVIII

ACCEPTANCE OF BILLS OF EXCHANGE

SECTION I

THE NATURE OF ACCEPTANCE

§ **479.** The drawer of a bill undertakes that when it is presented to the drawee he will accept it; and by acceptance is meant an undertaking on his part to pay it according to its tenor; [1] the drawer is not liable until acceptance.[2] The acceptor, by his act, engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity; and if he does not, the holder may sue him.[3]

If the drawee have funds in his hands belonging to the drawer, it is his duty, according to mercantile usage, to honor the bill by accepting it; but he is not legally bound to do so by the mere fact that he holds such funds, any more than a debtor is legally bound to execute a promissory note to his creditor for the amount due upon his request to do so.[4] But there may be relations between the drawer and drawee which make it incumbent on the latter to honor the bill. Thus if the drawee has been supplied with funds for the express purpose of meeting the bill; or if he have money on deposit under such

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1. Russell v. Phillips, 14 Q. B. 891 (68 Eng. C. L.); Byles (Sharswood's ed.) [*178], 304; Bayley (2d Am. ed.), 154; Story on Bills, § 272; Cox v. National Bank, 100 U. S. (10 Otto) 712. In Washington, drawer may be sued on contract to accept as an original undertaking. See Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158. If the draft is conditional, a general acceptance is upon the same conditions. Hannay v. Guaranty Trust Co. of New York, 187 Fed. 686.

2. Poole v. Carhart, 71 Iowa, 37.

3. Hoffman & Co. v. Milwaukee Bank, 12 Wall. 181; Bayley on Bills, 96. "Acceptance of a bill at common law, and under our statute, is merely the signification by the drawee of his assent to the order of the drawer. The legal meaning of acceptance is that the acceptor engages to pay the instrument according to the tenor of his acceptance. In other words, it is a promise to pay." Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182.

4. Story on Bills, 113, 117, 238; Edwards on Bills, 405; Chitty (13th Am. ed.) [*281], 318, 319. See chapter XLIX, on Checks, sections X and XI, vol. II.

circumstances as imply a contract on his part to accept the bill, as, for instance, if he be a banker, and the bill (or check) be drawn on a cash account, he will be answerable in an action of tort for not honoring the draft. But until he has accepted the bill he is not liable as a party to it.[5]

§ 480. Relation of drawee to bill before acceptance.—Until a drawee accepts the draft, he does not become liable to the payee named.[6] Until then, so entirely is he a stranger to it, that he may himself discount it. And he may then transfer it as the *bona fide* holder to another, who may sue and charge the drawer.[7] He may discount it either for the drawer, the payee, or an indorsee. "If the acceptor discounts the bill for the drawer, and then indorses it away, the drawer will be liable upon it to the holder, and the transfer by the drawer to the acceptor will operate as an indorsement, although, at the time, the drawer does not intend to transfer by way of indorsement, being under the impression that the bill is discharged by coming into the hands of the acceptor. Nor will the payment of the amount, less the discount, be deemed a payment of the bill by the acceptor."[8] If the drawee comes into possession of the bill before its dishonor, there is no presumption that he takes it with the obligation to accept.[9]

§ 481. Dispensing with and waiver of acceptance.—Sometimes, though infrequently, the bill directs the drawee to pay the amount specified, at a certain time, "without acceptance," or contains upon its face the expression "acceptance waived." In such cases the bill is not impaired in its negotiability, but the effect is to merge the ordinary proceedings on acceptance, or nonacceptance, into those

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5. Marzetti v. Williams, 1 B. & Ad. 415 (20 Eng. C. L.); Anderson & Co. v. Jones, 102 Ala. 537, 14 So. 871; Shutt Imp. Co. v. Erwin, 66 Kan. 261, 71 Pac. 521. In the absence of acceptance, an action cannot be maintained on an order. Dugane v. Huedza Pokroku No. 4, (Ia.) 119 N. W. 141.

6. Gamer v. Thomson, 35 Tex. Civ. App. 283, 79 S. W. 1083.

7. Attenborough v. McKenzie, 36 Eng. L. & Eq. 562; Desha v. Stewart, 6 Ala. 852; Swope v. Ross, 40 Pa. St. 186; Story on Bills (Bennett's ed.), § 223.

8. Swope v. Ross, 40 Pa. St. 186, Strong, J. In Attenborough v. McKenzie, *supra*, the holder of the bill took it by indorsement after it was due from the transferee of the acceptor. The ruling goes to the length that even the accepting drawee of a bill may take it as an indorsee, and as such may issue it.

9. Desha v. Stewart, 6 Ala. 852; Erickson v. Inman, 34 Oreg. 44, 54 Pac. 949, citing and approving text.

of payment or nonpayment, and the drawer is bound just as upon an accepted bill.[10]

SECTION II

WHAT BILLS REQUIRE ACCEPTANCE, AND BY WHOM AND WHEN THEY SHOULD BE ACCEPTED

§ 482. We come now to consider the form of procedure in procuring acceptance.

And in the *first* place: There are some bills, such as are drawn payable immediately on demand, which are not presented for acceptance, but only for payment. They are considered in the preceding chapter on "Presentment for Acceptance." And there are some bills which do not need acceptance, in order to bind the drawee, or rather in which the act of drawing itself constitutes acceptance. Thus, a bill drawn without being addressed to any drawee,[11] or drawn by a party upon himself,[12] or by a partner upon the firm of which he is a member, for partnership purposes.[13] Where a draft is drawn by an agent on his principal, by authority, it is equivalent to a draft drawn by the drawee on himself, and consequently an acceptance by the drawee is not necessary.[14] A bill drawn by the president of a corporation in its behalf, on the treasurer thereof, would be a bill drawn by the corporation on itself, and hence not need acceptance; [15] but if not drawn on the treasurer in his official character, it would be otherwise.[16]

Under Negotiable Instrument statute.—The rule of the text that a bill drawn by a party upon himself does not need acceptance is recognized by the statute.[17] A draft drawn by an agent on his principal by authority of the principal is equivalent to a draft drawn by the principal upon himself,[18] but when done without the authority of the

10. Denegre v. Milne, 10 La. Ann. 324; English v. Wall, 12 Rob. (La.) 132; Webb v. Mears, 9 Wright, 222; Carson v. Russell, 26 Tex. 452; Miller v. Thomson, 3 M. & G. 576 (42 Eng. C. L.); Rey v. Kinnear, 2 Moody & R. 117.

11. Marion, etc., R. Co. v. Hodge, 9 Ind. 163; Dougal v. Cowles, 5 Day, 511.

12. Hasey v. White Pigeon Co., 1 Doug. 193; Cunningham v. Wardwell, 3 Fairf. 466; Roach v. Ostler, 1 Man. & R. 120; cited 1 Parsons on Notes and Bills, 288. See *ante*, § 128.

13. Dougal v. Cowles, 5 Day, 511; Miller v. Thompson, 3 M. & G. 576.

14. Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537.

15. Hasey v. White Pigeon Co., 1 Doug. 193. See *ante*, § 129.

16. Halsted v. The Mayor, 5 Barb. 218.

17. Appendix, sec. 130.

18. First Nat. Bank v. Home Ins. Co., New York, 16 N. Mex. 66, 113 Pac. 815.

principal, the section of the statute that no person is liable on the instrument whose signature does not appear thereon, applies, and the principal is not liable thereon until it has been accepted.[19]

§ 483. Either of a set of bills may be presented for acceptance, and if not accepted, a right of action accrues immediately upon due notice against all the antecedent parties to the bill, without any others of the set being presented.[20] But the drawee should accept but one of the set, for if two or more of the set should be accepted, and should come into the hands of different holders, and the acceptor should pay one, he might also be obliged to pay the others also.[21]

Where one of a set which was made and accepted in blank is filled up, varying from the others, not only in date and amount, but also as to time and place of payment, and is negotiated by the correspondent of the acceptor to a *bona fide* party, without notice that such act was done without authority, the acceptor is liable to such *bona fide* holder.[22]

It seems that if the drawee accept two or more parts of a set of bills, and the several parts come into the hands of different *bona fide* holders without notice, he will be liable to pay on each part.[23]

§ 484. In the second place, as to the person who may accept a bill. —The drawing of a bill imports a contract on the part of the drawer that the drawee is a person competent to accept; and, therefore, if the holder upon presentment of the bill ascertains that the drawee is incapable of contracting—for instance, is a minor, an idiot, or a married woman—he may cause it to be protested, and proceed against antecedent parties, as usual in cases of dishonor.[24]

§ 485. Stranger cannot accept bill except for honor.—Except in cases of acceptance for honor, no one can accept a bill except the party on whom it is drawn, or his authorized agent.[25] Thus, if it

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19. Appendix, sec. 18. Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064.

20. Downee v. Church, 13 Pet. 207; Bank of Pittsburg v. Neal, 22 How. 108.

21. Bank of Pittsburg v. Neal, 22 How. 109.

22. Bank of Pittsburg v. Neal, 22 How. 97.

23. Bank of Pittsburg v. Neal, 22 How. 96.

24. Edwards on Bills, 381; Chitty on Bills (13th Am. ed) [*192], 221; Thompson on Bills, 92; Story on Bills, § 107. See Mellish v. Simeon, 2 H. Bl. 378; Tooting v. Hubbard, 3 Bos. & P. 291.

25. Davis v. Clarke, 6 Q. B. 16 (51 Eng. C. L.); Jenkins v. Hutchinson, 13

be addressed to A., an acceptance by B., unless for honor, will not bind him as acceptor.[26] But the holder of such a paper might treat it as a note.[27] There cannot be a series of acceptors; [28] and if a bill addressed to one be accepted by two persons, it has been thought that the acceptance of the first will be vitiated by having been altered in an essential part,[29] unless made with the acceptor's consent. But if any other person, after an acceptance, subsequently accepts the bill for the purpose of guaranteeing his credit, at the acceptor's request, in the usual form of an acceptance, then, if there is a sufficient consideration, he may be bound thereby as a guarantor; but he is not liable as an acceptor.[30] This proposition seems to be well supported by the authorities upon this subject. And the addition will not be a material alteration.[31]

Q. B. 744 (66 Eng. C. L.); Polhill v. Walter, 3 B. & Ad. 114 (23 Eng. C. L.); May v. Kelly, 27 Ala. 497; Keenan v. Nash, 8 Minn. 409.

26. Davis v. Clarke, 6 Q. B. 16 (51 Eng. C. L.); May v. Kelly, 27 Ala. 497.

27. Fielder v. Marshall, 30 L. J. C. P. 158 (1861), 9 C. B. (N. S.) 606; Ames on Bills and Notes, 111; Benjamin's Chalmers' Digest, 67. See *ante*, § 98; *post*, § 485.

28. Jackson v. Hudson, 2 Campb. 447; Bayley on Bills, 100; Story on Bills, § 254. In Malcomson v. Malcomson, 1 L. R. Ir. 228 (1878), a bill was drawn on a firm doing business in the name of the "Milford Spinning Co.," and Mr. Malcomson, a member, accepted it "for M. S. Co. and self." The vice-chancellor said: "There was no legal acceptance by Mr. M., and it is not his bill."

29. Thompson on Bills, 112, 212, there being no agreement as to any guaranty.

30. Story on Bills, § 254; Chitty on Bills (13th Am. ed.), 321; Jackson v. Hudson, 2 Campb. 447. In this case the bill was drawn on and accepted by I. Irving. Under his acceptance a defendant wrote, "Accepted, Jos. Hudson, payable at, etc." Hudson was sued as acceptor; and plaintiff offered to prove that he had had dealings with Irving, and had refused to trust him further, unless defendant would become his surety; and the defendant, in order to guarantee Irving's credit, wrote the acceptance in the bill. Lord Ellenborough said this was no acceptance, but a collateral undertaking, which should have been declared on as such. See Bayley on Bills, 100. In Thompson on Bills, 212, it is said: "It seems that a second person may accept a bill addressed to a first, if he accept on the footing expressed or understood at the time the bill was issued that he was to be a cautioner for the first; and if a person in this way become validly a party to a bill, he stands toward the holder in the same relation as if he were a coprincipal, his rights as a cautioner merely regulating his right of relief against the true principal." But it was recently held by the House of Lords that, in Scotland as in England, a bill can only be accepted by the drawee; and that no other person can be subjected to a joint obligation with him; and further, that a party signing the bill on the back after the acceptor could not be regarded as a guarantor, there being no memorandum within the Statute of Frauds. Steele v. McKinlay, 43 L. J. 358. See Malcomson v. Malcomson, 1 L. R. Ir. 228.

31. Smith v. Lockridge, 8 Bush, 425 (1871). In this case the bill was addressed

In an English case, where the bill was addressed by John Hart to "Mr. John Hart, payable to me or order"—across its face was written, "Accepted, H. J. Clarke"—it was held that Clarke could not be sued as acceptor, and Coleridge, J., said: "Acceptance can only be made by the party addressed, or for his honor. Here the last is not pretended, and the first cannot be presumed." [32] A party may be bound as an acceptor by any name or designation he may see fit to adopt, provided it clearly appears by extraneous evidence who was intended; and if he intends to contract by a certain designation, he is estopped to deny that the name by which he assumed to enter into the contract was the appropriate appellation. "The West Tennessee Department of the Life Association of America" would, therefore, be bound upon an acceptance made by its proper officer of a bill addressed to "The Western Department of the Life Association of America." [33]

§ **486.** Where a person other than the one addressed as drawee writes his name across the face of the bill, it would be competent for him to show as between immediate parties (and on account of its ambiguity, perhaps, as to others) in what character he intended to be bound.[34]

But if a party accept a bill in which no drawee is named, it will be regarded as acknowledging that he was the drawee and will operate as a complete accepted instrument.[35]

§ **487. An acceptance may be made by an agent**; but, certainly, the holder may require the production by him of clear and explicit authority from his principal to accept in his name, and without its

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to W. T. and George Lane, and by them accepted. It was indorsed by S. H. Lane, H. Smith, and J. J. Anderson, and discounted by D. S. Lockridge. Smith and Anderson, two of the indorsers, claimed that it was accepted by the Lanes only when they indorsed it, and afterward that it was altered by being accepted by J. A. Blaydes, without their knowledge or consent. Blaydes' name was written across the face of the bill as an acceptor; but the court held that he could not be an acceptor, and that it was not an alteration which discharged the indorsers, because in nowise changing their obligations or duties.

32. Davis v. Clarke, 6 Ad. & El. (N. S.) 16 (51 Eng. C. L.).

33. Hascall v. Life Assn. of America, 5 Hun, 152. See vol. I, § 399.

34. Curry v. Reynolds, 44 Ala. 349.

35. Wheeler v. Webster, 1 E. D. Smith, 1; *ante*, § 97; 1 Parsons on Notes and Bills, 289; Gray v. Milner, 8 Taunt. 739, 3 J. B. Moore, 90; Davis v. Clarke, 6 Q. B. 16; Thompson on Bills (Wilson's ed.) 212; Benjamin's Chalmers' Digest, 50.

production may treat the bill as dishonored;[36] and it has been doubted whether the holder is bound to acquiesce in an acceptance by an agent, as such an acceptance would multiply the proofs of the holder's title.[37] But if the agency were clear, we think the holder would be bound to take the agent's acceptance—acceptance by procuration, as it is termed.[38] If the holder takes an acceptance from one unduly alleging his agency, and without giving notice to antecedent parties, they will be released, if the principal refuses to ratify the act.[39]

If the bill be drawn upon an agent in his individual name, it would seem clear on principle that none but he, as an individual, could accept. But in Georgia, where the drawee was designated simply as "William S. Scruggs," an acceptance by him "for the Opinion Newspaper," was held to bind the firm doing business under that name.[40] This view could only be sustained upon the theory that the firm adopted and used his name. In Colorado, where the bill was addressed to "F. D. H., Treasurer," and accepted in like style, and the direction was to charge to the account of a certain company, evidence was admitted in an action brought by the payee to show that the drawee accepted in an official capacity as treasurer of and for the company he represented.[41] In Mississippi, a client drew on his attorney, and the latter, declining to accept in his own name, accepted as agent of the principal, all the parties being present; and it was held that the circumstances were admissible in evidence, and that the paper might be treated as the note of the principal, and that he was bound without demand or notice of dishonor.[42]

Under Negotiable Instrument statute.—Under the statutory provision requiring an acceptance of a bill to be in writing signed by the drawee, one cannot be a party, and, in the same transaction, an agent of the opposite party, except with the full knowledge and consent of such principal.[43]

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36. Atwood v. Munnings, 7 B. & C. 278 (14 Eng. C. L.); Byles on Bills (Sharswood's ed.), 113; Chitty (13th Am. ed.), 320; Thompson on Bills, 211; Roscoe on Bills, 71; Beawes, 87.

37. Coore v. Callaway, 1 Esp. 115; Byles, 113; Chitty, 321; Roscoe, 171.

38. Beawes, No. 87; Thompson on Bills, 211.

39. Thompson, 211; Chitty, 321.

40. Markham v. Hazen, 48 Ga. 570. And see also Hardy v. Pilcher, 57 Miss. 18, and § 418.

41. Hager v. Rice, 4 Colo. 90.

42. Hardy v. Pilcher, 57 Miss. 18.

43. Appendix, sec. 132. United States Nat. Bank of Vale v. First Trust & Sav. Bank of Brogan, (Ore.) 119 Pac. 343, holding that it was incompatible for the

§ **488. Bills drawn on joint parties and partners.**—If a bill is drawn on two persons not partners, both should accept, and if either refuse, the bill may be protested for his nonacceptance; [44] but the party accepting will be bound by his acceptance.[45] If the bill is addressed to two persons, "or either of them," acceptance by either is a sufficient compliance with its mandate.[46]

If a bill be drawn upon a firm, it may be accepted by any one of the partners in the partnership name; [47] and it will be a good acceptance of the firm (as we think, although the authorities are in conflict), if only the name of the accepting partner be signed, as it will be understood to signify that the firm responds to the request of the bill, and that the signing partner attests it.[48] But whether the acceptance be in the name of the firm, or of the signing partner, it will not bind the firm as against the drawer cognizant of the facts, unless the bill was drawn for partnership purposes,[49] except in the hands of a *bona fide* holder for value, without notice, in which event it would be valid whether drawn for partnership purposes or otherwise.[50]

§ **489.** If a bill drawn on an individual member of a firm be accepted by him in the name of the firm, it will bind him individually, but not the firm; [51] and if a bill be drawn on a firm, and accepted by a person describing himself as manager or agent, there may be an action against him as acceptor, although he may have falsely affirmed his authority to accept, and the firm be not bound.[52] An acceptance of

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cashier of one bank, the payee, to act as agent of another bank, as drawer, in accepting checks.

44. Chitty on Bills (13th Am. ed.), 73, 321; Dupays v. Shepherd, Holt, 297.

45. Owen v. Van Uster, 10 C. B. 318 (70 Eng. C. L.); Bayley on Bills, 40, 101; Byles [*180], 306; Smith v. Melton, 133 Mass. 369.

46. Thompson on Bills, 212.

47. Pinkney v. Hall, 1 Salk. 126 (1696); Mason v. Rumsey, 1 Campb. 384.

48. Byles on Bills (Sharswood's ed.), 126; Mason v. Rumsey, 1 Campb. 384; Chitty (13th Am. ed.), 53–54; Wells v. Masterman, 2 Esp. 731; Dolman v. Orchard, 2 Car. & P. 104; Tolman v. Hanrahan, 44 Wis. 133. The contrary doctrine has been held. See Heenan v. Nash, 8 Minn. 409, and cases cited; and *ante*, chapter IX, on Partners as Parties, § 362. The statute law of Michigan is otherwise. Gooding v. Underwood, 89 Mich. 178, 50 N. W. 818.

49. Pinkney v. Hall, 1 Salk. 126.

50. Catskill Bank v. Stall, 15 Wend. 364; Bairs v. Cochran, 4 Serg. & R. 397; Livingston v. Roosevelt, 4 Johns. 351.

51. Nichols v. Diamond, 24 Eng. L. & Eq. 403.

52. Owen v. Van Uster, 10 C. B. 318 (70 Eng. C. L.).

a bill drawn on him by a member of a firm will bind him only, although expressed to be on account of the firm.[53]

If a new partner be introduced into a firm, an acceptance by the old partners for an old debt in the name of the new firm will not, in the hands of the party taking it and cognizant of the facts, bind the new partner.[54]

§ **490. In the third place, as to the time when acceptance may be made.**—The acceptor may make his acceptance before the bill has been signed by the drawer, and while it is otherwise incomplete, and deliver it to be completed by the necessary insertions;[55] and his acceptance is valid if made after the bill is overdue,[56] and after it has been dishonored by refusal to accept, or by nonpayment, followed by protest.[57] It is not necessary that the bill should be drawn by the same person to whom the acceptor handed the blank acceptance.[58] And where the blank acceptance was filled up after the lapse of twelve years, and, as the jury found, after the lapse of a reasonable time, the acceptor was held liable to a *bona fide* indorsee.[59] Furthermore, the acceptor in blank will be liable for any amount for which the bill is filled up when it has passed into the hands of any *bona fide* holder, without notice that his authority has been exceeded.[60]

Acceptance dates from delivery, until which time it is revocable;[61] but if not in the hands of the acceptor, and accepted verbally, this principle would have no application.[62]

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53. Thompson on Bills, 212.

54. Shireff v. Wilks, 1 East, 48.

55. Harvey v. Cane, 34 L. T. R. 64. See *ante*, § 91 *et seq.*

56. Story on Bills, §§ 238, 250; 1 Parsons on Notes and Bills, 290; Byles on Bills (Sharswood's ed.), [*182]; Thompson on Bills, 214; Williams v. Winans, 2 Green (N. J.), 339; Mechanics' Bank v. Livingston, 33 Barb. 458; Spalding v. Andrews, 48 Pa. St. 413.

57. Chitty on Bills (13th Am. ed.), *286; Thompson on Bills, 214; Benjamin's Chalmers' Digest, 46; Bigelow on Bills and Notes, 50; Story on Bills, § 250; Byles on Bills (Sharswood's ed.), [*182]; Wynne v. Raikes, 5 East, 513; Jackson v. Pigot, 1 Ld. Raym. 364, 12 Mod. 212; Stockwell v. Bramble, 3 Ind. 428; Grant v. Shaw, 16 Mass. 344.

58. Schultz v. Ashley, 7 Car. & P. 99 (32 Eng. C. L.). See *ante*, §§ 142, 143*a*.

59. Montague v. Perkins, 22 Eng. L. & Eq. 516.

60. Bank of Commonwealth v. Curry, 2 Dana, 142; Moody v. Threlkeld, 13 Ga. 55; Byles on Bills (Sharswood's ed.), 308.

61. Cox v. Troy, 5 B. & Ald. 474. But see Thornton v. Dick, 4 Esp. 270; Johnson on Bills, 33; Trent Tile Co. v. Fort Dearborn Nat. Bank, 54 N. J. L. 35, 23 Atl. 423.

62. 1 Parsons on Notes and Bills, 291.

After delivery of the acceptance, it is a binding contract, whether it be on account of funds of the drawer in hand or for accommodation of parties to the bill.[63]

If there is a settled usage on the part of the bank to which a bill is sent for collection, not to note it as dishonored, after calling on the drawee for acceptance, it will be a good defense against the charge of negligence.[64]

§ 491. Acceptance of bill after maturity, and after death of drawer.—There may be acceptance of a bill after it has become payable, and after protest, in which case the bill is regarded as payable on demand.[65] And after acceptance has been once refused, the drawee may afterward accept, and bind himself as acceptor—but he cannot bind the other parties unless the bill was duly protested.[66]

Death of the drawer is no revocation of a bill in the hands of a *bona fide* holder; and, therefore, after his death, it may be accepted by the drawee, although he has knowledge of the fact.[67] The presumption is that a bill was accepted before maturity, and within a reasonable time after date.[68]

§ 492. Drawee may deliberate twenty-four hours whether or not to accept.—When the bill is presented to the drawee for acceptance, he is entitled, if he desires it, to a reasonable time to examine into the state of his accounts with the drawer, and deliberate whether or not he will honor the bill. To afford him this opportunity, which it may be very necessary for him to avail of, he is allowed twenty-four hours, and it is usual to leave the bill with him for that period;[69]

63. Trent Tile Co. v. Fort Dearborn Nat. Bank, 54 N. J. L. 34, 23 Atl. 423.

64. Bank of Washington v. Triplett, 1 Pet. 25.

65. Billing v. De Vaux, 3 M. & G. 565; Christie v. Pearl, 7 M. & W. 491; Jackson v. Pigot, 1 Ld. Raym. 364; Mitford v. Walcot, 1 Ld. Raym. 374; Bayley on Bills, 181; Story on Bills, § 250; Williams v. Winans, 2 Green, 339; Stockwell v. Bramble, 3 Ind. 428; Bank of Louisville v. Ellery, 34 Barb. 630; Kyd on Bills, 73; Roscoe on Bills, 172.

66. Wynne v. Raikes, 5 East, 514; Thompson on Bills (Wilson's ed.), 214; Chitty [*286], 324.

67. Cutts v. Perkins, 12 Mass. 206; Thompson on Bills, 215; Chitty [*287], 325; Hammond v. Barclay, 2 East, 227. See *post*, § 498, and chapter on Checks, § 1618*a*.

68. Roberts v. Bethell, 12 C. B. 778 (74 Eng. C. L.).

69. Connelly v. McKean, 64 Pa. St. 113; Case v. Burt, 15 Mich. 82; Overman v. Hoboken City Bank, 31 N. J. L. (3 Vroom) 563; Montgomery County Bank v. Albany City Bank, 8 Barb. 399; 1 Parsons on Contracts, 266; Bellasis v. Hester,

though it has been said that if the post goes out in the meantime, the bill should be protested immediately if not accepted, and notice of dishonor sent.[70] But this rule is too rigid,[71] especially in countries like the United States, in which the mail facilities are so great; nor does it consist with the rule allowing a whole day for preparation of notice.

But if the drawee refuses to accept within the twenty-four hours the bill must be protested immediately;[72] and if at the end of twenty-four hours the drawee does not signify his acceptance, protest must be immediately made, and notice given.[73]

§ **493. When acceptance irrevocable.**—When the bill is once accepted and issued, the acceptance is irrevocable.[74] But a drawee although he has written his acceptance on the bill, may change his mind and cancel it before delivery of the bill to the holder.[75] And where a bill was returned by the drawee with an obliterated acceptance, without evidence to account for the obliteration, it was held that there could be no recovery upon it.[76]

But after the acceptance has once been communicated to the holder —as by redelivery of the bill, accepted—it has been said that even with the holder's consent the drawee cannot then revoke, because the drawer and indorsers have acquired an interest in the acceptance.[77] But if it were discovered by the acceptor immediately after the

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1 Ld. Raym. 280; Ingram v. Foster, 2 J. P. Smith, 242; Byles on Bills (Sharswood's ed.), 303; 1 Parsons on Notes and Bills, 348; Byles on Bills (Am. ed.), 139; Story on Bills, § 237; Kyd, 126; Roscoe, 46; Edwards, 400; Chitty on Bills (13th Am. ed.), 317, 321; Johnson on Bills, 30. See also *post*, 500.

70. Bellasis v. Hester, 1 Ld. Raym. 280; Thompson on Bills (Wilson's ed.), 213; Beawes, No. 17; Byles on Bills (Sharswood's ed.), 303.

71. Morrison v. Buchanan, 6 Car. & P. 18; Chitty on Bills (13th Am. ed.), 317–321.

72. 1 Parsons on Notes and Bills, 348; Chitty on Bills (13th Am. ed.) [*279], 317; Edwards, 400.

73. Ingram v. Foster, 2 J. P. Smith, 242.

74. Wells v. Western Union Tel. Co., (Ia.) 123 N. W. 371, holding that a telegraph message directed from one bank to another bank stating that it will honor a certain person's draft for a certain amount, amounts in law to an acceptance of that draft, from which the bank cannot recede.

75. Cox v. Troy, 5 B. & Ald. 474, 1 Dowl. & R. 38; Chitty on Bills [*308], 347; Edwards, 418.

76. Cox v. Troy, 5 B. & Ald. 474, 1 Dowl. & R. 38. This was previously doubted. Chitty on Bills [*308], 347; Thompson on Bills, 220; Byles (Sharswood's ed.) [*189], 320.

77. Chitty [*308], 347.

accepted bill had been redelivered to the drawee that he was not in funds as he had supposed, so that his acceptance was, in fact, made under a mistake, he may recall and revoke it, provided there be yet time for the holder to notify the drawer and indorsers, and save himself from loss.[78] If the drawee retain the bill after intimating his acceptance, he cannot return and revoke it.[79]

§ **494. As to the date of acceptance.**—If the acceptance bears a date, it will be taken as *prima facie* evidence of the time when it was made, even when the date is in a different handwriting from the rest of the acceptance.[80] When the acceptance bears no date, there is no presumption that it was made at the date of drawing; but, on the contrary, it will be presumed that it was made afterward.[81] The presumption is, that it was made within a reasonable time after drawing, and prior to the term of payment.[82] It is said, in Pardessus, that it may be inferred to have been accepted on the date of the bill.[83]

§ **495.** Where a bill (says Mr. Chitty) payable at days, usances, or otherwise, after sight, is accepted, it is usual and proper to require the drawee to certify or write the day of the presentment of the acceptance, by which means, in case of dispute, the same evidence which will establish the handwriting to the acceptance itself will also prove the time it was made.[84] But it has been decided that if, on production of such a bill, an acceptance appears to have been written by the defendant under a date which is not in his handwriting, the date is evidence of the time of acceptance, because it is the usual course of business in such cases for a clerk to write the date, and for the party to write his acceptance under the date.[85] If there be no date it may be inferred to have been accepted on the date of the bill.[86]

It has been suggested that when accepting a foreign bill for a large amount, and without advice, it is advisable, and a proper precaution,

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78. Irving Bank v. Wetherald, 36 N. Y. 335. See chapter XLIX, on Checks, section II, vol. II.

79. Smith v. M'Lure, 5 East, 476.

80. Glossup v. Jacob, 4 Campb. 227, 1 Stark. 70; Thompson on Bills, 217.

81. Begbi v. Levi, 1 C. & J. 180.

82. Roberts v. Bethel, 22 L. J. C. P. 69.

83. 1 Pardessus, 393.

84. Chitty on Bills (13th Am. ed.) [*292], 330.

85. Glossup v. Jacob, 4 Campb. 227, 1 Stark. 69.

86. Chitty on Bills [*292], 330.

to specify the amount in words and figures (*e. g.*, $2,000. Accepted for two thousand dollars) to avoid the risk of alteration.[87]

SECTION III

FORM AND VARIETIES OF ACCEPTANCE—EXPRESS AND IMPLIED ACCEPTANCE

§ **496.** According to the law merchant, an acceptance may be (1) expressed in words or (2) implied from the conduct of the drawee. (3) It may be verbal [88] or written. (4) It may be in writing on the bill itself or on a separate paper. (5) It may be before the bill is drawn or afterward.[89] And (6) there may be absolute, conditional, and qualified acceptances.

Acceptance by telegram has been held sufficient; [90] and under the statutes of New York, which make an unconditional promise to accept a bill before it is drawn equivalent to actual acceptance in favor of a party, who upon the faith thereof receives it for valuable consideration, it has been adjudged that a telegram written and sent by the promisor operates as acceptance.[91]

By statute, in many of the States, these principles of the law merchant governing acceptances, are modified, or repealed in one respect or another, as will be seen hereafter.

§ **497.** (1) **As to express acceptance** it is usually made by writing the word "accepted" across the face of the bill (which the drawee may do with pen or pencil), and adding the acceptor's signature. But

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87. Chitty on Bills [*300], 338.

88. Jarvis v. Wilson, 46 Conn. 90; Spurgeon v. Swain, 13 Ind. App. 188, 41 N. E. 397.

89. Text approved, Whilder v. M. & P. Nat. Bank, 64 Ala. 28.

90. *Post*, § 551*a*; Central Savings Bank v. Richards, 109 Mass. 414; Nevada Bank v. Luce, 139 Mass. 488. See § 560, and note; Lindley v. First Nat. Bank, 76 Iowa, 630; *In re* Armstrong, 41 Fed. 382, citing the text; Brinkman v. Hunter, 73 Mo. 172; First Nat. Bank v. Clark, 61 Md. 401; Franklin Bank v. Lynch, 52 Md. 280; Molson's Bank v. Howard, 8 Jones & S. 15; Coffman v. Campbell, 87 Ill. 98; Whilden v. Merchants, etc., Bank, 64 Ala. 1; Garrettson v. Bank, 47 Fed. 687; Wells v. Western Union Tel. Co., (Ia.) 123 N. W. 371. An acceptance by telegram has been held sufficient, within the meaning of a statute avoiding acceptances on separate paper, except in favor of a person to whom such acceptance shall have been shown. Garretson v. North Atchison Bank, 39 Fed. 166.

91. Molson's Bank v. Howard, 8 Jones & S. 15.

by the law merchant neither the word nor the signature is necessary—"accepted"[92] without a signature, "seen,"[93] "honored,"[94] "presented,"[95] "I will pay the bill,"[96] or writing the day and month when presented;[97] or a written direction of the drawee on the bill to some other person to pay it,[98] or the signature of the drawee alone,[99] or the word "excepted," it being obviously intended for "accepted."[1] The words, "I take notice of the above," were recently held in Massachusetts not necessarily to import acceptance; and even if they did, unexplained, to be open to explanation, as between immediate parties.[2] Where the drawee wrote his name across the bill, it was held inadmissible for him to show that he refused to write "accepted," for the name alone imported it.[3] In Arkansas the words, "Protest waived. Payment guaranteed," written on the draft by the drawee, were held to constitute a valid acceptance.[4]

§ 497a. Part payment of bill.—Merely paying and crediting a part of the amount on the bill would not amount to an acceptance in writing;[5] and even where a parol acceptance is sufficient, a part

92. Philips v. Frist, 19 Me. 77; Dufaur v. Oxenden, 1 Moody & R. 90; Leslie v. Hastings, 1 Moody & M. 119.

93. Barnet v. Smith, 10 Fost. 256; Spear v. Pratt, 2 Hill, 582.

94. Anonymous, Comb. 401.

95. Story on Bills, § 243; 1 Parsons on Notes and Bills, 282.

96. Ward v. Allen, 2 Metc. (Mass.) 53; Leach v. Buchanan, 4 Esp. 226.

97. 1 Parsons on Notes and Bills, 243; Cunningham on Bills, 26.

98. Moore v. Whithy, Buller N. P. 270; Harper v. West, 1 Cranch C. C. 192.

99. Spear v. Pratt, 2 Hill, 582; Wheeler v. Webster, 1 E. D. Smith, 1; Kyd on Bills, 80. But where the drawee wrote on the back of the bill, the vulgar and contemptuous expression, "Kiss my foot," signing his name thereto, it was held a rejection of the bill. Norton v. Knapp, 64 Iowa, 112; Fowler v. Gates City Bank, 88 Ga. 29, 13 S. E. 831.

1. Miller v. Butler, 1 Cranch C. C. 170; Cortelyou v. Maben, 22 Nebr. 697; Vanstrum v. Liljengren, 37 Minn. 191.

2. Cook v. Baldwin, 120 Mass. 317 (1876).

3. Kaufman v. Barrenger, 70 La. Ann. 419.

4. Block v. Wilkerson, 42 Ark. 256, citing the text.

5. Bassett v. Haines, 9 Cal. 261. In this case it appeared that A. drew an order on B. in favor of C. for $206.50. C. presented it to B., who paid $22.50 thereon, and the amount was receipted on the back in the handwriting of B., and signed by C. The court said: "The only question in the case is, whether this constitutes an acceptance 'in writing, signed by the acceptor,' as required by the sixth section of the act relating to bills of exchange and promissory notes." Wood's Digest, 72. "We think it clear that this was no acceptance, either at common law or under the statute. Haines may have owed the drawer, Willse, the sum of twenty-two dollars and fifty cents, and no more. If so, the payment

payment by the drawee is not such a recognition as will, as matter of law, bind him to pay the remainder, for it may have been accompanied with positive refusal to pay more.[6]

§ 497b. Statutory requirements of acceptance in writing on the bill.—In the year 1821 it was enacted in England, by the statute 1 & 2 Geo. IV., chap. 78, § 2, that "no acceptance shall be sufficient to charge any person, unless such acceptance be in writing on such bill." Since that statute it has been laid down by high authority that a mere signature on the face of the bill, without any words of acceptance, may be an acceptance in writing within the meaning of the statute;[7] and, on the other hand, that words of acceptance without a signature, if intended as an acceptance, might suffice.[8] By statute 19 & 20 Victoria, chap. 78, § 2, it was enacted "that no acceptance of any bill of exchange shall be sufficient to bind or change any person, unless the same be in writing on such bill, and signed by the acceptor or some person duly authorized by him." After this enactment it was contended that inasmuch as before its passage a mere signature was deemed an acceptance in writing—within the statute 1 & 2 Geo. IV., it was still not the less so; and that inasmuch as it was a signature of the acceptor, the bill was both accepted in writing and signed by the acceptor within the meaning of the statute 19 & 20 Victoria. But looking at the history of the statute, Lord Denman was of the contrary opinion: and the mere signature was held not to amount to an acceptance under the later statute.[9] The decision, however, was immediately nullified by act of Parliament.[10] Under a similar statute

of that amount, and the indorsement of the same upon the paper, would not imply that he accepted and would pay the whole. The receipt is evidence that Haines owed only that sum and paid it. In all the instances cited by the counsel of plaintiff, the writing on the bill related to the entire amount. But the receipt only relates to the amount paid, and implies no acceptance of the order for the balance. Besides this, the receipt is not signed by the acceptor, within the meaning of the statute." But see White v. Rosencrantz, 123 Cal. 634, 56 Pac. 436, 69 Am. St. Rep. 90.

6. Cook v. Baldwin, 120 Mass. 317 (1876). See *post*, § 499.

7. Byles on Bills (12th ed.), 191. See Ames on Notes and Bills, vol. I, p. 166. In Leslie v. Hastings, 1 Moody & R. 199 (1831), it was held that a blank acceptance, that is, a mere signature, was "an acceptance in writing." See also Molloy v. Delves, 7 Bing. 428; Baker v. Jubber, 1 M. & G. 212, *semble.*

8. Dufaur v. Oxenden, 1 Moody & R. 90 (1831). See also Corlett v. Conway, 5 M. & W. 655, per Parke, B.; Chitty on Bills (13th Am. ed.), [*291].

9. Hindlaugh v. Blakey, 3 C. P. D. 136. See also *post*, § 504.

10. See Steele v. McKinlay, 34 Eng. Rep. 106.

in New York, to that of 19 & 20 Victoria, the mere signature of the drawee was deemed a sufficient acceptance, Cowen, J., saying: "This is treated by the law merchant as a written acceptance—a signing by the drawer. * * * It is supposed that the rule has been altered by 1 R. S. 757 (2d ed.). This requires the acceptance to be in writing, and signed by the acceptor or his agent. The acceptance in question was, as we have seen, declared by the law merchant to be both a writing and a signing. The statute contains no declaration that it should be considered less. * * * The whole purpose was doubtless to obviate the inconvenience of the old law, which gave effect to a parol acceptance." [11]

Under Negotiable Instrument statute.—The statute declares that acceptance of a bill must be in writing and signed by the drawee.[12] This section of the statute, abolishing verbal and implied acceptances by providing that the acceptance must be in writing and signed by the drawee, must be construed in connection with a further section, declaring that the action of the drawee in destroying a bill or in not returning it, as required by the section, shall be deemed an acceptance of it; and a constructive acceptance of a bill under the latter section is as effective to charge the drawee as an acceptance in writing under

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11. Spear v. Pratt, 2 Hill, 582 (1842); Bigelow on Bills and Notes (2d ed.), 32; Edwards on Bills, 411–415; Wheeler v. Webster, 1 E. D. Smith, 1; Peterson v. Hubbard, 28 Mich. 197; Kaufman v. Barringer, 20 La. Ann. 419, accord; Mechanics' Bank v. Yager, 62 Miss. 529. In New York the acceptance must appear upon the bill, except as against a person who has taken the bill upon the faith of an acceptance contained in a separate paper. (1 R. S. §§ 6, 7, p. 768.) Fairchild v. Feltman, 32 Hun, 398.

12. Appendix, sec. 132. See also Izzo v. Ludington, 79 N. Y. S. 744, 79 App. Div. 272, affirmed 178 N. Y. 621, 70 N. E. 1100; Seattle Shoe Co. v. Packard, 43 Wash. 527, 86 Pac. 845, 117 Am. St. Rep. 1064. Under the statute, section 185, declaring that the provisions of that act with respect to bills of exchange payable on demand shall apply with equal force to checks, and section 132 providing that the acceptance of a bill of exchange must be in writing, the acceptance of a check must be in writing. Baltimore, etc., R. Co. v. First Nat. Bank of Alexandria, 102 Va. 753, 47 S. E. 837. The acceptance may be on a separate paper. Lehnard v. Sidway (Mo. App.), 141 S. W. 430. In Wadhams v. Portland & Y. R. Co., 37 Wash. 86, 79 Pac. 597, it was held that it must be alleged in the complaint that the acceptance was in writing. Before the N. I. L., but under a statute requiring an acceptance to be in writing, it was held that the declaration need not allege that the acceptance was in writing, though that must be proved. Faircloth-Byrd Mercantile Co. v. Adkinson (Ala.), 52 So. 419. And see Barnsdale v. Waltemeyer, 142 Fed. 415, wherein it was held, under a Colorado statute, that when the answer does not affirmatively show that the acceptance was by parol, it is equivalent to a plea of a written acceptance.

the former section.[13] And a further section, providing that the holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and, if such request is refused, may treat the bill as dishonored,[14] has been held not to be confined to sight bills, but to be applicable to all bills of exchange, and although a bill be presented for acceptance before the date of payment fixed, and the drawee refuses to accept it, the holder may treat the bill as dishonored, and has acquired the immediate right to call on the other parties to the bill.[15]

§ 498. Position of acceptor's signature.—Although usual, it is not necessary for the signature when written to be across the face of the bill. It may be written at the bottom of the bill immediately below the drawer's name, or it may be written above and parallel to it. Thompson says: "The position of the drawee's subscription seems immaterial, provided it be there, for it may be written above as well as below that of the drawer; and as it has been held that an indorsement may be written on the face of the bill, an acceptance may, as is sometimes the case, be indorsed." [16]

A letter from the drawee to the drawer, the latter being dead, but the former not knowing it, has been held an acceptance, on the ground that it was so intended.[17]

§ 498a. Death of drawer no revocation of bill.—The death of the drawer is no revocation of a bill if it has been delivered to the payee, and the drawee may accept and pay it.[18] "The death of the drawer," says Parsons, "is no objection whatever to an ordinary acceptance by the drawee, whether with or without knowledge, for the death is no revocation of the bill if it has passed into the hands of a holder for value."[19] This view seems to us entirely correct and has

13. Appendix, sec. 137. Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266.

14. Appendix, sec. 133.

15. National Bank Park v. Saitta, 111 B. Y. S. 927, 127 App. Div. 624, affirmed 196 N. Y. 548, 89 N. E. 1106.

16. Thompson on Bills, 220.

17. Billing v. D Vaux, 3 M. & G. 565.

18. *Ante*, § 491; Cutts v. Perkins, 12 Mass. 206; Thompson on Bills, 216, Story on Bills, § 250; 1 Parsons on Notes and Bills, 287; Chitty on Bills [*287] 325; Hammond v. Barclay, 2 East, 227, acceptance was before the drawee had notice of the death of the drawer.

19. 1 Parsons on Notes and Bills, 287, and note *b*. See chapter on Checks, § 1618*a*; Story on Bills, § 250.

the sanction of authority.[20] Upon the delivery of the bill to the payee, the liability of the drawer becomes complete, if the holder is guilty of no laches, and it results that the drawer has a right to discharge that liability.[21]

§ **499. Implied acceptance.**—(2) Acceptance may be implied from the conduct of the drawee. Any act which clearly indicates an intention to comply with the request of the drawer,[22] or any conduct of the drawee (no statute intervening) from which the holder is justified in drawing the conclusion that the drawee intended to accept the bill, and intended to be so understood, will be regarded as an acceptance.[23]

§ **499a. Effect of detention of bill.**—Keeping a bill a considerable length of time without returning an answer, may, under some circumstances, be considered as an acceptance, especially if the drawee be informed that delay will be so considered, and there be an inference from the language of the drawee that he intended an acceptance.[24]

The cases have been decided upon special circumstances, and, as a general rule, the mere detention for an unreasonable time is not considered as amounting to an acceptance.[25]

Thus, where a bill has been sent to the drawee by mail for accept-

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20. Cutts v. Perkins, 12 Mass. 206.

21. Cutts v. Perkins, 12 Mass. 210–211 (1815).

22. Andressen v. First Nat. Bank, 2 Fed. 125, in which case bank paid part cash and issued certificate of deposit for the balance. See *ante*, § 497*a*.

23. 1 Parsons on Notes and Bills, 287; Byles on Bills (Sharswood's ed.) [*185], 315; Billing v. De Vaux, 3 M. & G. 565; McCutchen v. Rice, 56 Miss. 455. See Lockhart v. Moss, 53 Mo. App. 633.

24. Chitty on Bills [*295], 334; Byles on Bills (Sharswood's ed.) [*185], 315; Bayley on Bills, 193; Harvey v. Martin, 1 Campb. 425. See Jeune v. Ward, 2 Stark. 326, note, 1 B. & Ald. 653; Edwards on Bills, 418; Lockhart v. Moss, 53 Mo. App. 633. See also *ante*, § 492, and *post*, § 500.

25. Mason v. Barff, 2 B. & Ald. 26; Koch v. Howell, 6 Watts & S. 350; Colorado Nat. Bank v. Boettcher, 5 Colo. 190, citing the text; Holbrook v. Payne, 24 N. E. 210. Unaffected or uncontrolled by statute, an acceptance of a bill of exchange or check may be implied from the conduct of the drawee. Such acts or conduct on his part which indicate clearly an intention to honor the bill and from which the drawer may infer such intention is regarded as an acceptance, and will impose liability on the drawee; unreasonable detention, as well as the destruction, of the bill, retaining sufficient funds to meet an outstanding check by the drawee in settling the drawer's account, and other circumstances, are regarded as an implied acceptance. Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955, 17 L. R. A. (N. S.) 1266.

ance, with the view of waiting for funds or securities to be forwarded by the drawer, and is retained by the drawee, it is not an implied acceptance, for the retention is consistent with the rights of all parties.[26] And where the holder leaves a bill for acceptance, it is his duty to call for it within a reasonable time, so as to ascertain whether it has been accepted or not; and if he does not call for it within a reasonable time, there would be no ground to insist that its retention was an implied acceptance.[27]

§ 500. **Whether the destruction of the bill** by the drawee will amount to an acceptance has been a question upon which learned judges have differed in opinion. In an English case where the drawee refused acceptance, but retained and subsequently destroyed the bill, Lord Ellenborough thought it amounted to acceptance; but Bayley, Abbott, and Holroyd, JJ., thought otherwise, and it was so determined.[28] But the court seemed to be of the opinion that if there had not been a previous refusal to accept, the destruction of the bill would have been an implied acceptance.[29]

The drawer in such cases has his remedy of trover for the destruction of the bill; [30] and it is singular, as is well observed by Chitty, that it should ever have been supposed that the tortious act of destroying a bill, which is calculated to defeat the remedy on the bill, should have been deemed evidence of a contract on the part of the drawee to pay the bill to the holder.[31] In New York by Revised Statutes (§ 11, 2d ed., p. 757) it is provided that "every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or nonaccepted, to the holder, shall be deemed to have accepted the same." This statute it has been held, applies only to cases in which the acts of the drawee are of a tortious character, and imply an unauthorized conversion by him, and not to cases in which the bill is willingly left in his hands by the holder, and no demand therefor is made.[32]

26. Mason v. Barff, *supra*.

27. Jeune v. Ward, 2 Stark. 326, 1 B. & Ald. 654, Bayley, J.

28. Jeune v. Ward, 2 Stark. 326, 1 B. & Ald. 653. See Edwards on Bills, 417.

29. Jeune v. Ward, *supra*, Holroyd, J.

30. Story on Bills, § 248; 1 Parsons on Notes and Bills, 285; Johnson on Bills, 31.

31. Chitty on Bills [*296], 335; Edwards on Bills, 418.

32. Matteson v. Moulton, 11 Hun, 268. See also Gates v. Eno, 4 Hun, 96, and *ante*, §§ 492, 499a.

Under Negotiable Instrument statute.—The statute provides that "Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted the same." [33] It has been shown that, in the absence of special circumstances, it was the rule at common law that the mere failure to return a bill is not an acceptance, and it has been held that the statute reiterates the common law rule. Under that rule, mere retention is not sufficient to charge the drawer with refusal to return the bill to the holder; there must have been either destruction or refusal to return to the holder after a demand for its return.[34] The view that the statute is merely declaratory of the common law rule is supported by another section declaring that "The acceptance must be in writing and signed by the drawee." [35] And similar statutory provisions which had been enacted before the uniform Negotiable Instrument statute was passed or in States which have not adopted that statute, have been so construed.[36] In Pennsylvania, however, a different construction of the statute, as originally passed, has been made, and it has been held that the statute does not contemplate a tortious refusal to return, amounting to a conversion, but that the neglect or failure to return to the holder within twenty-four hours after delivery to the drawee is a refusal to return within the meaning

33. Appendix, sec. 137.

34. Westberg v. Chicago Lumber, etc., Co., 117 Wis. 589, 94 N. W. 572, wherein the court said: "The doctrine of constructive acceptance is based on the general principles of estoppel. If the conduct of the drawee will prejudice the existing rights of the holder, unless it means acceptance, and the drawee has knowledge of such fact, he is estopped to deny the only purpose which could render his conduct innocuous; namely, acceptance of the bill. This underlying principle suggests the reasons for many of the limitations upon the implication of acceptance from conduct; as for example, that such implication arises only when the bill is presented for acceptance, and that no one but the holder (payee or indorsee) can make such technical presentment. * * * Only when the drawee knows that acceptance is expected would he suppose that his conduct can lead to a belief that he does accept. Only when the presentment is by the holder, whose conduct and rights must be affected by acceptance or refusal, is the drawee charged by the strict rules of the law merchant with notice that his conduct may so injuriously affect the person delivering the bill to him." It should be noticed, however, that this construction is required in Wisconsin by the language of the statute, which adds to section 137 that "Mere retention of the bill is not an acceptance."

35. Appendix, sec. 132.

36. St. Louis, etc., R. Co. v. James, 78 Ark. 490, 95 S. W. 804; Matteson v. Moulton, 79 N. Y. 627; Dickinson v. Marsh, 57 Mo. App. 566.

of the statute.[37] But soon after this decision, the legislature met this construction of the statute by an amendment of the section: "That the mere retention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance: And provided further, That the provisions of this section shall not apply to checks." [38]

In an action upon drafts, in order to raise the presumption of acceptance by destruction of the same or refusal to return them accepted or nonaccepted, the plaintiff must sustain the burden of proof that the drafts were negotiable paper of the nature and kind that could be presented for acceptance, and that they were actually delivered to the drawee for acceptance and not for payment.[39]

§ 501. Other illustrations of constructive or implied acceptance.— It has been held that if the drawee of a bill, drawn and indorsed for his accommodation, procure the same to be discounted, and promise to pay it at maturity, he constitutes himself an acceptor; [40] and that a promise to pay a bill at maturity amounts to an acceptance.[41] Also, that authority "to draw on us or either of us," and "We hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts," binds the signers jointly and severally to the payment of acceptances by each other.[42]

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37. Wisner v. First Nat. Bank, 220 Pa. 21, 68 Atl. 955. In that case the court said: "The drawee to whom a bill is delivered for acceptance is deemed or taken to have accepted it under this section of the act (a) where he destroys it; (b) where he refuses within twenty-four hours after delivery to return the bill accepted or non-accepted to the holder; and (c) where he refuses within such other period as the holder may allow to return the bill accepted or nonaccepted to the holder. When either of these conditions exists the drawee becomes an acceptor of the bill, and assumes liability as such. An implied or a verbal acceptance of a bill is abolished by the act and there are now only two modes of accepting a bill; (1) By writing, signed by the drawee, as provided in section 132, and (2) by a nonreturn of the bill, which is declared by the section under consideration to be equivalent of an acceptance. The manifest purpose in requiring the prompt return of the bill is in the interest of and for the protection of the holder. It is immaterial to the drawer when the bill is returned, as he is protected by the notice of dishonor; and hence this section of the act requiring prompt action in returning the bill was obviously enacted for the benefit of the holder of the bill." See also State Bank v. Weiss, 91 N. Y. Supp. 276.

38. Laws of Pennsylvania, 1909, No. 169.

39. First Nat. Bank v. Whitmore, 177 Fed. 397.

40. Bank of Rutland v. Woodruff, 34 Vt. 89; Bigelow on Bills, 53; Benjamin's Chalmers' Digest, 44. *Aliter* if discounted by drawee. Swope v. Ross, 40 Pa. St. 186.

41. Spaulding v. Andrews, 12 Wright, 411.

42. Michigan State Bank v. Pecks, 2 Williams, 200.

§ **502.** If the drawee has expressly or impliedly promised the intended drawer to accept the bill, to be drawn upon him for a valuable consideration, and should afterward refuse to perform such contract, the drawer may recover re-exchange and damages consequent upon its dishonor.[43] And where the drawee has funds of the drawer, very slight circumstances will support the presumption of a contract to accept.[44]

A promise to notify a party when he may draw a bill amounts to an undertaking to accept the bill when drawn in pursuance thereof.[45]

It has been said that the words, "I will not accept this bill," written across the face of it, amounts to acceptance, but it is impossible to suppose that any such doctrine is maintainable unless it could be shown that the word "not" was unintentionally inserted.[46] If it were inserted to deceive the holder, it has been suggested that the drawee might be bound.[47] "I protest the within," written on the back of a draft by the drawee, has been considered sufficient evidence of due presentment and refusal.[48]

§ **503. Acceptance on separate paper.**—There is no doubt that, in the absence of statutory interdiction, an acceptance may be upon a separate paper, as in a letter, for instance, as well as upon the bill itself.[49] The drawee cannot be held liable upon a contract of acceptance external to the bill, unless the language used clearly and unequivocally imports an absolute promise to pay.[50] Thus, a written promise to accept an existing bill, or "that it shall meet with due

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43. Chitty on Bills (13th Am. ed.) [*281], 319; Smith v. Brown, 2 Marsh. 41, 6 Taunt. 340.

44. Laing v. Barclay, 1 B. & C. 398, 2 Dowl. & R. 530.

45. Smith v. Brown, 2 Marsh. 41, 6 Taunt. 340.

46. 1 Parsons on Notes and Bills, 283; Roscoe on Bills, 178.

47. Roscoe on Bills, 178.

48. Pridgen v. Cox, 13 Tex. 257.

49. Billing v. De Vaux, 3 M. & G. 565; Hatcher v. Stalworth, 25 Miss. 376; Fairlie v. Herring, 3 Bing. 625; Pierson v. Dunlap, Cowp. 571; Wynne v. Raikes, 5 East, 514; Grant v. Hunt, 1 M., G. & S. 44; McEvers v. Mason, 10 Johns. 207; Greele v. Parker, 5 Wend. 414; § 550 *et seq.*

50. First Nat. Bank v. Commercial Sav. Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340. Where a bill of exchange has had written thereon by the drawee, before endorsement by the payee, a statement that it will be credited to the account of the payee on return properly endorsed, and there has been verbal assurance that the amount has in fact been credited to the payee, there is both a written and a verbal acceptance. Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345.

honor"; or that the drawee "will accept or certainly pay it"—or any other equivalent language, has been held to amount to acceptance.[51] But if the language be equivocal—if it be merely stated, "Your bill shall have attention"—it is not sufficient.[52] And it has been held that a clear and unequivocal promise to pay on contract of acceptance external to the bill is not made by returning to a telegraphic inquiry, "Is J. F. Donald's check on you $350 good?" the telegraphic response, "J. F. Donald's check is good for sum named." [53] Promises to accept are hereafter considered.

SECTION IV

VERBAL AND WRITTEN ACCEPTANCE

§ **504.** Acceptance is usually effected by the drawer's writing his name across the face of the bill. And it seems that the holder may always insist on such an acceptance in writing, and in default thereof treat the bill as dishonored.[54] But there is no doubt that a verbal as well as a written acceptance is by the law merchant binding on the drawee.[55]

Statutes in some States require an acceptance to be in writing.[56]

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51. Ibid. See § 550 *et seq.*; Burke v. Utah Nat. Bank, 47 Nebr. 247, 66 N. W. 295.

52. Rees v. Warwick, 2 B. & Ald. 113.

53. First Nat. Bank v. Commercial Sav. Bank, 74 Kan. 606, 87 Pac. 746, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340.

54. Chitty on Bills (13th Am. ed.) [*287], 326; Edwards on Bills, 417.

55. Lumley v. Palmer, 2 Stra. 1000; Chitty, Jr., 275 (1735); Sproat v. Matthews, 1 T. R. 182 (1786); Grant v. Shaw, 16 Mass. 34; Phelps v. Northrup, 56 Ill. 156; Sturges v. Fourth Nat. Bank, 75 Ill. 595; Miller v. Neihaus, 51 Ind. 401, case of an order; Scudder v. Union Nat. Bank, 91 U. S. (1 Otto) 406; Pierce v. Kittredge, 115 Mass. 374; Dunovan v. Flynn, 118 Mass. 539; Spaulding v. Andrews, 48 Pa. St. 411; Jarvis v. Wilson, 46 Conn. 90; McCutchen v. Rice, 56 Miss. 455; Barcroft v. Denny, 5 Houst. (Del.) 10; Neumann v. Shroeder, 71 Tex. 84; Louisville R. Co. v. Caldwell, 98 Ind. 246; Weinhauer v. Morrison, 49 Hun, 498; Chitty on Bills (13th Am. ed.) [*289], 327; Story on Bills, § 242; Edwards on Bills, 417, 422; 1 Parsons on Notes and Bills, 285; Byles (Sharswood's ed.) [*184], 313; Bayley, chapter VI, section 1; Putnam Nat. Bank v. Snow, 172 Mass. 569, 52 N. E. 1079, citing and approving text; Spurgeon v. Swain, 13 Ind. App. 188, 41 N. E. 397; Exchange Bank v. Hubbard, 10 C. C. A. 295, 62 Fed. 112; Dickinson v. Marsh, 57 Mo. App. 566; Haeberle v. O'Day, 61 Mo. App. 390; Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345.

56. See Faircloth-Byrd Mercantile Co. v. Adkinson, 167 Ala. 344, 52 So. 419;

In England, by statute 19 & 20 Victoria, chap. 97, § 6, it is provided that "no acceptance of a bill of exchange, inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, signed by the acceptor or some person duly authorized by him." And it has been held that the word "accepted" written across the face of the bill, but unsigned, did not satisfy the statute.[57] It has been held, however, under a statute providing that an acceptance of a bill of exchange must be in writing, but that it is a sufficient acceptance if the acceptor writes "his name across the face of the bill, with or without other words," that the manner of acceptance thus authorized is merely permissive and does not exclude any other mode of acceptance, so long as it is in writing and clearly discloses an intention to accept.[58]

§ **504a. Words amounting to acceptance.**—In the absence of statutory provision, any words used by the drawee to the drawer or holder, which by reasonable intendment signify that he honors the bill, will amount to such acceptance; though it would be different if the words were addressed to a stranger having no interest in the bill. Thus, where a foreign bill drawn on defendant was protested by nonacceptance and returned, and afterward the drawee told the plaintiff, "If the bill comes back I will pay it," was held an acceptance.[59] So, if the drawee say, "Leave your bill with me, and I will accept it."[60] So, where the holder met in the street the drawee of the bill which had been sent to his counting-house, and returned unaccepted, and the drawee said, "If you will send it to the counting-house again, I will give directions for its being accepted," Lord Ellen-

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Flat v. Mulhall, 4 Mo. App. 476; Erickson v. Inman, 34 Oreg. 44, 54 Pac. 949. As to the effect of the Statute of Frauds, see *post*, § 566. Under a statute declaring that to make an acceptance of a bill of exchange binding it must be in writing, signed by the party to be charged therewith, or by some person by him lawfully authorized so to do, where goods were sold to the payee of a bill of exchange on the faith of a parol acceptance of the same, which was not made as an inducement to or in contemplation of the sale, the acceptor was not liable to the seller in an action on the bill. Lewin v. Greig, 115 Ga. 127, 41 S. E. 497.

57. Hindhaugh v. Blakey, 1 C. P. Div. 136. Since this decision, and in consequence of it, an act has been passed by the British Parliament declaring that a written acceptance of a bill shall not be deemed insufficient because consisting merely of the signature of the acceptor written thereon. See 41 Vict., chap. XIII; Steele v. McKinlay, 34 Eng. Rep. 106. See *ante*, § 497b.

58. Hughes Bros. v. Rawhide Gold Mining Co., 16 Cal. App. 293, 116 Pac. 969.

59. Cox v. Coleman, Chitty, Jr., on Bills, 274 (1732).

60. Chitty, Jr., 12; Bayley on Bills, chap. VI, § 1.

borough held that if the bill had been sent accordingly, it would operate as an acceptance, but otherwise not, the words being conditional.[61] So, where the drawees requested that funds should be placed in their hands to meet a certain bill, and after the bill was left at their house and was not accepted, one of them, on being complained to, said: "What! not accepted! we have had the money; they ought to be paid, but I do not interfere in this business; you should see Mr. P.," Best, C. J., said: "We are all of opinion that there has been a good acceptance of the bill." [62]

§ **505.** Where the drawee, on hearing a bill read, says it is correct, and shall be paid, it is an acceptance,[63] drawn on the faith of a consignment of goods, and the drawee refused to accept before the bill of lading and invoices came to hand, but after their arrival called on the holder's agent, and said that if he would get the bill back he would accept and pay it, and the bill was accordingly returned, it was held as an acceptance.[64] So, if the drawee of a bill at sight promise to pay it on a subsequent day named, it is an acceptance.[65] The words, "Will pay A. Harper draft $2,300 for stock," by telegram, have been held an unconditional acceptance.[66]

§ **506. Verbal acceptance must not be equivocal.**—The words used must evince a clear intention on the part of the drawee to bind himself to the payment of the bill at all events, in order to amount to an acceptance, and equivocal language will not suffice. Therefore, where the drawee said, on the day after presentment for acceptance, when the plaintiff's clerk called for the bill, "There is your bill, it is all right," it was held no acceptance.[67] So, saying, when a bill is presented for payment, that "it will be paid," if said with reference to immediate payment, will not amount to an acceptance, if the holder decline immediate payment on the terms proposed, because he makes an ulterior demand.[68] So, saying, "The bill shall have atten-

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61. Anderson v. Hick, 3 Campb. 179 (1812).

62. Fairlie v. Herring, 11 Moore, 320, 3 Bing. 525 (1826).

63. Ward v. Allen, 2 Metc. (Mass.) 53.

64. Grant v. Shaw, 16 Mass. 341.

65. Clarke v. Gordon, 3 Rich. (S. C.) 311. But see Peck v. Cochran, 7 Pick. 35.

66. Coffman v. Campbell, 87 Ill. 98; Gambrill v. The Brown Hotel Co., 11 Colo. App. 529, 54 Pac. 1025. See also State Bank of Beaver County v. Bradstreet, 89 Nebr. 186, 130 N. W. 1038 as to a telegram accepting a "draft for horses."

67. Powell v. Jones, 1 Esp. 17 (1763), per Lord Kenyon.

68. Anderson v. Heath, 4 Maule & S. 303 (1815).

tion," [69] or, "I will pay it, but I cannot now. I'll give you a bill at three months," [70] will not suffice. So it has been held that if the drawee of a bill say he cannot accept it without further direction from A. B., and A. B. afterward desire him to accept and draw upon C. D. for the amount, the mere drawing a bill upon C. D. will not amount to an absolute acceptance, nor can become such before the bill upon C. D. is accepted.[71]

§ **507. Words addressed to stranger not acceptance.**—In order to amount to an acceptance, the words used must be addressed to the drawer or holder, or their agent, or to some one who takes the bill on the faith and credit imparted by them; and if the drawee say to a mere stranger, "I must accept and pay the bill," or, "I shall have to accept or pay it," it is no acceptance.[72] For, as acceptance is a contract, it must be assented to by both parties, and a mere stranger has no privity with the drawee.

§ **507a. Verbal acceptance must be assented to by holder of the bill,** since in all cases he has a right to insist on an acceptance in writing on the bill itself, in order to avoid mistakes and prevent difficulties which may arise from mere parol proof thereof.[73]

SECTION V

ABSOLUTE, CONDITIONAL, VARIANT, AND QUALIFIED ACCEPTANCE

§ **508.** It is the right of the holder of the bill to require an absolute and unconditional acceptance—that is, an acceptance in conformity with the tenor of the bill—and may cause it to be protested unless it be so accepted.[74] The holder may, however, at his risk, take a conditional, varying, or qualified acceptance, and in such cases the acceptor

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69. Rees v. Warwick, 2 B. & Ald. 113 (1818).

70. Reynolds v. Peto, 11 Exch. 410, 33 Eng. L. & Eq. 481. See also Bonnell v. Mawha, 8 Vroom, 200; Rulo First Nat. Bank v. Gordon, 45 Mo. App. 293.

71. Smith v. Nissen, 1 T. R. 269.

72. Martin v. Bacon, 2 S. C. 132; Bayley on Bills, chapter VI, section I, § 109; Edwards on Bills, 416; 1 Parsons on Notes and Bills, 286; Benjamin's Chalmers' Digest, 44.

73. Story on Bills, §§ 242, 247; Edwards on Bills, 417.

74. In Boehm v. Garcias, 1 Campb. 425, the bill was drawn on Lisbon, "payable in effective and not in val reals." The drawee offered to accept it payable in

will, if the condition be complied with, or the qualification admitted, be bound thereby; and the holder will likewise be bound by it.[75] Where the bill as drawn requested the drawee to pay the amount on May 28th, Patterson, J., said: "It was competent for him by his acceptance to extend the time of payment subject to an option in the holder to take such acceptance, and agree to such alteration, or treat the bill as dishonored by nonacceptance." [76] The burden of proof is on the plaintiff to show performance of the condition of a conditional acceptance; [77] and, although absolute then it should be set out as conditional, with an averment of performance.[78]

Under Negotiable Instrument statute.—Under the statutory definition of an acceptance of a bill of exchange,[79] an acceptor may impose

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val denaros, another sort of currency. Lord Ellenborough, in suit brought by the holder against the drawee, said: "The plaintiff had a right to refuse this acceptance; the drawee of a bill has no right to vary the acceptance from the terms of the bill, unless they be unambiguously and unequivocally the same. Therefore, without considering whether a payment in denaros might have satisfied the term effective, an acceptance in denaros was not a sufficient acceptance of a bill drawn payable in effective. The drawee ought to have accepted generally, and an action being brought against them on the general acceptance the question would probably have risen as to the meaning of the term." Parker v. Gordon, 7 East, 385; Gammon v. Schmoll, 5 Taunt. 344; Thompson on Bills, 219; Beawes, No. 265; Story on Bills, § 272; Chitty (13th Am. ed.) [*287–288], 326; Shackleford v. Hooker, 54 Miss. 716; Green v. Raymond, 9 Nebr. 298; Gibson v. Smith, 76 Ga. 34, citing the text. In Louisiana, it has been held that a dated acceptance to pay on a specified day, which is, in fact, the last day of grace, is according to the tenor of the bill. Kenner v. Creditors, 19 Mart. 540. See as to conditional acceptance by letter, Shaver v. Western Union Tel. Co., 57 N. Y. 459.

75. A qualified acceptance which is taken and relied upon by the payee becomes, upon a compliance with its condition, as binding an obligation and as effective an assignment of the debt as an absolute acceptance. But there must be a compliance with the condition to make such an acceptance effective. Barnsdall v. Waltemeyer, 142 Fed. 415. Petit v. Benson, Cumberbach, 452 (1697); Smith v. Abbott, 2 Stra. 1152; Julian v. Shorbrook, 2 Wills, 9; Anderson v. Hick, 3 Campb. 179; McCutchen v. Rice, 56 Miss. 455; Shackleford v. Hooker, 54 Miss. 716; Green v. Raymond, 9 Nebr. 298; Mitchell v. Barring, 10 B. & C. 4; Ford v. Angelrodt, 37 Mo. 50; Wintersmith v. Post, 4 Zabr. 420; Crowell v. Plant, 53 Mo. 145; Taylor v. Newman, 77 Mo. 265; Hughes v. Fisher, 10 Colo. 383; Herter v. Goss, 57 N. J. L. 42, 30 Atl. 252.

76. Russell v. Phillips, 14 Q. B. 900. See also Walker v. Atwood, 11 Mod. 190.

77. Read v. Wilkinson, 2 Wash. C. C. 514; Gammon v. Schmoll, 5 Taunt. 344; Mason v. Hunt, 1 Doug. 297; Nagle v. Horner, 8 Cal. 358; Liggett v. Weed, 7 Kan. 273; First Nat. Bank v. Bensley, 1 Fed. 609.

78. Langston v. Corney, 4 Campb. 176; Ralli v. Sarell, 1 Dowl. & R. N. P. 33; Posey v. Bank, 7 Colo. App. 108, 42 Pac. 684.

79. Appendix, sec. 132.

conditions, and where a drawer, on his acceptance of a draft payable to a bank, transmitted the draft to the bank by letter stating that the acceptance was on the terms indicated in a prior letter reciting that the acceptance was for accommodation only and without any intention to be bound thereon, the letters showed that there was no "acceptance" of a bill of exchange, and one taking from the bank with notice, could not enforce liability against the drawee.[80]

§ **509. Illustrations of conditional acceptances.**—Where an order was accepted on condition that the drawer became entitled to payment on a certain contract, the acceptor is not liable on the acceptance when the drawer was found not entitled to anything on that contract, and cannot become liable thereon because the drawer becomes entitled to payment on a different and subsequent contract.[81] Acceptances "to pay as remitted for;"[82] "to pay when in cash for the cargo of the ship Thetis;"[83] "to pay when goods consigned to me are sold;"[84] "to pay when a cargo of equal value is consigned to me;"[85] "payable when house is ready for occupancy,"[86] are examples

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80. Lehnhard v. Sidway, 160 Mo. App. 83, 141 S. W. 430.

81. Glidden v. Massachusetts Hospital Life Ins. Co., 187 Mass. 538, 73 N. E. 538. The acceptance of an order to pay a certain sum out of earnings payable by the drawee to the drawer, the acceptance being conditioned on the earnings being sufficient to cover the amounts for the several months enumerated, does not limit the liability of the drawee to the net "earnings" after paying his expenses during each month. Smith v. Bates Mach. Co., 182 Ill. 166, 55 N. E. 69.

82. Banbury v. Lissett, 2 Stra. 1211.

83. Julian v. Shorbrook, 2 Wills, 9.

84. Smith v. Abbott, 2 Stra. 1152.

85. Mason v. Hunt, 2 Doug. 297. Where a draft was drawn payable on receipt by the drawee of goods purchased by the drawer, the acceptance of the draft was in effect an agreement upon the part of the drawee to pay the amount stated therein upon receipt of the goods. Fisher v. Frank, 8 Cal. App. 472, 97 Pac. 95. (1908).

86. Foster v. Balmforth, 44 Conn. 435; Barber v. Johnson, 5 App. D. C. 305; Cook v. Wolfendale, 105 Mass. 401. Under such an acceptance, the acceptor was not liable thereon when the contractor did not complete the building notwithstanding the destruction by fire without the contractor's fault. Hogan v. Globe Mut. B. & L. Assoc., 140 Cal. 610, 74 Pac. 153, reversing 71 Pac. 706. Where an owner of property has made a contract for the erection of a building, and has accepted an order drawn by the contractor in favor of the material man for an amount to be paid out of the last payment due the contractor, payments made by the owner to the contractor on a supplemental contract, of money due on the last payment, are unauthorized and not binding upon the material man. Bearsley v. Cook, 154 N. Y. 707, 49 N. E. 126, affirming 35 N. Y. S. 12, 89 Hun, 151. Where a contractor accepts an order drawn by a subcontractor to be paid

of conditional acceptances. So, where on presentment of bills for acceptance the drawee said he would have accepted them if he had had certain funds which he had not been able to obtain from France, but that when he did obtain them he would pay the bill, it was held a conditional acceptance.[87] And it has been held that the words "Accepted payable on giving up a bill of lading" constituted a conditional acceptance, but not a further condition to the acceptor's liability that the bill of lading should be given up at the day of maturity of the bill.[88] If drawee, on presentment, proposes to pay in fifteen days, it is an acceptance to pay at that time, if communicated to the holder.[89] If a drawee accept a bill in regular form, but upon an agreement with the drawer that he should not negotiate it before complying with certain conditions, and the drawer proceed to negotiate it without performance of those conditions, the acceptor would be bound to a *bona fide* holder without notice.[90] Where the drawer declines to accept unconditionally, but receives and keeps the bill on a promise to "try and save the amount for the holder," it does not amount to an obligatory acceptance.[91] And where a mortgagee accepted an order drawn by a third person in favor of the mortgagor "with the full understanding that it is to be indorsed upon note" of the mortgagor,

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out of moneys due him on his contract, the promise is conditional upon the performance of his contract by the subcontactor, and when the subcontractor abandoned his contract before performance of the contract, payments made to induce him to go on with his contract cannot be considered in determining whether payments had been made on the original contract to the full amount of the contract price. Pohlman v. Wilcox, 146 Cal. 440, 80 Pac. 625.

87. Byles on Bills [*187], 317; Mendizabal v. Machado, 6 Car. & P. 218 (25 Eng. C. L.), 3 Moore & S. 841.

88. Byles on Bills [*187], 317; Smith v. Vertue, 30 L. J. C. P. 56, 9 C. B. (N. S.) 214 (99 Eng. C. L.); Burke v. Utah Nat. Bank, 47 Nebr. 247, 66 N. W. 295. Where an acceptance was conditioned upon the receipt of indorsed bills of lading, and the amount of the bill of exchange was paid before it was discovered that the bills of lading were forged, the amount paid thereon may be recovered where no intervening rights or liabilities were acquired or imposed. Guaranty Trust Co. v. Grotrian, 114 Fed. 433, 57 L. R. A. 689, affirming 105 Fed. 566. Where the acceptance of orders was based upon a condition "that lumber to the value of the above must be on the switch," such condition had reference to the value of the lumber on the switch between the date of the order and the time for its payment, and did not depend upon the existence of a debt due from the drawer to the drawee at the time payment was due. Fletcher v. Simms & Graham, 75 Ark. 162, 86 S. W. 993.

89. Wylie v. Bryce, 70 N. C. 425.

90. Merritt v. Duncan, 7 Heisk. 156.

91. McEowen v. Scott, 49 Vt. 376.

such stipulation was held to be simply a refusal to accept the order according to its tenor and became a proposition to the mortgagor to credit him on his note with the sum named, and the mortgagor's assent to the proposition was essential before any obligation arose on the part of the mortgagee to pay the order as proposed.[92]

§ 510. Refusal of, and assent to, conditional acceptance; notice of assent.—On the offer of a conditional or varying acceptance, if the holder resolve to reject it altogether, he may protest generally, or give general notice of nonacceptance; but if he is willing to accept the offer, he should then give notice of its exact terms to all the parties, and state his readiness to accept the offer if they will respectively consent.[93] A general or unqualified protest or notice of nonacceptance would, in such a case, evince that the holder did not acquiesce in the offer, and preclude him from afterward availing himself of it;[94] but not if he was not aware of the acceptance when he caused the bill to be noted or protested for nonacceptance.[95]

§ 511. Qualification of rule.—The rule above stated is in respect to the indorsers of a bill of absolute and invariable application.[96] But in respect to the drawer, it is subject to qualification. The drawer warrants that the drawee is in funds, and that he will accept and pay the bill. And he is bound to know whether or not the drawee is in funds. Therefore, when he draws without having the right to do so, he is not entitled to notice of dishonor. And upon the same principle it is thought that he cannot be injured, and will not be discharged by the holder's taking a qualified acceptance payable at a future day.[97] True, such an acceptance is a departure from the tenor of the bill; but the drawer, having improperly drawn the bill, cannot complain of the holder for taking those steps which seem essential to prevent its entire dishonor, and to secure its payment.[98]

Bayley says that "a neglect to give notice where there is a conditional acceptance, is done away with by the completion of those conditions before the bill becomes payable; and a neglect, where

92. Pearson v. Gooch, 69 N. H. 571, 45 Atl. 406.

93. Chitty's language [*301], 340.

94. Sproat v. Mathews, 1 T. R. 182.

95. Fairlie v. Herring, 3 Bing. 625, 11 Moore, 520.

96. Edwards on Bills, 428, 430.

97. Walker v. Bank of the State, 13 Barb. 636; Edwards on Bills, 429.

98. Edwards on Bills, 429.

there is an acceptance as to part, and a refusal as to the residue only, discharges the persons entitled to notice as to the residue only." [99] But he cites no authority for this doctrine. It seems obviously illogical, and has been justly criticised and dissented from.[1]

§ **512.** Where a bill was drawn by a contractor on the postmaster-general, and having been "accepted on condition that the drawer's contracts be complied with," was discounted by the defendants, it was held that such forfeitures as had occurred previous to such acceptance were not within the condition.[2] "I will see the within paid eventually," written on the back of a draft, was held a promise to pay in a reasonable time.[3]

§ **513. Acceptances to pay " when in funds."**—An acceptance to pay "when in funds," renders the drawee liable only when he has funds; [4] though it has been held that this implied when the drawee has funds which the drawer has a present right to demand and receive, and that it did not apply to wages for daily labor earned after acceptance, and needed for the daily subsistence of the laborer.[5] "When in funds" means "when in cash," and available securities will not answer this condition until actually converted into money.[6] If the funds are not received in the acceptor's lifetime, but are collected by the administrator, the latter is liable as representative of the deceased; [7] but the addition of the word "administrator" to an acceptance does not make it a conditional one, nor qualify his liability.[8]

Where the acceptance is to pay out of the first money received,

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99. Bayley on Bills, chap. 7, § 2.

1. Story on Bills, § 272, note 1.

2. United States v. Bank of the Metropolis, 15 Pet. 377.

3. Brannin v. Henderson, 12 B. Mon. 62.

4. Marshall v. Clary, 44 Ga. 513. Where an order was accepted containing the words "Said order to be paid on or before November 1, 1899," and also a direction "and charge the same to the $1,800 payment," the latter clause merely indicates to what sum, as between the drawer and acceptor, the payment of the order should be charged, and by the acceptance the drawee was bound to pay the order by the time stated. Shepard v. Abbott, 179 Mass. 300, 60 N. E. 782.

5. Wintermute v. Post, 4 Zabr. 420.

6. Campbell v. Pettengill, 7 Greenl. 126.

7. Swansey v. Breck, 10 Ala. 533; Gallery v. Prindle, 14 Barb. 186; Owen v. Iglanor, 4 Coldw. 15.

8. Tassey v. Church, 4 Watts & S. 346.

the acceptor is bound to pay from time to time, on reasonable request, such funds as he receives from the drawer; and a judgment for a certain sum which he received is no bar to another action for a sum subsequently received.[9] An acceptance in the words, "Accepted for the full amount, provided there is this amount in my hands," is an absolute undertaking to pay all the money of the drawer in the drawee's hands, not exceeding the amount of the draft.[10] An acceptance to pay, "if on settlement there is anything over," becomes on settlement an acceptance for what balance may be due if the condition be assented to by the holder.[11]

If the holder receive an acceptance to be paid "when in funds," he cannot resort to the drawer until the acceptor refuses to pay after he is in funds; [12] and the conditional acceptor will not be liable if the funds are intercepted, or compliance with the condition is prevented, by operation of law.[13]

Where the drawee, upon presentment of a bill or order, says, "I

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9. Perry v. Harrington, 2 Metc. (Mass.) 368. See also Knefel v. Flanner, 66 Ill. App. 209, affirmed 166 Ill. 147, 46 N. E. 762. An acceptance conditioned to pay the amount out of any money which might come into the acceptor's hands payable to the drawer, makes the drawer liable only when the money was received payable to the drawer, and not for money coming into his hands from obligations which had previously been assigned by the drawer to parties other than the payee of the note. Knoll v. Melone, 1 Cal. App. 637, 82 Pac. 982. If an order be drawn payable out of a specified fund to become due from the drawee to the drawer, acceptance therefore binds the drawee to the extent only that such fund becomes available for the purpose. McMurray v. Sisters of Charity of St. Elizabeth, 68 N. J. L. 312, 53 Atl. 389. Where an order to pay a certain sum "out of the first moneys due us * * * under our contract with you * * * , after deducting * * * any money that you may have to advance in order to get out" timber under the contract, was accepted, the acceptor had the right to make such advances as were required of them to enable the drawer to comply with his contracts, and in determining what was necessary to protect himself and the payee, the acceptor was required to exercise good business prudence according to the usual course of business. Crane v. Williamson, 111 Ky. 271, 63 S. W. 610. Where an order to pay to the payee a certain sum out of the proceeds of the sale of property, after the payment of certain other claims and orders, was accepted, the drawee is liable thereon to the payee notwithstanding a liability of the drawer to him further than that stated on the order. Cramer v. Munkres, 14 Wys. 234, 83 Pac. 374.

10. Ray v. Faulkner, 73 Ill. 469.

11. Stevens v. Androscoggin Water Power Co., 62 Me. 498.

12. Andrews v. Baggs, Minor, 173; Campbell v. Pettengill, 7 Greenl. 126; Knox v. Reeside, 1 Miles, 294; Gallery v. Prindle, 14 Barb. 186.

13. Browne v. Coit, 1 McCord, 408.

must defer payment until in receipt of funds," the language implies that he accepts to pay when in funds, and the implication is the stronger when he receives and detains the instrument.[14]

§ 514. Suits on acceptances to pay " when in funds."—In a suit to recover on such an acceptance, the burden of proof is on the plaintiff to show that the acceptor is in funds; [15] and where a factor so accepted an order of a planter, it was held that he was only bound to pay out of the first funds coming into his hands, after deducting advances.[16] Evidence is admissible to explain a conditional acceptance when its full meaning does not appear. Thus, an acceptance payable "when the lumber is run to market," is conditional, and the circumstances require explanation. What lumber? What market? By whom, and when to be run to market? All these proper inquiries to be made.[17]

§ 515. As to qualified acceptances.—As an acceptance may vary from the tenor of the order by introducing a condition, so it may vary from it as to the sum, time, place, or mode of payment.[18] Such an acceptance is generally called a qualified acceptance, and the same principles govern it as govern a conditional acceptance.

By receiving such qualified acceptance the holder discharges all antecedent parties, unless he obtains their consent.[19] Thus, if the bill be addressed to the drawees at their place of residence, and it is accepted, payable at a different town, it is a material variation if the holder receives it, and does not protest for nonacceptance; [20] but a bill addressed generally to the drawee, in a city, may be accepted, payable at a particular bank in the city.[21] If the drawee accept to pay at a certain future day, different from that named in the draft,

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14. Pope v. Huth, 14 Cal. 407.

15. Owen v. Lavine, 14 Ark. 389; Andrews v. Baggs, Minor, 173; Knox v. Reeside, 1 Miles, 294; Atkinson v. Manks, 1 Cow. 691; Carlisle v. Hooks, 58 Tex. 421, citing the text.

16. Hunter v. Ingraham, 1 Strobh. 271; Owen v. Iglanor, 4 Coldw. 15.

17. Lamon v. French, 25 Wis. 37.

18. See Byles on Bills [*186], 316; Chitty on Bills [*203], 342; Vanstrum v. Liljengren, 37 Minn. 191.

19. Byles on Bills [*186], 316; Chitty on Bills [*300], 339; Story, § 204; Sebag v. Abithol, 4 Maule & S. 462; Gibson v. Smith, 75 Ga. 33.

20. Niagara Bank v. Fairman County, 31 Barb. 403.

21. Troy City Bank v. Lauman, 19 N. Y. 477; Meyers v. Standart, 11 Ohio (N. S.), 29; Niagara Bank v. Fairman County, 31 Barb. 403.

and the holder receives such acceptance, it will bear grace like all engagements by negotiable paper to pay at a certain time.[22]

§ 516. A bill drawn payable at a certain time may be accepted on condition of being renewed to a certain other time, and it will be properly declared on as payable at the time named in the acceptance.[23] If accepted as to part of the amount drawn for, it is a good acceptance as to such part; [24] and if accepted payable partly in money and partly in bills, it is a good acceptance as to the part payable in money.[25] The holder may take a partial acceptance, but he will discharge the drawer and indorsers unless he protests as to the residue.[26]

§ 517. Conditions to written acceptances.—If any conditions are annexed to a written acceptance, they should appear on its face. It has been laid down that acceptance may be rendered conditional by another contemporaneous writing,[27] but such condition could have no effect against a *bona fide* holder ignorant of it.[28] The terms of an acceptance in writing cannot be varied by any contemporaneous parol agreement, as that is against the first principles of the law of evidence.[29]

Sometimes the words which make the acceptance conditional are in the bill or order itself, as where the order ran, "Please pay, etc., out of the amount to be advanced to me, when the houses I am now erecting on your land are so far completed as to have the plastering done, according to our contract," and in such case if the work were never done, the condition upon which the defendant would be bound would not be complied with.[30] And it matters not that the contract

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22. Green v. Raymond, 9 Nebr. 295.

23. Russell v. Phillips, 14 Q. B. 891; Clarke v. Gordon, 3 Rich. 311.

24. Weggersloffe v. Kerne, 1 Stra. 214; Thompson on Bills (Wilson's ed.) 225.

25. Petit v. Benson, Comb. 452; 1 Parsons on Notes and Bills, 312.

26. Marius, 68, 86; Thompson on Bills, 226.

27. Bowerbank v. Monteiro, 4 Taunt. 884; Meyer & Co. v. Decroix, L. R., App. Cas. 520 (1891).

28. United States v. Bank of Metropolis, 15 Pet. 377; Montague v. Perkins, 22 Eng. L. & Eq. 516; Story, § 240; Edwards, 424; Thompson, 223.

29. Adams v. Wordley, 1 M. & W. 347; Besant v. Cross, 10 C. B. 896 (70 Eng. C. L.); Hoare v. Graham, 3 Campb. 57; Haverin v. Donnell, 7 Smedes & M. 244; Goodwin v. McCoy, 13 Ala. 271; Foster v. Clifford, 44 Wis. 569. See *ante*, §§ 80, 81; Kervan v. Townsend, 25 App. Div. 256, 49 N. Y. Supp. 137, citing text; Crane v. Williamson, 111 Ky. 271, 63 S. W. 610, citing text.

30. Newhall v. Clark, 3 Cush. 376. See Crowell v. Plant, 53 Mo. 145; Greene v. Duncan, 37 S. C. 239, 15 S. E. 956.

was canceled by agreement with the acceptor, provided there was no fraud. The acceptance of an order payable "If in funds," is regarded as an admission that the acceptor has funds to meet it, and he cannot afterward allege want of consideration against the holder.[31]

§ 518. Conditions to verbal acceptances.—Where a verbal acceptance is competent, a condition annexed to a verbal acceptance may be shown, because it does not vary or contradict the contract, but shows what the contract was.[32] But the acceptor having once accepted absolutely, cannot by subsequent declarations annex a condition to his liability.[33]

§ 519. Acceptances payable at a particular place; Sergeant Onslow's Act.—Before the statute 1 & 2 Geo. IV., chap. 78, was enacted, it was a point much disputed whether a bill or note drawn or made payable at a particular place—or a bill accepted payable at a particular place—should be necessarily presented at such place in order to charge the acceptor, maker, or other parties. Finally it was decided in the House of Lords that an acceptance payable at a particular place was a qualified acceptance, rendering it necessary, in an action against the acceptor, to aver and prove presentment at such place.[34] This led to the passage of the statute 1 & 2 Geo. IV., above referred to, called Sergeant Onslow's Act, which provided that an acceptance payable at a particular place should be deemed a general acceptance, unless expressed to be payable there "only, and not otherwise or elsewhere." Since that statute, a bill may, in England, be accepted in three different forms when it is drawn generally on a party—that is: First, it may be accepted simply without more. Secondly, it may be accepted payable at a particular banker's which will be the same in effect as against the acceptor; or, thirdly, it may be accepted payable at a particular banker's 'only, and not otherwise or elsewhere.'" In this latter case, it will be deemed a qualified acceptance; and presentment at the banker's will be a condition precedent to the right of the holder to maintain an action against the acceptor thereon.[35]

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31. Kemble v. Lull, 3 McLean, 272; Edwards on Bills, 420.

32. Edwards on Bills, 426.

33. Wells v. Brigham, 6 Cush. 6.

34. Rowe v. Young, 2 Brod. & Bing. 165, 2 Bligh, 391, overruling the opinion of eight of the twelve judges who were consulted.

35. Halstead v. Skelton, 5 Ad. & El. 86. In 1 Parsons on Notes and Bills,

In an action against the drawer, or an indorser, if the bill be accepted and payable at a particular place named by the acceptor, it is still necessary to prove presentment there.[36] And so if the bill be drawn payable at a particular place, presentment must be made there in order to charge the drawer or indorser.[37] The statute 1 & 2 Geo. IV. does not extend to promissory notes, and, therefore, if a note be made expressly payable at a particular place, it is necessary, in England, to present it there for payment in order to charge the maker.[38]

§ **520. Rule in the United States.**—In the United States a different view from that expressed by the House of Lords has prevailed; and according to the ruling of the Supreme Court, and of the great current of decisions of the State courts of last resort, the effect and construction of an acceptance would accord with the act of 1 & 2 Geo. IV.—that is, the acceptance will be regarded as general in all cases,

309–311, it is said: "If a bill were accepted 'payable only at such a place,' it would be so entirely conditional under the English statutes, that if not demanded there, the acceptor would not be liable at all. We think this should be the rule in the United States, on the ground that such words are equivalent to 'accepted, provided that,' or, 'on condition that;' but it is not certain that a bill accepted with the word 'only,' or possibly with express words of condition, might not be held by some courts as binding the acceptor to the amount of the bill, but discharging him from interest and costs, if he had funds at the proper place at the maturity of the bill, by which it would then and there have been paid. The principle upon which any such decision must be founded is, that the having the funds there for that purpose operates as a tender of them. The cases which we have been considering are, as our notes show, in a curious state of conflict, confusion, and uncertainty. A great number of fine subtile distinctions have been made on a comparatively narrow point, and it seems as if ingenuity and acuteness had been exerted to make refinements in an important commercial question, instead of an endeavor to carry out the real and honest intentions of the contracting parties, and to produce uniformity in the law precisely there where uniformity is eminently desirable."

36. Gibb v. Mather, 8 Bing. 214 (21 Eng. C. L.); Maule & S. 387, 2 C. & J. 254; Saul v. Jones, 28 L. J. Q. B. 37, 1 E. & E. 59 (102 Eng. C. L.), Tindal, C. J., saying: "In cases between the indorsee and the drawee, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary in order to make the drawer liable upon the dishonor of the bill by the acceptor." "It appears to us that the statute neither intended to alter, nor has it in any manner altered the liability of drawers of bills of exchange; but that it is confined in its operation to the case of acceptors alone."

37. Boydell v. Harkness, 3 C. B. 168 (54 Eng. C. L.).

38. Sanderson v. Bowes, 14 East, 500; Byles on Bills (Sharswood's ed.) [*208], 344–345.

save when the bill is drawn, or the acceptance expresses that it is payable at a particular banker's "only, and not otherwise or elsewhere." [39] This subject will be more fully discussed when we come to consider the principles governing "presentment for payment." [40]

SECTION VI

ACCEPTANCE FOR HONOR, OR SUPRA PROTEST

§ **521.** There is a peculiar kind of acceptance called acceptance for honor, or *supra protest.* This most frequently happens when the original drawee (and the drawee *au besoin,* if any) refuses to accept the bill, in which case a stranger may accept the bill for the honor of some one of the parties thereto, which acceptance will inure to the benefit of all the parties subsequent to him for whose honor it was accepted.[41]

§ **522. As to the circumstances under which there may be such an acceptance,** it is only allowable when acceptance by the drawee has been refused, and when the bill has been protested, and hence it is called acceptance *supra protest.*[42]

The reason assigned for this is that the drawers and indorsers have a right to say that the bill was not primarily drawn on the acceptor for honor; and the only proper proof of the refusal of the original drawee is by protest, that being the known instrument, by the custom of merchants, to establish the facts.[43]

§ **523. As to the method of acceptance for honor,** it is in this wise: the acceptor for honor, or *supra protest,* appears before a notary public, witnesses and declares that he accepts such protested bill in honor of the drawer or indorser, as the case may be, and that he will

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39. Wallace v. McConnell, 13 Pet. 136. Numerous cases are cited in the chapter on Presentment for Payment. Forms of declarations, and an excellent treatise on this subject, may be found in 4 Rob. Pr. (new ed.), 450–454.

40. § 641 *et seq.*

41. Bayley on Bills, 177; Story, §§ 255–256; *Ex parte* Wackerbath, 5 Ves. 574; Konig v. Bayard, 1 Pet. 250; Hussey v. Jacob, 1 Ld. Raym. 88; May v. Kelly, 27 Ala. 497; Hoare v. Cazenove, 16 East, 391.

42. Ibid.

43. Story on Bills, § 256.

pay it at the appointed time.[44] And then he subscribes his name to the words, "Accepted *supra protest* for the honor of A. B.," or, as is more usual, "Accepts, S. P." [45]

Sometimes the form used is, "Accepted, under protest, for honor of Messrs. ———, and will be paid for their account, if regularly protested and refused when due."[46] And the acceptor *supra protest* must be particular to state for whose honor he accepts.[47]

It is the duty of the acceptor *supra protest*, as soon as he has made the acceptance, to notify the fact to the party for whose honor it is done; [48] and the party paying a bill under protest for honor must give reasonable notice to the person for whose honor he pays, otherwise he will not be bound to refund.[49]

§ **524. As to who may be acceptor for honor.**—A stranger may undoubtedly accept for honor; and by the word "stranger" in this connection is meant any third person not a party to the bill. It seems that acceptance for honor may also be made by the drawee, who, if he does not choose to accept the bill drawn generally on account of the person in whose favor, or on whose account, he is advised it is drawn, he may accept it for the honor of the drawer, or of the indorsers, or of all or any of them.[50]

But if the drawee were bound in good faith to accept the bill, he cannot change his relations to the parties, and accept it *supra protest* for the honor of an indorser; he must either accept or refuse.[51]

An acceptor *supra protest* for the honor of an indorser may, however, recover against such indorser, though he accepted at the instance of the drawee, and as his agent, provided the indorser were not thereby damnified. The indorser might avail himself of any defense which he could have made, had the drawee accepted for his honor, and then sued upon the acceptance.[52] It is immaterial, indeed, as to the defenses which a drawer or indorser may make against an acceptor

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44. Gazzam v. Armstrong, 3 Dana, 554.

45. Thompson on Bills, 323; Byles (Sharswood's ed.) [*265], 402; Chitty on Bills [*346], 387.

46. Mitchell v. Baring, 10 B. & C. 4, 4 Car. & P. 35.

47. Story on Bills, § 256.

48. Story on Bills, § 259; Edwards on Bills, 441.

49. Wood v. Pugh, 7 Ohio, Part 2, 156.

50. Story on Bills, § 259.

51. Schimmelpennich v. Bayard, 1 Pet. 264; Chitty on Bills [*345], 386.

52. Konig v. Bayard, 1 Pet. 250.

for honor, whether such acceptor acted at the instance of the drawer, or as the agent of the drawee.[53]

§ **525. Several acceptors for honor of different parties.**—While there cannot be successive acceptors of a bill, generally speaking, there may be several acceptors *supra protest* for the honor of different parties [54] that is, one may accept for the honor of the drawer, another for the honor of the first indorser, and another for the honor of the second indorser, and so on.[55]

And the acceptor *supra protest* may accept for the honor of any one, or all, of the parties to the bill; and his acceptance should designate for whose honor it was made, in which case it could be at once perceived for whose benefit it inured.[56] If the acceptance do not specify for whose honor it was made, it will be construed to be for the honor of the drawer; [57] and if for the honor of the bill, or of all the parties, it should be so expressed.[58]

§ **526. As to the rights of an acceptor for honor.**—By his acceptance for honor, the acceptor has recourse against the party for whose honor he accepts, and all parties whom the latter would have recourse against, and none others.[59] But the acceptor for the honor of the drawer cannot recover against him without proof of a presentment for acceptance or payment, and refusal and notice to the drawer.[60]

If he accepts for the honor of the drawer only, he will in general have no recourse against the indorsers; and if for the honor of an indorser, he will have no recourse against a subsequent indorser [61]—

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53. Gazzam v. Armstrong, 3 Dana, 554; Wood v. Pugh, 7 Ohio, 156.

54. Chitty on Bills, 375; Story on Bills, § 260; 1 Parsons on Notes and Bills, 315; Byles on Bills (Sharswood's ed.) [*255], 403; Beawes, 33.

55. Chitty on Bills, 376; Story on Bills, § 260; Byles on Bills (Sharswood's ed.) [*255], 403.

56. Hussey v. Jacob, 1 Ld. Raym. 88; Lewin v. Brunette, 1 Lutw. 896; 1 Parsons on Notes and Bills, 313; Story on Bills, § 256.

57. Chitty [*346], 387; 1 Parsons on Notes and Bills, 313.

58. Gazzam v. Armstrong, 3 Dana, 552.

59. Byles (Sharswood's ed.) [*259], 406; Goodall v. Polhill, 1 C. B. 233.

60. Baring v. Clark, 19 Pick. 220; Schofield v. Bayard, 3 Wend. 488.

61. Gazzam v. Armstrong, 3 Dana, 554, Marshall, J., saying: "We are decidedly of the opinion that he (the acceptor for honor) acquired no demand, or right of action, against any party subsequent to the one for whom he made the payment, and that, even as against the preceding parties, he was only substituted to the rights of that party in the same condition as if he paid the bill

the exception arising in cases where the person for whose honor he accepts the bill might have recourse against either, as when he is an accommodation drawer or indorser.[62]

§ 527. As to the liability of the acceptor for honor.—The acceptance for honor or *supra protest* is not an absolute engagement like an ordinary acceptance for value. It is a conditional engagement, and to render it absolute, the performance of several acts as conditions precedent are essential.[63] Such an acceptance, says Lord Tenterden, C. J., "is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill, 'keep this bill, don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have your money.'"[64] The nature of such an acceptor's undertaking is more analogous to

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himself." In Mertens v. Winnington, 1 Esp. 112, counsel contended that where a bill is taken up for honor of a party, only such party was liable. But Lord Kenyon was of opinion "that where a bill is so taken up, the party who does so is to be considered as an indorsee paying full value for the bill, and as such entitled to all remedies to which an indorsee would be entitled, that is, to sue all the parties to the bill." But this proposition is too broad; for there are cases in which the payor *supra protest* stands on a very different footing from an indorsee. Thus, if he paid for honor of the acceptor, he could not sue the drawer, as the acceptor could not sue him.

62. Story on Bills, § 256.

63. Chitty on Bills [*347], 388.

64. Williams v. Germaine, 7 B. & C. 457, 1 Moody & R. 394. In Hoare v. Cazenove, 16 East, 391 (1812), Lord Ellenborough said: "It is an undertaking to pay if the original drawee, upon a presentment to him for payment, should persist in dishonoring the bill, and such dishonor by him be notified by protest to the person who has accepted for honor. * * * The use and convenience, and indeed the necessity of a protest upon foreign bills of exchange, in order to prove in many cases the regularity of proceedings thereupon, is too obvious to warrant us in dispensing with such an instrument in any case where the custom of merchants, as reported in the authorities of law, appears to have acquired it. And indeed the reason of the thing, as well as the strict law of the case, seems to render a second resort to the drawee proper, when the unaccepted bill still remains with the holder; for effects often reach the drawee who has refused acceptance in the first instance, out of which the bill may and would be satisfied if presented to him again when the period of payment had arrived. And the drawer is entitled to the chance of benefit to arise from such second demand, or at any rate to the benefit of that evidence which the protest affords, that the demand has been made duly without effect, as far as such evidence may be available to him for purposes of ulterior resort."

that of an indorser [65] than that of an ordinary acceptor, and to render him absolutely liable it is necessary:

First. To present the bill at maturity to the original drawee, notwithstanding his prior refusal, because between the time of such refusal and the time of maturity, effects may have reached the drawee, out of which he might, if the bill were again presented, pay it; and the drawer and other parties are entitled to the chance of any benefit which might arise from such second demand. And if it were not made (except in the case of a bill made payable at a place not being the residence of the drawee), the drawer and indorsers would be discharged; and as the acceptor *supra protest* would thereby lose recourse against them, he is also discharged.[66]

Second. Upon refusal by the original drawee to pay the bill when it is presented at maturity, it must be again protested for nonpayment, and such protest and presentment must be alleged in the declaration against the acceptor *supra protest*.[67] And *Third*, it is then necessary to present the bill in due time to the acceptor *supra protest*.[68]

If on such presentment the acceptor *supra protest* refuses to pay, there must be another formal protest, stating the presentment for payment to the drawee, the protest for his nonpayment, the presentment of the bill and acceptance to the acceptor *supra protest*, and demand of payment of him, and the protest for his nonpayment; and notice thereof must be forthwith forwarded to the drawer and indorsers.[69]

§ 528. Admissions of acceptor for honor.—There appears to be a conflict of opinion as to the extent of the admission of the acceptor *supra protest*. According to a recent eminent author, the acceptor *supra protest* does not admit the genuineness of the signature of any party for whose honor the acceptance is given, not even the drawer's, and, therefore, he could recover back money paid to the holder if the bill turned out to be a forgery.[70] The language of the case cited in support of this doctrine would seem to sustain it; but confined to the

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65. 1 Parsons on Notes and Bills, 315.

66. Chitty [*348], 389–390; Story on Bills, § 261; Barry v. Clark, 19 Pick. 220.

67. Chitty [*350], 392; Story on Bills, § 261.

68. Ibid.; Chitty [*351], 392.

69. Chitty [*352], 393; 1 Parsons on Notes and Bills, 320.

70. 1 Parsons on Notes and Bills, 323.

point decided, it determines no more than that acceptance for the honor of an indorser does not admit his signature.[71]

The reasoning of the judge which leads to this conclusion, however, would go to the full extent of the rule laid down by Professor Parsons. But it is at least subject to this modification, that one who accepts for the honor of the drawer is estopped from denying that the bill is a valid bill; and, consequently, it would not be competent for him to set up as a defense to an action by an indorsee that the payee is a fictitious person, and that he was ignorant of the fact at the time he accepted the bill.[72]

Why, indeed, the acceptor *supra protest* should not be bound by the same rules which apply to an ordinary acceptor in the usual course of business we cannot perceive. It is his own voluntary act, and unless he has been imposed upon by the holder of the bill to such an extent as to warrant a defense on the distinct ground of fraud, he should, we

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71. Wilkinson v. Johnson, 3 M. & C. 428. Abbott, C. J. (Lord Tenterden), said: "A bill is carried for payment to the person whose name appears as acceptor, or as agent of an acceptor, entirely as a matter of course. The person presenting very often knows nothing of the acceptor, and merely carries or sends the bill according to the direction that he finds upon it; so that the act of presentment informs the acceptor or his agent of nothing more than that his name appears to be on the bill as the person to pay it; and it behooves him to see that his name is properly on the bill. But it is by no means a matter of course to call upon a person to pay a bill for the honor of an indorser; and such a call, therefore, imports, on the part of the person making it, that the name of a correspondent, for whose honor the payment is asked, is actually on the bill; but still his attention may reasonably be lessened by the assertion that the call itself makes to him in fact, though no assertion may be made in words. And the fault, if he pays on a forged signature, is not wholly and entirely his own; but begins at least with the person who thus calls upon him. And though, where all the negligence is on one side, it may perhaps be unfit to inquire into the *quantum*, yet where there is any fault in the other party, and that other party cannot be said to be wholly innocent, he ought not, in our opinion, to profit by the mistake into which he may, by his own prior mistake, have led the other; at least, if the mistake is discovered before any alteration in the situation of any of the other parties, that is, while the remedies of all the parties entitled to remedy are left entire, and no one is discharged by laches."

72. Phillips v. Thurn, 18 C. B. (N. S.) 694 (1865), Erle, C. J., said: "I take it to be clear that if the defendant had not intervened, and the action had been brought by the holder of the bill against the drawer, the drawer would have been by law compelled to admit that the bill was a valid bill payable to bearer. * * * It seems to me that there is good reason for saying that that which the drawer would be estopped from denying, the acceptor for honor should also be estopped from denying. I think that he is equally bound to admit that the bill is a valid bill."

think, be held up to the strict performance of his engagement, and estopped from denying any fact—such as the validity of the signatures of parties—which it presupposes.[73] Certainly when the bill has passed into the hands of a *bona fide* holder for value after the acceptance *supra protest*, he could not then be permitted to open the question of forgery.[74]

§ 529. Holder not bound to take acceptance for honor.—The holder is in no case bound to take an acceptance for honor;[75] but if he receives it, and it is for the honor of a particular party, he cannot sue such party until the maturity of the bill, and its dishonor by the acceptor *supra protest*.[76] And if the acceptance is for the honor of all the parties to the bill, he cannot sue any of them until it has matured and been dishonored.[77]

But there seems to be no reason why the holder may not sue prior parties, when the acceptance is for honor of a particular party, after giving them due notice.[78]

§ 530. Protest for better security.—There is another species of acceptance for honor which occurs after acceptance and before the maturity of the bill, when the acceptor absconds or becomes a bankrupt or insolvent.[79] In this case the holder is not bound to protest the bill, and his neglect to do so will not affect his remedy against any prior party.[80] But he may make protest if he choose to do so, and it is then called protest for better security.[81] Mr. Chitty says on this

73. In Byles on Bills (Sharswood's ed.) [*258], 406, it is said: "The acceptor *supra protest* admits the genuineness of the signature, and is bound by any estoppel binding on the party for whose honor he accepts. Thus, where a bill was drawn in favor of a nonexisting person or order, but the name of the drawer, and the name of the payee and first indorser were both forged and the defendant accepted for the honor of the drawer, it was held that the defendant was estopped from disputing that the drawer's signature was genuine, and that the bill was drawn in favor of a nonexisting person, was negotiable, and had become payable to bearer." See also Story on Bills, § 262; Redfield and Bigelow's Leading Cases, 83–63.

74. Story on Bills, § 262; Salt Spring Bank v. Syracuse Sav. Inst., 62 Barb. 101.

75. Chitty on Bills [*345], 387; Mitford v. Walcott, 12 Mod. 410, 1 Ld. Raym. 575; Gregory v. Walcup, 1 Comyns, 76; Pillans v. Van Mierop, 3 Burr. 1663; Byles on Bills (Sharswood's ed.) [*256], 403; Edwards on Bills, 443.

76. Williams v. Germaine, 7 B. & C. 468, 1 Man. & R. 394.

77. Story on Bills, § 258; Chitty, 375.

78. Story on Bills, § 258.

79. Chitty on Bills [*344], 385.

80. *Ex parte* Wackerbath, 5 Ves. 574.

81. Chitty on Bills [*344], 385.

subject: "The custom of merchants is stated to be, that if the drawee of a bill of exchange abscond before the day when the bill is due, the holder may protest it, in order to have better security for the payment, and should give notice to the drawer and indorsers of the absconding of the drawee; and if the acceptor of a foreign bill become bankrupt before it is due, it seems that the holder may also, in such case, protest for better security; but the acceptor is not, on account of the bankruptcy of the drawer, compellable to give this security. The neglect to make this protest will not affect the holder's remedy against the drawer and indorsers; and its principal use appears to be that, by giving notice to the drawers and indorsers of the situation of the acceptor, by which it is become improbable that payment will be made, they are enabled by other means to provide for the payment of the bill when due, and thereby prevent the loss of re-exchange, etc., occasioned by the return of the bill. It may be recollected that, though the drawer or indorsers refuse to give better security, the holder must, nevertheless, wait till the bill be due before he can sue either of those parties." [82]

§ **531.** An acceptor for honor of the drawer thereby releases the accommodation acceptor of the bill, because an acceptor for honor can acquire only the rights of the party for whose honor he accepts, and the drawer could not sue the accommodation acceptor.[83] If the bill be payable at a certain time after sight, and is accepted for honor, the time runs from such acceptance, and not from the presentment to the drawee.[84]

SECTION VII

THE EFFECT OF ACCEPTANCE—WHAT IT ADMITS

§ **532. The effect of the acceptance of a bill** is to constitute the acceptor the principal debtor.[85] The bill becomes by the acceptance

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82. Ibid.

83. McDowell v. Cook, 6 Smedes & M. 420; Gazzam v. Armstrong, 3 Dana, 554.

84. Williams v. Germaine, 7 B. & C. 468, 1 Man. & R. 394, 403.

85. Thompson on Bills, 229; Ragsdale v. Gresham, 141 Ala. 308, 37 So. 367; Capital City Ins. Co. v. Quinn, 73 Ala. 560, citing the text; Jarvis v. Willson, 46 Conn. 90; Cooper v. Jones, 79 Ga. 379; Parmelee v. Williams, 72 Ga. 45; Hall v. Capital Bank, 71 Ga. 715; Davis v. Baker, 71 Ga. 34; Huston v. Newgass, 234

very similar to a promissory note—the acceptor being the promisor, and the drawer standing in the relation of an indorser [86] or a surety.[87]

But in respect to the acceptor's position with regard to the drawer, and the amount for which he renders himself liable by accepting the bill, it is well to observe that the acceptance does not entitle the acceptor to charge it in account against the drawer from the date of acceptance, unless he pays the whole amount at the time, or discharges the drawer from all responsibility.[88]

Like the maker of a note, the acceptor is bound by all the terms of the instrument, and if it contain a stipulation for payment of attorney's fees, he is bound by it.[89]

If the acceptance be for the drawer's accommodation, the acceptor does not thereby become entitled to sue the drawer upon the bill; but when he has paid the bill, and not before, he may recover back the amount from the drawer in an action for money had and received,[90] and if a bill has been drawn for the benefit and accommodation of the acceptor, and he has received the proceeds and benefit thereof, then

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Ill. 285, 84 N. E. 910, reversing 135 Ill. App. 117 (as to an acceptance for accommodation of the drawer); Hamilton v. Catchings, 58 Miss. 92, although he accepts for accommodation; Bank of Indian Territory v. First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537; Heurtematte v. Morris, 101 N. Y. 63, citing the text; Bank v. Loan & Trust Co., 119 N. C. 554, 26 S. E. 131, citing and approving the text; Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345. In Georgia, if the drawer write his name across the face of a draft, drawn payable to his order, before acceptance, it may be declared as a promissory note. Patillo v. Mayer, 70 Ga. 715; Bank v. Loan & Trust Co., 119 N. C. 554, 26 S. E. 131, citing and approving text. So absolutely is the acceptor regarded as a primary debtor, it has been decided that the owner or holder of a bill of exchange is under no duty to such acceptor to retain or render available, collateral security for the payment of the bill received from the payee or indorser thereon. See Fowler v. Gates City Bank, 88 Ga. 29, 13 S. E. 831. Upon the fulfillment of the terms of a conditional acceptance the acceptor became bound as the principal debtor to the payee, and the payee was not bound to return mortgaged property or to foreclose a mortgage given him by the drawer before he could maintain an action against the acceptor. Crutchfield v. Martin, 117 Pac. 194, 27 Okl. 764.

86. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136, affirming 103 N. J. S. 584.

87. *In re* Stevens, 74 Vt. 408, 52 Atl. 1034. The drawee of a check, when he accepts it, makes himself the guarantor thereof. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. St. Rep. 817.

88. Bracton v. Willing, 4 Call, 288.

89. Smith v. Muncie National Bank, 29 Ind. 158.

90. Planters' Bank v. Douglas, 2 Head, 699; Christian v. Keen, 80 Va. 377, citing the text; Martin v. Muncy, 40 La. Ann. 190; Church v. Swope, 38 Ohio St. 493; Abraham v. Mitchell, 112 Pa. St. 230.

the drawer is the accommodation party, and the obligation, as between the drawer and acceptor, is that of the acceptor.[91] If the acceptor put the bill in circulation, he is estopped from showing it was then paid.[92]

§ 533. What acceptance admits: (1) Signature of drawer.—It follows from the fact that the acceptor assumes to pay the bill, and becomes the principal debtor for the amount specified, that acceptance is an admission of everything essential to the existence of such liability. Therefore, acceptance is, in the *first* place, an admission of the signature of the drawer, the drawee being supposed to know his correspondent's handwriting, and, by accepting, to acknowledge it; and in a suit against the acceptor he would not be permitted to plead or show that the handwriting was not the drawer's, and would be bound by his acceptance even though the drawer's name were forged.[93]

§ 534. (2) Admission of funds of drawer in drawee's hands.—In the *second* place, acceptance admits that the acceptor had funds of the drawer in his hands, for the drawing of the bill implies this, and acceptance in the usual course of business only follows when it is the fact. Therefore, the acceptor cannot deny that he was in funds when suit is brought by a holder of the bill,[94] and knowledge by the holder

91. Bailey v. Wood, 114 Ky. 27, 69 S. W. 1103.

92. Hinton v. Bank of Columbus, 9 Port. 463.

93. Wilkinson v. Lutwidge, 1 Stra. 648 (1726). Lord Raymond, C. J., thought acceptance acknowledged handwriting of the drawer, but was not conclusive evidence. In Jenys v. Fawler, 2 Stra. 946 (1732), it was held that proof of forgery of drawer's handwriting was inadmissible. Hoffman & Co. v. Bank of Milwaukee, 12 Wall. 193; Goetz v. Bank of Kansas City, 119 U. S. 556; Johnston v. Commercial Bank, 37 W. Va. 343; Hortsman v. Henshaw, 11 How. 177; Bank of the United States v. Bank of Georgia, 10 Wheat. 333; White v. Continental Nat. Bank, 64 N. Y. 316; Goddard v. Merchants' Bank, 4 N. Y. 147; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Bank of Commerce v. Union Bank, 3 N. Y. 235; Levy v. Bank of United States, 1 Binn. 27; Peoria R. Co. v. Neill, 16 Ill. 269; Ellis v. Ohio Life, etc., Co., 4 Ohio St. 628; Whitney v. Bunnell, 8 La. Ann. 429; Leach v. Buchanan, 4 Esp. 226; Price v. Neal, 3 Burr. 1354; Smith v. Chester, 1 T. R. 654; Wilkinson v. Johnson, 3 B. & C. 428; Sanderson v. Coleman, 4 M. & G. 309; Angel v. Ellis, 1 McGloin, 57; Welch v. Mayer, 4 Colo. App. 440, 36 Pac. 613; Neal v. Coburn, 92 Me. 146, 42 Atl. 348, 69 Am. St. Rep. 495; Belknap v. Davis, 19 Me. 455; Trust Co. of America v. Hamilton Bank, 112 N. Y. S. 84, 127 App. Div. 515; Title Guarantee & Trust Co. v. Haven, 111 N. Y. S. 305, 126 App. Div. 802; Havana Cent. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12.

94. Hoffman v. Bank of Milwaukee, 12 Wall. 181; Hortsman v. Henshaw, 11

of a draft as to there being no funds of the drawer with the acceptor to meet the draft cannot relieve the acceptor of the effect of his acceptance of the draft;[95] though as between himself and the drawer it is only *prima facie* evidence that the drawer had funds in his hands, and he may rebut this presumption by showing that the acceptance was for the drawer's accommodation, or otherwise under circumstances which place him under no obligation to pay the bill to him.[96] But, notwithstanding the presumption that the acceptor has funds of the drawer, yet, where bills have been drawn upon letters of credit to enable a party to purchase and ship merchandise, this presumption is rebutted, and the drawer becomes the primary debtor, and is liable to the acceptor for his advances. But if the acceptor has notice that one of two joint drawers of such a bill has merely loaned his name to give currency to the bill, such drawer is no more liable to the acceptor than if he had merely indorsed the bill.[97]

§ **535. (3) Admission of drawer's capacity to draw.**—In the

How. 177; Raborg v. Peyton, 2 Wheat. 385; Kemble v. Lull, 3 McLean, 272; Ragsdale v. Greshan, 141 Ala. 308, 37 So. 367, citing text; Jarvis v. Wilson, 46 Conn. 90 (case of parol acceptance); Ray v. Morgan, 112 Ga. 923, 38 S. E. 335, 53 L. R. A. 210; Heurtematte v. Morris, 101 N. Y. 63, citing the text; Jordan v. Tarkington, 4 Dev. 357; Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345; Grumback v. Hirsch, 17 Tex. Civ. App. 618, 43 S. W. 1031; *In re* Stevens, 74 Vt. 408, 52 Atl. 1034. In an action by the payee against the drawee of an order drawn by a vendor against his vendee, the fact that advances had been made by the vendee after the presentation and acceptance of the order would be no defense, unless made in pursuance of an agreement entered into between the original parties before the acceptance of the order, or unless the payee knew of such advances and assented thereto. Wadhams & Co. v. Inman, Poulsen & Co., 38 Oreg. 143, 63 Pac. 11. Where a contractor for the construction of a railroad accepted an order drawn upon him by a subcontractor, on the supposition that he and the subcontractor had a lien on the railroad for the amount of their work and that the amount of their estimates would be collected, he is liable on the acceptance though it turned out that the railroad became insolvent and that he was mistaken in the assumption that the full amount of the subcontractor's work would be paid for. Chattanooga Grocery Co. v. Livingston, (Tenn. Ch. App.) 59 S. W. 470 (1900).

95. Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345.

96. See chapter on Consideration, §§ 174–176; Turner v. Browder, 5 Bush, 216; Park v. Nichols, 20 Ill. App. 143; Klopfer v. Levi, 33 Mo. App. 322. And it follows that the acceptance of a draft by the drawee is no evidence of a loan by him to the drawer—the drawee is presumably a debtor for the amount of the draft, and payment of it, and discharge of the debt. Doyle v. Unglish, 143 N. Y. 556, 38 N. E. 711.

97. Turner v. Browder, 5 Bush, 216; *ante,* § 176.

third place, the acceptor admits the capacity of the drawer to draw the bill, for otherwise it would not be valid; [98] and, therefore, he cannot set up a plea, that the drawer of a bill, which he had accepted, was a body corporate having no legal authority to draw the bill,[99] or was a bankrupt,[1] infant,[2] married woman,[3] or fictitious person.[4] When the bill is drawn in the name of a firm, acceptance admits that there is such a firm,[5] and if it be drawn by a person as executor, it admits his right to sue in that character.[6]

§ **536. (4) Admission of payee's capacity to indorse.**—In the *fourth* place, the acceptor admits the capacity of the payee to indorse the bill when it is drawn payable to the payee's order, for by the very act of acceptance he agrees to pay to his order; [7] and, therefore, he cannot show that at the time of acceptance the payee was an infant,[8]

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98. Story on Bills, § 113; Byles (Sharswood's ed.) [*193], 325; Thompson on Bills, 230, 231; Title Guarantee & Trust Co. v. Haven, 111 N. Y. S. 305, 126 App. Div. 802.

99. Halifax v. Lyle, 3 Welsby, Hurl. & G. (Exch.) 466. And so the payment of checks drawn by the treasurer of a corporation payable to himself individually, by the deposit bank of the corporation was an acknowledgment by such bank that the treasurer possessed authority from the corporation to draw such checks. Havana Cent. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12.

1. Braithwaite v. Gardiner, 8 Q. B. 473. Lord Denman, C. J., quoting Lord Abinger's opinion in Pitt v. Chappelew, 8 M. & W. 616, said: "Lord Abinger was a high authority on subjects of this kind. It is clear what his opinion was on the point of estoppel in Pitt v. Chappelew, and I think it rests on sound principles. In this case, all parties knowing the bankrupt's situation, the defendant accepts a bill drawn by him. He thereby admits that the bankrupt had power to draw upon him; and, therefore, on a short and simple ground, always the best, I am of opinion that the plaintiff has a right to maintain this action."

2. Taylor v. Croker, 4 Esp. 187; Jones v. Darch, 4 Price, 300; Crutchfield v. Martin, 27 Okl. 764, 117 Pac. 194.

3. Smith v. Marsack, 6 C. B. 486; Cowton v. Wickersham, 54 Pa. St. 302.

4. Cooper v. Meyer, 10 B. & C. 468, 5 Man. & R. 387.

5. Bass v. Clive, 4 Maule & S. 13.

6. Aspinall v. Wake, 10 Bing. 51.

7. See *ante*, §§ 93, 242.

8. Jones v. Darch, 4 Price, 300 (1817). The payee was an infant, and the acceptor knew it when he accepted. Taylor v. Croker, 4 Esp. 187 (1803). The drawers, who were infants, had drawn the bill payable to their own order. Lord Ellenborough held that the acceptance admitted their power to indorse, and the acceptor could not show they were infants. Byles (Sharswood's ed.) [*193] 325.

an insane person,[9] a married woman,[10] a bankrupt,[11] or a corporation without legal existence.[12] It is a general principle, applicable to all negotiable securities, that a person shall not dispute the power of another to indorse such an instrument, when he asserts by the instrument which he issues to the world, that the other has such power.[13] Indeed, there could be no reason why the acceptor should be interested to show that the payee was incompetent to make the order; for he has been guaranteed in that regard by the drawer, and may charge the amount in account against him whether the payee were competent or not.

§ **537.** (5) **Admission of agent's handwriting and authority.**—In the *fifth* place, if the bill be drawn by one professing to act as agent of the drawer, the acceptance admits his handwriting and authority as agent to draw.[14] In the leading case of Robinson v. Yarrow, the question arose between the acceptor and the indorsee of the drawer by procuration, and the doctrine is stated in the text in the language generally used by text-writers and judges. It is, however, contended with force in a recent Louisiana case, that the doctrine only applies as between the acceptor and a *bona fide* transferee without notice of want of authority in the agent to draw; and that as between the acceptor and the payee who has taken the bill from the agent, the former is not estopped from showing that the agent drew without authority, the payee being himself under obligation to make due inquiry.[15] And this seems to be a reasonable limitation of the principle.

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9. Smith v. Marsack, 6 C. B. 486. See *ante*, §§ 93, 242.

10. Smith v. Marsack, 6 C. B. 486. But in Massachusetts it has been held that evidence of the insanity of the payee at the time the note was executed was admissible. Peaslee v. Robins, 3 Metc. (Mass.) 164. See *ante*, § 93.

11. Drayton v. Dale, 2 B. & C. 293 (1823), which was the case of a note made payable to the order of a bankrupt. Bayley, J., in Drayton v. Dale, *supra*. Approved in Smith v. Marsack, 6 C. B. 486. See *ante*, § 242.

12. See *ante*, chapter III, § 93.

13. See chapter XLII, on Forgery, section III; Mayer v. Old, 57 Mo. App. 639, text cited.

14. Robinson v. Yarrow, 7 Taunt. 455 (1817), 1 Moore, 150; Chitty, Jr., on Bills, 993; Ames on Bills, 475; Bigelow on Bills, 569; Byles on Bills (Sharswood's ed.), *34, 111; Chitty on Bills (13th Am. ed.), *639, 717; 1 Parsons on Notes and Bills, 322.

15. Angel v. Ellis, 1 McGloin, 61, McGloin, J., saying: "A party accepting a commercial, negotiable draft or bill of exchange guarantees the authority of the drawer to execute the same, and the genuineness of his signature. This principle has been held applicable to such an instrument drawn by an agent, and the

§ 538. What acceptance does not admit: (1) Signature of payee. —But beyond these admissions the acceptance does not go. In the *first* place, it does not admit the genuineness of the signature of the payee when it purports to bear his indorsement, or that of any other indorser, for with their handwriting he is not presumed to be familiar; and, therefore, if the signature of the payee or other indorser be forged, the acceptor will not be bound to pay the bill to any one who is compelled to trace title through such indorsements.[16] And if he has gone so far as to pay the bill to any one holding it under such forged indorsement, he may, as a general rule, recover back the amount.[17] The rule would not apply, however, where the drawer had issued the bill with the forged indorsement upon it, for then the

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authority of the agent declared to be amongst the things guaranteed by the acceptance. Robinson v. Yarrow, 7 Taunt. 445. There is really no reason why, in the hands of an innocent holder, the guarantee should not extend so far. But as one who received a draft from a forger with notice, actual or legal, could not impose such guarantee upon the acceptor, and as one dealing with an agent must, at his peril, inquire into the scope of that agent's authority, and is negligent if he do not, it is reasonable to hold a person taking a draft, executed by a mandatory, as charged with knowledge as to the character and extent of the agency, and not protected by the acceptance, as an innocent person would be. And in view of this obligation upon the part of persons dealing primarily and directly with agents, the drawer has as much right, and perhaps more, to presume that the payee has performed his prior duty, and ascertained the extent of the agent's power before taking his draft, as the negligent payee has to suppose that the acceptor would not commit himself unless the draft were correct. At all events, this enforced guarantee, peremptorily debarring the acceptor upon commercial paper from setting up error, fraud, forgery, or other similar defenses, is in derogation of the general law, existing only in favor of commerce. Where the contract is not in the shape of commercial paper, it is open to attack and recission for error, violence, fraud, or menace, or illegality, or absence, or failure of consideration, under our Civil Code. Civ. Code, arts. 1881, 1893, 1819, 1824, 1846, 1847, 1850. If, therefore, defendants accepted this order in error, as we believe they did, we stand face to face with express provisions of law, which accord them the right to be relieved, and we must be governed thereby. Civ. Code, arts. 1821, 1881."

16. Holt v. Ross, 54 N. Y. 474; Edwards on Bills, 432. In White v. Continental Nat. Bank, 64 N. Y. 320, Allen, J., says: "The plaintiffs as drawees of the bill were only held to acknowledge the signature of their correspondents; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument, or of any other names appearing thereon, or of the title of the holder." Lyndonville Nat. Bank v. Fletcher, 68 Vt. 85, 34 Atl. 38, 54 Am. St. Rep. 874.

17. Ibid.; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Dick v. Leverich, 11 La. 573; Williams v. Drexel, 14 Md. 566.

acceptor could charge the amount in account against him, and as the forged indorsement could in such case subject him to no loss, he would not be entitled to recover back the amount.[18] The acceptance does not admit the signature of the indorser, even when the bill is payable to the drawer's order, and purports to be indorsed by him in the same handwriting as the drawer's.[19] But if the drawer is a fictitious person, and the bill is payable to the drawer's order, the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer; and in such case the holder may show, as against the acceptor, that the signature of the fictitious drawer and of the first indorser are in the same handwriting.[20]

§ 539. (2) Acceptance no admission of agency to indorse.—In the *second* place, acceptance does not admit agency to indorse, which must be proved by the holder in order to recover against the acceptor, even though the acceptor acknowledges agency to draw the bill, and the indorsement was upon it at the time of acceptance. Thus, where a bill was drawn over the signature, "A. Henry p. proc. C. Staeben & Co.," and was expressed to be payable "to our order," and was indorsed in like manner as drawn: "A. Henry p. proc. C. Staeben & Co.," and was accepted by the defendant, and sued on by the plaintiff, it was held that, in order to recover, he must prove the procuration to indorse. And Park, J., said: "The mere acceptance proves the drawing, but it never proves the indorsement; it is not at all necessary that a power given to draw bills by procuration should enable the agent to indorse by procuration; the first is a power to get funds into the agent's hands, the other to pay them out." [21]

§ 540. (3) Acceptance no admission of genuineness of terms in body of the bill.—In the *third* place, the acceptance does not admit the genuineness of the terms contained in the body of that bill at the time of the acceptance; and, therefore, if at that time they had been altered so as to purport to bind the drawer for a larger sum, or

18. See chapter XLII, on Forgery, section III; Hortsman v. Henshaw, 11 How. 177; Meacher v. Fort, 3 Hill (S. C.), 227; Coggill v. American Exchange Bank, 1 N. Y. 113.

19. Robinson v. Yarrow, 7 Taunt. 455; Canal Bank v. Bank of Albany, 1 Hill (N. Y.), 287; Beeman v. Duck, 11 M. & W. 257; Williams v. Drexel, 14 Md. 566. See chapter XLII, on Forgery, section III.

20. Cooper v. Meyer, 10 B. & C. 468; Beeman v. Duck, 11 M. & W. 251.

21. Robinson v. Yarrow, 7 Taunt. 455 (1817). See *ante*, § 537; Benjamin's Chalmers' Digest, 211.

in a different manner than that of the original bill, he will not be bound by his acceptance to pay the amount, unless the drawer had by his own carelessness afforded opportunity for the alteration, and the acceptor could, therefore, charge him in account with the whole amount.[22] But where the drawer alters it himself, or acquiesces in an alteration, before acceptance, it binds him, and, therefore, the acceptor.[23]

If the drawer were not responsible for affording the opportunity for the alteration to be made, the acceptor could not only defend against a recovery upon the bill, but might himself recover back the amount paid upon it, or, at least, to the extent of the amount for which he would still remain liable to the drawer.[24] If, however, the acceptor were himself responsible for issuing the bill in such a form as to admit of its being easily forged or altered—as where an acceptor wrote his acceptance in blank, on an agreement with the drawer that he should not draw for over $1,000, and the latter inserted a larger sum and passed the bill to the plaintiff—he would be bound for the whole amount, and could not recover it back if paid.[25]

SECTION VIII

EXTINGUISHMENT OF ACCEPTOR'S OBLIGATION

§ **541.** The obligation of the acceptor may be discharged, extinguished, or waived: (1) by operation of law; (2) by payment; (3) by release; and (4) by express or implied waiver or agreement of the parties.

In the first place, as to discharge by operation of law, this occurs when the acceptor is discharged by force and effect of the laws of the place where the acceptance was made—as, for example, by going into bankruptcy, or pleading successfully the Statute of Limitations.[26]

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22. Young v. Grote, 4 Bing. 253; Young v. Lehman, 63 Ala. 519; White v. Continental Nat. Bank, 64 N. Y. 320; Marine Nat. Bank v. National City Bank, 59 N. Y. 68. See chapter XLIX, on Checks, and chapter XLII, on Forgery; also chapter XLIII, on Alteration, section VI.

23. Langton v. Lazarus, 5 M. & W. 628–629; Ward v. Allen, 2 Metc. (Mass.) 57.

24. Bank of Commerce v. Union Bank, 3 N. Y. 230. See chapter XLIX, on Checks, sections XIII, XIV; on Forgery, section III.

25. Van Duzer v. Howe, 21 N. Y. 531.

26. 1 Parsons on Notes and Bills, 328.

In the second place, the acceptor may be discharged by payment of the bill according to its tenor. This branch of the subject is elsewhere fully considered,[27] as is also the discharge by release.[28]

§ 542. Holder's waiver of acceptor's contract.—In the fourth place, as to when an acceptor may be discharged by the express or implied waiver or agreement of the parties, it is a general principle of law that an executory contract, whether sealed or unsealed, may be discharged before breach by mere verbal agreement, or by a waiver of the rights accruing under it.[29] But after breach it can only be discharged by payment, release (under seal), or by taking some collateral thing in satisfaction, or by merger by operation of law, as by judgment, or taking a higher security.[30] But cases of bills of exchange are said to form an exception to this rule, and the liability of the acceptor, or other party, remote or immediate, though complete, may be discharged, by an express renunciation of his claim on the part of the holder without consideration.[31]

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27. See chapter XXXVIII, on Payment, vol. II.

28. See chapter XL, on Discharges, etc., § 2, vol. II.

29. Story on Bills, § 266; 1 Parsons on Notes and Bills, 324 *et seq.*; Chitty on Bills [*310], 349. See especially Byles on Bills [*192], 324; Sharswood's note 1; also Foster v. Dawber, 6 Exch. 850, Parke, B.; Dobson v. Espie, 26 L. J. (N. S.) 240 (1857).

30. Story on Bills, § 266.

31. Byles on Bills (Sharswood's ed.) [*190–191], 322. It is therein said: "It is a general rule of law that a simple contract may, before breach, be waived or discharged, without a deed and without a consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration. To this rule it has been repeatedly held that contracts on bills of exchange form an exception, and that the liability of the acceptor, or other party remote or immediate, though complete, may be discharged by an express renunciation of his claim on the part of the holder without consideration. The exception seems at first to violate a fundamental rule, but the reason may be that the distinction between a release under seal, and a release not under seal, is quite unknown in foreign countries. An express and complete renunciation by the holder of his claim on any party to the bill is, therefore, according to the law merchant, equivalent to a release under seal. And as it would be highly inconvenient to introduce nice distinctions and nice questions of international law, all the contracts on a foreign bill, though negotiated or made in England, and all the contracts on an inland bill, depending, as they do, on the same law merchant, may be so released. And such a relaxation of the general rule in the case of bills of exchange is not unreasonable on another ground. The money due at the maturity of a bill of exchange is in practice expected to be paid immediately, and in many cases with remedies over in favor of the debtor. Parties liable who are expressly told that recourse

§ **543. Discharge of acceptor for accommodation.**—In the case of acceptances for accommodation, the principles upon which this doctrine rests are not difficult to discover. The acceptor is, indeed, according to the form and nature of his contract, primarily liable to the holder. But the debt which he has bound himself to pay, is in every respect the debt of another person to the payee or the holder; and the payee or holder, while having the right to sue the acceptor as his principal debtor, has such relations to the party for whose accommodation the bill has been accepted, that it is not unnatural for him to be in negotiation with such party respecting its settlement. And when he relinquishes his claim against the acceptor, it is nothing more than a waiver of his right to hold him as primarily bound for another's debt, for which he may be regarded in some sort, though not to all intents and purposes, as a surety. Thus where the holder knowing that the acceptance was for accommodation, and himself possessed goods of the drawer from the proceeds of which he expected payment, told the acceptor and his creditors that he should look to the drawer, and not come upon the acceptor; and, in consequence, the acceptor assigned his property for the benefit of his creditors, it was held, that if by the facts an unconditional renunciation was established, it was a discharge of the acceptor, although the goods in the possession of the holder proved to be of little value, and the drawer was insolvent; but if the words imported only that the renunciation was conditional, and that the holder only looked to the drawer in the first instance, the acceptor was not discharged.[32] So where the holder arrested the acceptor, and finding that he had accepted for accommodation of Dallas, the drawer, his attorney, took security from Dallas, and wrote to the acceptor that "he had settled with Dallas, and he (the acceptor) need not trouble himself further," it was held that the acceptor was discharged.[33] But where an accommodation acceptor applied to the holder to give up the bill, which he refused to do, but said the acceptor should not be troubled about it, it was held under the circumstances, that the acceptor was not discharged.[34]

§ **544. Renunciation of right to hold acceptor liable.**—The text-

will not, in any event, be had to them, are almost sure, in consequence, to alter their conduct and position."

32. Whately v. Tricker, 1 Campb. 35 (1807); Chitty, Jr., 740; Chitty on Bills [*311], 350; Story on Bills, § 266; 1 Parsons on Notes and Bills, 324.

33. Black v. Peele, cited in Dingwall v. Dunster, 1 Doug. 247; Chitty, Jr., 403; Bayley on Bills, 188.

34. Adams v. Gregg, 2 Stark. 531 (1819); Chitty, Jr., 1076.

writers generally concur in the doctrine that even where the acceptance is for value and in the usual course of business an express renunciation by the holder of the right to proceed against the acceptor operates as a waiver of such right, and discharges the acceptor.[35] And there is authority to support the doctrine. Where one Walpole holding a bill accepted by Pulteney, agreed to consider his acceptance at an end, and wrote in his bill-book the memorandum, "Pulteney's acceptance at an end," and kept the bill from 1772 to 1775 without calling on Pulteney, it was held that the latter was discharged.[36] In the cases where the renunciation is express, it will discharge the acceptor, although without consideration, for the reason that it would operate as a fraud upon him to hold otherwise. And the doctrine arises out of the peculiar relations of the parties.[37] The acceptor enters into his engagement with funds of the drawer in his hands, or under some business arrangement according to his course of dealing and if the holder expressly renounces claim against him, his hands are then untied, and he is left free to account to the drawer for the funds in his hands, or at least is no longer bound to appropriate them to the payment of the bill, or to carry out the arrangements contemplated for its payment. To permit the holder, after thus exonerating the acceptor, to recur to him for payment, would work in many cases the harshest injustice and he is estopped from doing so.[38]

§ 545. Requisites to renunciation of right to hold acceptor liable.—It is absolutely requisite according to some authorities that the renunciation of claim against the acceptor should be express.[39] In

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35. Bayley on Bills, 187, 188; Story on Bills, § 267; 1 Parsons on Notes and Bills, 325.

36. Walpole v. Pulteney, cited in Dingwall v. Dunster, 1 Doug. 248; Chitty, Jr., 401; Story on Bills, § 267; Succession of Foerster, 43 La. Ann. 190, 9 So. 17.

37. Byles on Bills [*191], 323. See remarks of that author quoted in note 1, § 542.

38. See Story on Bills, § 267. Very nearly concording with the text is the observation of Professor Parsons, in 1 Parsons on Notes and Bills, 326–327, note 10, where it is said: "The true ground it is conceived is, that a waiver works by way of estoppel rather than by way of contract. We should prefer to state the rule thus: an express renunciation, founded upon a consideration, or honestly and fairly acted upon by the holder, so as to put him in a worse situation than if the renunciation had not been made; or any act upon the part of the holder, giving the acceptor reasonable ground to infer that the former had renounced all claim upon him, and acted upon, amounts to discharge."

39. Dingwall v. Dunster, 1 Doug. 247, 13 East, 430 (1780); Byles on Bills (Sharswood's ed.) [*191], 323; Edwards on Bills, 435.

a case where the accommodation acceptor wrote to the holder that he had been informed that the drawer had taken up the bill, and given another to his (the holder's) satisfaction, and the holder took no notice of it, but received interest from the drawer for several years, and during that time did not call on the acceptor, it was held that the latter was not discharged. Ashurst, J., said: "An acceptor makes himself a debtor, and his case is different from that of the other parties to the bill. Nothing but an express discharge will do." Willes, J.: "I do not think silence can discharge the acceptor. No case of tacit discharge has been produced." Buller, J.: "Nothing but an express agreement can discharge an acceptor.[40] But if an agreement may discharge the acceptor we do not see why it may not be implied as well as expressed. It is the fact and not the form that should be looked to. And all that is necessary to discharge the acceptor is that the renunciation of claim against him should be clearly made out whether by words or acts. What is meant by the declaration that the renunciation must be express is doubtless nothing more than that it must be unmistakable, distinct, and direct, and is not to be inferred from the mere circumstance of delay. To say that "the circumstances must amount to an express renunciation" defines the correct doctrine—that it must be equally as clear.[41]

§ 546. What will not discharge acceptor.—It is quite clear that,

40. Dingwall v. Dunster, *supra.*

41. See Farquhar v. Southey, 2 Car. & P. 497; Wintermute v. Post, 4 N. J. L. 420. In Parker v. Leigh, 2 Stark. 228 (1817), indorsee sued acceptor. It appeared that when he threatened suit, the acceptor called to ascertain the amount, and the plaintiff showed an account containing several claims, among which was the bill sued on. The plaintiff said that as to the sum on the bill for £300, he should look to the drawer for it; that the sum of £160 was due upon it, and that he held the warrant of attorney of an Irish baronet for the amount. The defendant supposing that he was settling the whole of the plaintiff's claim, paid the amount, which he said he should not otherwise have done. The court did not regard the renunciation as unconditional; but that the holder only intended to look to the drawer first. This is, we think, the gist of the decision. Lord Ellenborough said: "If he does not expressly renounce all claim upon the security, it still remains valid in point of law. If the party were to forego a bill in equity on that account, it would be a good consideration for a renunciation of part of his claim; but the ground of renunciation must be distinctly proved. The plaintiff probably might suppose that Williams (the drawer) would pay the bill, and that he should not have occasion to call upon the defendant. I am of opinion that in point of law the circumstances do not amount to an express renunciation, and nothing short of that will be sufficient to discharge the defendant from his acceptance of the bill." Bayley on Bills, 189.

as the acceptor is the principal debtor, mere delay to proceed against him will not discharge him.[42] It was so held where, in a suit by an indorsee against the acceptor, no demand was proved till three months after the bill had fallen due, and the drawer had in the meantime become insolvent.[43] Nor will receiving interest from the drawer or indorser;[44] nor giving time to them when the acceptance is for value.[45] And when the acceptance is for accommodation, the case will not be altered, as we think,[46] though some cases take a different view.[47] This branch of the subject is amply discussed in the chapter on Principal and Surety.[48]

§ 547. Failure of consideration for acceptance.—If the consideration inducing an acceptance afterward fail, it will, nevertheless, be binding to the payee or other holder, if such failure were not occasioned by his fault;[49] and if by the acceptance the time of payment were extended, or the terms of the bill otherwise varied, the acceptor cannot object to the alteration;[50] nor will his obligation be varied by the fact that the bill was accepted after the time of payment had passed.[51]

§ 548. Effect on acceptance of taking security and giving time to another party.—An acceptor, being the primary debtor as to the holder, will not be discharged by taking security from the other parties, or giving them time to pay the bill.[52] But taking a coextensive security from the acceptor himself by specialty will discharge him,[53] unless it recognizes the bill as still existing, in which case it will

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42. *Ante*, § 545.

43. Anderson v. Cleveland, 13 East, 430 (1779). Lord Mansfield said: "The acceptor of a bill or maker of a note always remains liable. The acceptance is proof of having assets in his hands, and he ought never to part with them, unless he is sure that the bill has been paid by the drawer."

44. Farquhar v. Southey, 2 Car. & P. 497, Moody & M. 14; Dingwall v. Dunster, 1 Doug. 247.

45. Story on Bills, § 268; *post*, § 547.

46. 1 Parsons on Notes and Bills, 325. See chapter XLI, on Discharge of Surety, vol. II.

47. Ibid.; Beveridge v. Richmond, 14 Mo. App. 405.

48. See chapter XLI, vol. II.

49. Corbin v. Southgate, 3 Hen. & M. 319.

50. United States v. Bank of Metropolis, 15 Pet. 395; 2 Rob. Pr. (new ed.) 151.

51. Mitford v. Wallcot, 1 Salk. 129.

52. Story on Bills, § 268, and numerous cases cited. See *ante*, § 546.

53. Ansell v. Baker, 15 Q. B. 20 (69 Eng. C. L.).

not.[54] If the holder receive from the acceptor another bill indorsed by the acceptor, as satisfaction or security for the first bill, he discharges him both as acceptor and indorser, by neglect to give him notice of dishonor of the last bill; [55] but not if the last bill was given as collateral security and not indorsed by him.[56]

§ **549. Evidence of renunciation.**—A cancellation by the holder or by a third party is evidence of a waiver, and whether the cancellation in the latter case was by the holder's consent or not, is for the jury to determine.[57] If the cancellation is by mistake, it does not operate as a discharge; [58] but if the holder, knowing the mistake, causes the bill to be noted for nonacceptance, he is estopped from saying it was accepted.[59]

Under Negotiable Instrument statute.—The statute contains provisions respecting renunciation and cancellation of negotiable instruments,[60] and under the statute, it has been held that a paper written and signed by a payee, that "The enclosed note I wish to be cancelled in case of my death" was not an express renunciation of his rights either against the maker or upon the instrument.[61]

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54. Twopenny v. Young, 3 B. & C. 208.

55. Bridges v. Berry, 3 Taunt. 130.

56. Bishop v. Rowe, 3 Maule & S. 362.

57. Sweeting v. Halse, 9 B. & C. 365 (17 Eng. C. L.), 4 Man. & R. 287; Succession of Foerster, 43 La. Ann. 190, 9 So. 17.

58. Wilkinson v. Johnson, 3 B. & C. 428; Raper v. Birkbeck, 15 East, 17; Novelli v. Rossi, 2 B. & Ad. 757.

59. Sproat v. Matthews, 1 T. R. 182; Bentnick v. Dorrien, 6 East, 199; 1 Parsons on Notes and Bills, 328.

60. Appendix, secs. 122, 123. The statutory rule that where the plaintiff claimed that cancellation of a note was unintentional, by mistake, or without authority, the burden was upon him to establish such facts, was recognized in First Nat. Bank v. Gridley, 98 N. Y. S. 445, 112 App. Div. 398.

61. Leask v. Dew, 92 N. Y. S. 891, 102 App. Div. 529, affirmed 184 N. Y. 599, 77 N. E. 1190.

CHAPTER XIX

PROMISES TO ACCEPT BILLS OF EXCHANGE—HOW AFFECTED BY THE STATUTE OF FRAUDS

SECTION I

WRITTEN AND VERBAL PROMISES TO ACCEPT EXISTING AND NONEXISTING BILLS

§ 550. **First: A written promise to the drawer to accept an existing bill, which is communicated to a third party,** and induces him to take the bill upon the credit thereby excited, is undoubtedly, by the decisions in England and in the United States, the same as an actual acceptance. "The defendant," said Lord Ellenborough, in such a case, "has thereby enabled another with truth to assert, and furnished him with the means of proving that assertion, by the production of the defendant's letter, that he had undertaken to accept the bills, which in ordinary mercantile understanding amounts to an acceptance, and by that credit was attached to the bills. * * * It may be for the convenience of mercantile affairs that a bill may be accepted by a collateral writing, without the bill itself coming to the actual touch of the acceptor, which would sometimes create great delay. This acceptance being by writing comes within all the cases cited." [1] And to this extent go all the decisions.[2]

§ 551. **Second: A written promise to the drawer to accept a nonexisting bill, which is communicated to a third party,** and induces

1. Clarke v. Cock, 4 East, 57 (1803).

2. McEvers v. Mason, 10 Johns. 213; Goodrich v. Gordon, 15 Johns. 6; Wilson v. Clements, 3 Mass. 10; Greele v. Parker, 5 Wend. 514; Grant v. Shaw, 16 Mass. 341; Edson v. Fuller, 2 Fost. 183; 1 Parsons on Notes and Bills, 298; Cassel v. Dows, 1 Blatchf. C. C. 335; Cook v. Miltenberger, 23 La. Ann. 377; Steman v. Harrison, 42 Pa. St. 57; Vance v. Ward, 2 Dana, 95; Carrollton Bank v. Tayleur, 16 La. (O. S.) 490; Russell v. Wiggin, 2 Story C. C. 214; Storer v. Logan, 9 Mass. 58; Nimocks v. Woody, 97 N. C. 1; Ruiz v. Renald, 100 N. Y. 256; Brown v. Ambler, 66 Md. 395.

him to take the bill, it is also agreed by the English and United States decisions to be the same as an actual acceptance. The United States Supreme Court declares that "upon a review of the cases which are reported, a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterward takes the bill on the credit of the letter, a virtual acceptance." [3] And where the letter was written on the 17th of April, and the bills were drawn on the 1st of May following, and taken on the faith of the promise to accept contained in it, Lord Mansfield said: [4] "If one man, to give credit to another, makes an absolute promise to accept his bill, the drawer or any other person may show such promise on the exchange to get credit;" and held that the letter-writer would be bound as an acceptor. So, the promise must be unconditional, and to this extent the authorities generally concur.[5]

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3. Coolidge v. Payson, 2 Wheat. 66; Boyce v. Edwards, 4 Pet. 111; Schimmelpennich v. Bayard, 1 Pet. 264; Bank of Atchison County v. Bohart Commission Co., 84 Mo. App. 421.

4. Mason v. Hunt, 1 Doug. 297 (1780).

5. Kennedy v. Geddes, 8 Port. 268; Kennedy v. Geddes, 3 Ala. 581; Whilder v. M. & P. N. B., 64 Ala. 30; Kendrick v. Campbell, 1 Bailey, 552; Goodrich v. Gordon, 15 Johns. 11; Greele v. Parker, 5 Wend. 414; Storer v. Logan, 9 Mass. 58; Wilson v. Clements, 3 Mass. 10; Gates v. Parker, 43 Me. 544; Steman v. Harrison, 42 Pa. St. 57; Vance v. Ward, 2 Dana, 95; Russell v. Wiggin, 2 Story C. C. 214; Wildes v. Savage, 1 Story C. C. 22. But it is also held, in this case, that if the bill be payable after sight, and not after date, a promise to accept a non-existing bill does not amount to an acceptance. There are distinctions between an action on a bill or check as an accepted bill and one founded on a breach of promise to accept. Van Buskirk v. State Bank of Rocky Ford, 35 Colo. 142, 83 Pac. 778, 117 Am. St. Rep. 182. An unconditional promise in writing to accept an order is an acceptance of the order under the provisions of section 3197, Civ. Code. James v. E. G. Lyons Co., 134 Cal. 189, 66 Pac. 210, 147 Cal. 69, 81 Pac. 275, the court saying that the statute, in speaking of an unconditional promise, uses the word as it is generally used and understood in the law of contracts, and it was intended only that the promise spoken of should be free from all those limitations which are usually referred to as conditions in treaties on contracts. It was clearly not contemplated that a mere limitation as to the amount or purpose of the drafts would render the promise conditional, within the meaning of the statute. In Missouri, a bill may be accepted before it is drawn by a collateral undertaking, though it must be in writing, and unconditional, under Revised Statutes, 1889, section 721, but a letter promising to "pay his drafts for cost of cattle, or hogs, not to exceed two car loads at a time, made on day of shipment," is too general to be regarded as an actual acceptance of a particular bill. Bank of Atchison County v. Bohart Com. Co., 84 Mo. App. 421. Where live stock brokers promised to honor the draft of a cattle buyer, to be drawn on them for a

In a New York case where the defendant authorized in writing one Loveland as his agent to draw upon him, and money was advanced upon a bill drawn by the agent in pursuance of such authority, it was said: "The language of the instrument amounts to an unconditional written promise to accept the draft, plaintiff having discounted it upon the faith of the authority for a valuable consideration.[6] But where the right to draw is conditioned upon the performance of some act, or the existence of certain facts, it has been held that it must appear that the act has been performed, or the facts exist." [7]

§ **551a. Promise to accept by telegram.**—A telegram, it has been held, would stand on the same footing as a letter; and telegraphic authority to draw at thirty days for $2,500 was accordingly held a valid acceptance. It was said in Massachusetts by Morton, J.: "The telegram sent to the St. Louis Zinc Co. was an authority for it to draw the bills of exchange in suit, and necessarily implied a promise to accept it. This telegram was shown to the plaintiffs, who thereupon discounted the bill. They took the bill upon the faitn of the defendants' promise, and are entitled to hold them as acceptors." [8] Where a party was authorized by telegram to draw for a certain amount, and by a second telegram to increase the amount provisionally, and the party drew for both amounts, and obtained a discount of the second draft, suppressing the fact that the first draft for the smaller amount had already been drawn, the drawee was held not liable.[9] And where authority by telegram to draw was subsequently countermanded by

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certain amount, if two carloads were consigned to them, the promise was a conditional one, and they were not liable on a draft when only one car was consigned, unless they waived the condition by accepting and selling the property actually consigned to them, with notice that no further consignment had been or would be made. First State Bank of Aberdeen v. Thuet, 86 Minn. 364, 93 N. W. 1. Compare McPhee & McGinnity v. Fowler, 36 Colo. 202, 85 Pac. 421, holding that where the drawee of an order held property of the maker sufficient to pay the order, he was liable under his contract to accept the order, though there was a condition attached to his agreement to accept, which had not been performed by the maker.

6. Merchants' Bank v. Griswold, 9 Hun, 565.

7. Bank of Montreal v. Recknagel, 109 N. Y. 491; Germania Nat. Bank v. Taaks, 101 N. Y. 442; Bank of Atchison County v. Bohart Commission Co., 84 Mo. App. 421.

8. Central Sav. Bank v. Richards, 109 Mass. 414; Bank of Montreal v. Thomas, 16 Ont. 503; Garretson v. North Atchison Bank, 39 Fed. 166; Allentown Nat. Bank v. Kimes, 12 Phila. 329; Garretson v. Bank, 47 Fed. 867.

9. Nevada Bank v. Luce, 139 Mass. 488.

a later telegram, the drawee was held not liable in damages to a holder to whom the drawer had exhibited the authority, suppressing the countermand.[10]

§ 552. **Third: As to a written promise to the drawer to accept an existing bill, which was not communicated to the holder,** and therefore, did not enter into the inducement to take it, the decisions are in a condition of inextricable confusion. In a number of them the inquiry whether or not the holder was induced by the promise to take the bill, is held the criterion of its effect, whether such promise be written or verbal. In others, it is considered immaterial. In an early case, where the bill was drawn April 3d, and the letter, declaring that "it should be duly honored and placed to the drawer's debit," within ten days after, but not communicated to the holder, it was held an acceptance, available to him.[11] Subsequently, where the plaintiffs, who were indorsees of the payee, sued the drawee of a bill, who had written a letter to the drawer, after the bill had been protested for nonacceptance while in the plaintiff's hands, stating that they "would accept or certainly pay all the bills which have hitherto appeared." Lord Ellenborough adhered to this precedent, declaring that he only conformed to an established rule of law "on a subject which, least of all others, endured uncertainty and change." [12] But this view may be regarded as overruled, for the great preponderance of authority is to the effect that, unless the holder took the bill on the face of the promise, it is not an acceptance.[13] And in Massachusetts, it has been held that a promise to accept a bill contained in a letter to the drawer, written after the holder took the bill, would not enable him to sue the drawee as acceptor, even though the bill was expressed

10. First Nat. Bank v. Clark, 61 Md. 400, 48 Am. Rep. 114; Franklin Bank v. Lynch, 52 Md. 280.

11. Powell v. Monnier, 1 Atk. 611 (1737).

12. Wynne v. Raikes, 5 East, 514, 2 Smith, 98 (1804). See Fairlee v. Herring, 3 Bing. 525 (1826).

13. Pierson v. Dunlop, 2 Cowp. 571 (1777); Kennedy v. Geddes, 8 Port. 268; Lagrue v. Woodruff, 28 Ga. 649; McEvers v. Mason, 10 Johns. 207; Lewis v. Kramer, 3 Md. 289; Storer v. Logan, 8 Mass. 58; Wilson v. Clements, 3 Mass. 10. The rule that in the case of a written promise to the drawer to accept an existing bill, it is not an acceptance unless the holder took the bill on account of the promise, applies to written acceptances not written on the face of the paper, because it is the desire of the law to restrict within the narrowest limits the doctrine of liability to an action on negotiable paper by reason of anything not appearing on the face of the paper. Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345

to be drawn "against twelve bales of cotton," and had been discounted on the credit thereof.[14] There are, however, cases in the United States which hold the contrary view as applied to existing bills, and maintain that they need not have been taken on faith of the promise to make it operate as an acceptance.[15]

§ 553. **Fourth: As to a written promise to the drawer to accept a nonexisting bill, which was not communicated to the holder** before he received it, the decisions are alike jarring and perplexing. More than a century ago it was held that a written promise, contained in a letter, to honor a bill to be drawn, operated as an acceptance of it, although the credit on which the bill was drawn was given before the promise to accept was made; and the doctrine there recognized is that a naked promise to accept operates as an acceptance, whether the holder take the bill on the faith of it or not. Lord Mansfield said: "'I will give the bill due honor,' is the same as accepting it. If a man agrees that he will do the formal part, the law looks upon it (in the case of an acceptance of a bill) as if actually done. This is an engagement 'to accept the bill, if there was a necessity to accept it, and to pay it when due,' and they could not afterward retract. It would be very destructive to trade, and to trust in commercial dealing if they could." Mr. Justice Wilmot said: "*Fides servanda est;* an acceptance for the honor of the drawer shall bind the acceptor, and so shall a verbal acceptance. And whether this be an actual acceptance, or an agreement to accept, it ought equally to bind." Mr. Justice Yates, said: "A promise to accept is the same as an actual acceptance; and a small matter amounts to an acceptance." Mr. Justice Aston declared that "a promise to accept was an implied acceptance." [16]

§ **554.** But Lord Mansfield soon qualified the opinion quoted,

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14. Bank of St. Louis v. Rice, 98 Mass. 288, 107 Mass. 41.

15. Mason v. Dousay, 35 Ill. 424; Jones v. Bank of Iowa, 34 Ill. 313; Read v. Marsh, 5 B. Mon. 8.

16. Pillan v. Van Mierop, 3 Burr. 1663 (1875). See *ante,* § 552. In Read v. Marsh, 5 B. Mon. 10 (1844), Breck, J., said: "It seems to be now well settled that a letter, promising to accept or protect a bill, whether written before or after it is drawn, may operate as an acceptance, and that it may so operate, although the holder has not been induced by such letter or promise to take the bill." A promise to accept or to honor a bill or order not in existence, but subsequently drawn in favor of the promisee, who takes it for value or for a pre-existing debt, is as effective as an acceptance after the order is drawn. Barnsdall v. Waltemeyer, 142 Fed. 415.

by observing in a subsequent case (where, however, the promise was made to the holder of an existing bill), that: "It has been truly said, as a general rule, that the mere answer of a merchant to the drawer of a bill, saying, 'he will duly honor it,' is no acceptance unless accompanied with circumstances which may induce a third person to take the bill by indorsement. But if there are any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer." [17] And this view generally obtains, that the promise to the drawer must induce the holder to take the bill thereafter drawn, in order to amount to acceptance of it.[18]

§ **555. Fifth: As to a verbal promise to accept an existing bill, which is communicated to the holder,** and induces him to take it, it was conceded by Le Blanc, J., in the case cited below,[19] that it would amount to an acceptance (upon the authority of Pierson v. Dunlop, *ante*, § 554), but the bill in question having been drawn subsequent to the promise, this particular question did not arise.

§ **556. Sixth: As to a verbal promise to accept a nonexisting bill, which is communicated to the holder** and induces him to take it; this particular point was decided by the Court of Exchequer which held that, notwithstanding the bill had been discounted on the credit of the promise, by the holder, it did not amount to an acceptance of it.[20] And the same view has been taken in the United States.[21]

§ **557. Seventh: As to a verbal promise to accept an existing bill, not communicated to the holder before he takes it.**—We know of

17. Pierson v. Dunlop, 2 Cow. 571 (1777).

18. Lewis v. Kramer, 3 Md. 289; Storer v. Logan, 9 Mass. 58; *ante*, § 552; Seaboard Nat. Bank v. Burleigh, 74 Hun, 400, 26 N. Y. Supp. 587.

19. Johnson v. Collings, 1 East, 98 (1800).

20. Bank of Ireland v. Archer, 11 M. & W. (1843), Parke, B.

21. Kennedy v. Geddes, 8 Port. 268. See 2 Rob. Pr. (new ed.) 156; Rulo First Nat. Bank v. Gordon, 45 Mo. App. 293. Where a bond and mortgage were made by an owner of land to secure advances which should be made by the holder of the bond in the construction of buildings on the land, the holder of the bond and mortgage is liable for the promise of his agent to accept orders drawn by the owner notwithstanding he has furnished funds to the full amount of the bond and mortgage. Eighth Ward Bank of Brooklyn v. McLoughlin, 99 N. Y. S. 362, 113 App. Div. 750. An oral promise, given for the benefit of a purchaser of goods, that the promisor "would stand for" a certain amount on a thirty day draft drawn on the promisor was a promise to accept a draft and not to pay for goods bought. Pake v. Wilson, 127 Ala. 240, 28 So. 665.

no case in which this identical question has been decided. Its determination must be reached according to the principles stated under other heads.

Since the above suggestion was made in a former edition of this work the precise point was decided in Vermont in favor of the validity of a parol promise made by the drawee to the drawer of a bill after it had been drawn, but which had not been communicated to the payee before he received it, the court, by Taft, J., saying: "An acceptance may be by parol, and may be given the drawer, and may be given after the bill is drawn as in the case at bar. The acceptance inures to the benefit of the payee. It is in its legal effect a promise to him.[22]

§ **558. Eighth: As to a verbal promise to accept a nonexisting bill not communicated to the holder,** this was held no acceptance in an English case; but Le Blanc, J., thought, if he had taken the bill on the faith of the promise, it would be different. Grose, J., declared that: "No authority has been cited to show that by the law merchant a mere promise to accept a bill to be drawn in future, amounts to an actual acceptance of the bill when drawn." Lord Kenyon, C. J., said that the fact that this was a nonexisting bill varied the case from those previously decided, and that "he knew not by what law such a promise was binding as an acceptance," [23] and this view is generally concurred in.[24]

§ **559.** From this review of the adjudicated cases it will be seen how vacillating and conflicting they have been. In some the criterion is declared to be, whether or not the holder took the bill on the faith of the promise. In others, this is deemed immaterial. In some, a distinction is taken between existing and nonexisting bills; and in some between written and verbal promises. And it is often lamented that anything has been deemed to be an acceptance of a bill but an express acceptance in writing.[25] Certainly this would have greatly simplified the law; but this is not the law. And amid jarring opinions we are left to pursue the course which reason commends. As verbal acceptance is as effectual as written acceptance, it would seem to

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22. *In re* Goddard's Estate, 66 Vt. 419, 29 Atl. 634. See § 559.

23. Johnson v. Collings, 1 East, 98 (1800). See 2 Rob. Pr. (new ed.) 153.

24. Bank of Michigan v. Ely, 17 Wend. 508; Wilson v. Clements, 3 Mass. 10.

25. Johnson v. Collings, 1 East, 98 (1800), Lord Kenyon, C. J.; Boyce v. Edwards, 4 Pet. 122; Espy v. Bank of Cincinnati, 18 Wall. 620; 2 Rob. Pr. (new ed.) 153.

follow as a necessary sequence, that a parol promise to accept should be as effectual as a written promise—provided no statutory enactment discriminated between them. In either case, however, it is a sound view of the law, as it seems to us, to require either that the promise should be made to the holder of the bill then in possession of it, in which case he is brought in privity with the drawee; [26] or that the promise, when made to the drawer, should have been communicated to the holder, and entered into the inducement to his taking it. It is true, that if there had been an actual acceptance of the bill by parol, or otherwise, before the holder took it, it would be available to him, although he was unconscious of it until afterward. It would be the same as a faintly written acceptance on the bill, subsequently discovered—for it was engrafted on the bill in law at the time. But a promise to accept is different. When made to the drawer it may be construed as authority to him to tell the holder that the drawee will accept it. If the drawer exercises that authority the holder is brought in privity with the drawee, and the promise to accept may be regarded, in such a case, as an acceptance by anticipation. But if not communicated to the holder the drawer only is wronged by the breach of promise—the proposition from the drawee to the drawer, the authority from the drawee is unexercised—no new credit or obligation respecting the bill is created; and the drawer, in case of subsequent dishonor, must be left to sue the drawee for breach of promise to accept.

§ 560. What requisite to make promise to accept nonexisting bill amount to acceptance.—In order that the promise to accept a nonexisting bill shall amount to acceptance, there are two indispensable requisites: *First,* that it should be written within a reasonable time before the bill is drawn, for otherwise the drawer will be presumed to have declined to act on the authority granted him to draw, and the drawee will not be construed to have intended an indefinite liability.[27] And *second,* the promise must so describe the bill that there can be no doubt of its application to it.[28] High authorities go further, and de-

26. Miln v. Prest, 4 Campb. 393 (1816).

27. Coolidge v. Payson, 2 Wheat. 66; Greele v. Parker, 5 Wend. 414; Cassel v. Dows, 1 Blatchf. C. C. 335. In First Nat. Bank v. Hensley, 2 Fed. 609, it was held that a year's delay was unreasonable. Putnam Nat. Bank v. Snow, 172 Mass. 569, 52 N. E. 1079.

28. See Franklin Bank v. Lynch, 52 Md. 270; Krakauer v. Chapman, 16 App. Div. 115, 45 N. Y. Supp. 127, citing text. It is not necessary that the promise,

clare that the promise must put its finger, so to speak, upon the specific bill; and that otherwise, if the promise be broken, the promisor may be sued by the drawer for breach of promise to accept; but cannot be sued by any one as acceptor.[29] Thus where a letter of credit addressed to Mr. A. stated: "Mr. B. C., of D., is authorized to draw on us for the amount of any lots of cotton which he may buy and ship to us, as soon after as opportunity will offer; such drafts will be duly honored

to be binding under the statute, section 3197, Civ. Code, must relate to and describe a particular bill, or the particular bill referred to in the complaint; it is sufficient if it can be fairly inferred from the language of the promise that it was intended to include the bill of exchange upon which the action is based. James v. E. G. Lyons Co., 134 Cal. 189, 66 Pac. 210, 147 Cal. 69, 81 Pac. 275. No obligation to honor any draft excepting one shipped to the drawee is assumed by a live stock commission firm in writing thus to a bank: "We will honor Mr. Payne's draft for one thousand dollars on hogs or cattle. Should he want more at any time, have him call on us by phone and we will make arrangements to handle his stock. We limit our customers as we have to keep our bank account up here." Stough v. Healy, 75 Kan. 526, 89 Pac. 898, 10 L. R. A. (N. S.) 918, the court saying that it was not a promise to pay any draft within the amount named, without regard to the use made of the proceeds or the shipment of any stock to the drawees.

29. See *ante*, § 511; Coolidge v. Payson, 2 Wheat. 66; Boyce v. Edwards, 4 Pet. 111; Schimmelpennich v. Bayard, 1 Pet. 234; Cassel v. Dows, 1 Blatchf. 335; Carrollton Bank v. Tayleur, 16 La. (O. S.) 490; Carnegie v. Morrison, 2 Metc. (Mass.) 406; Brinkman v. Hunter, 73 Mo. 172. In Franklin Bank v. Lynch, 52 Md. 270, it was held that a telegraphic message, "You may draw on me for $700," was not an acceptance, but might be sued on as a promise to accept, the court saying that the telegram did not point to or designate the draft. First Nat. Bank v. Clark, 61 Md. 400; Brinkman v. Hunter, 73 Mo. 172. And accordingly it has been held that where the defendants had guaranteed a draft in sixty days, with interest at 7 per cent., drawn by B. for wool sold to a corporation of which they were the directors, the indorsement being as follows: "We hereby guarantee the payment of the within draft and waive notice of nonpayment and protest"; and they agreed that if B. would ship certain other wool to the corporation and draw upon it for the price thereof at sixty days, they would "indorse the draft as heretofore," held that this did not bind them to indorse the draft bearing interest; the words "as heretofore" having reference only to the form of the indorsement and not to the amount or rate of interest of the draft. See Tansey v. Peterson, 88 Iowa, 544, 55 N. W. 577. And a promise to accept a draft for a stated sum does not extend to a draft for that sum with exchange, thus increasing the amount of the draft. Lindley v. First Nat. Bank, 76 Iowa, 630; State Bank of Fox Lake v. Citizens' Nat. Bank of King City, 114 Mo. App. 663, 90 S. W. 123. Where a draft for a certain amount "with exchange" was returned with a letter refusing to accept the draft but promising to accept one for $5 less than that stated, the letter is a promise to accept a duplicate of the draft for the smaller amount, and this means for such amount "with exchange." Stough v. Healy, 75 Kan. 526, 89 Pac. 898, 10 L. R. A. (N. S.) 918.

by, yours, etc., E. F.;" it was held that it did not operate as an acceptance of certain bills drawn by A. on E. F. The reasons assigned were, first, that it was written two years before the bill was drawn, and, further, "what is conclusive against its being considered an acceptance," said Thompson, J., "is, that it has no reference whatever to these particular bills, but is a general authority to draw at any time, and to any amount, upon lots of cotton shipped to them." [30]

§ **561.** But, while it should clearly appear that the bill corresponds to the authority, or promise, we cannot perceive that there should be any nicety of description either as to number, amount, date, or otherwise. The burden of proof is upon the holder to establish that by comparing the face of the bill with the promise; or the bill in connection with the transaction in which it is drawn with the promise—that it comes fairly and reasonably within its terms. This done, there can be no reason why the promisor may not be sued as an acceptor, as well as for breach of promise to accept. In either case the correspondence of the bill with the promise must be proved, and a cause of action existing there does not seem to be any sufficient reason for determining that the character of the proof must shape its form, and also determine whether it shall be brought by the holder of the bill who has taken it on the faith of the promise, or by the drawer, whose just expectations have been disappointed. The doctrine that the drawer may sue for breach of promise to accept when the bill is not accurately described in the promise, but that such promise does not operate as an acceptance, has been well said to rest on a distinction without a difference.[31] And in New York the views here expressed have been adopted in numerous cases. Where the letter of credit addressed to the drawers, ran, "I hereby authorize you to draw on me, at ninety days, from time to time, for such amounts as you may require, provided that the whole amount running and unpaid shall not exceed three thousand dollars, etc.," Bronson, J.,[32] after quoting the cases cited in the subjoined note,[33] said: "These cases show that the written promise to accept need not contain a particular descrip-

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30. Boyce v. Edwards, 4 Pet. 11. As to when letter of credit amounts to acceptance, see *post*, § 1799, vol. II, and Lefargue v. Harrison, 70 Cal. 380.

31. Bissell v. Lewis, 4 Mich. 450; Nelson v. First Nat. Bank, 48 Ill. 39.

32. Ulster County Bank v. McFarland, 5 Hill (N. Y.), 432 (1843), 3 Den. 553 (1846); Seaboard Nat. Bank v. Burleigh, 74 Hun, 400, 26 N. Y. Supp. 587.

33. Parker v. Greele, 2 Wend. 545; Greele v. Parker, 5 Wend. 414; Bank of Michigan v. Ely, 17 Wend. 508.

tion or identification of the bill to be drawn. It is enough that it be drawn in pursuance of the authority. The plaintiff received and discounted the bill upon the faith of the letter, and it was drawn in pursuance of the authority; the judge was right in charging the jury that there was a sufficient acceptance." And in an Illinois case this view was admirably stated and illustrated.[34]

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34. In Nelson v. First Nat. Bank, 48 Ill. 39, it appeared that a party had taken a check upon the faith of a promise by the bank to pay the drawer's check. The court said: "It is objected in the present case by counsel for appellee, that the promise to pay by the bank did not sufficiently identify the checks to which the promise was to be applied, and the case of Boyce v. Edwards, 4 Pet. 122, is cited as an authority in point. The authority of that case is certainly to the effect that the promise of the bank cannot be treated as a technical acceptance, for want of identification of the checks. We may be permitted to say, however, that the difference between a promise to accept a particular bill or check to be thereafter drawn, and a promise to accept all checks which a person might draw for a specific purpose, is so extremely technical and refined that we should be inclined, where the plaintiff had received the check or bill upon the faith of the promise, and had sued on the promise as an acceptance, to hold with the Supreme Court of Michigan, Bissell v. Lewis, 4 Mich. 450, that it was a distinction without a difference. It seems to us a fair construction of the language of Chief Justice Marshall would require, not that the promise should describe the bill to be drawn and accepted, by its date and amount, and the name of the drawee, as that would be generally impossible; but merely in such a mode that there could be no possible doubt as to the application of the promise to the bill to be drawn. A description of sufficient certainty could thus be made to apply to a series of bills, as well as to one bill. In the present case, foi example, there can be no difficulty in applying the promise of the bank to the check under consideration. Indeed, in this very case of Boyce v. Edwards, the court, while giving so technical a construction to the language of Chief Justice Marshall, say the reason of the rule is, 'that the party who takes the bill upon the credit of such authority may not be mistaken in its application.' If that be the reason of the rule, it would seem that any description should be held sufficiently certain which would leave no doubt that a particular bill or series of bills was intended by the promise, and had been negotiated upon its faith." "The question, however, whether the promise in this case can be considered a technical acceptance, we do not propose to decide, and it is, indeed, of no practical importance, for in this same case of Boyce v. Edwards, on which counsel for appellant rely as showing the promise not to be an actual acceptance, it is held that, though a recovery cannot be had upon the bill as an accepted bill, it may be had in an action founded upon a breach of the promise to accept. In an action of the latter character the court say, 'The evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise.' The court further say, 'as respects the rights and the remedy of the immediate parties to the promise to accept, and all others who may take bills upon the credit of such promise, they are equally secure and equally attainable by an action for the breach of the promise to accept, as they could be by an action on the bill itself.'

§ 562. To what bills the doctrines stated are applicable.—The rule that the promise to accept, designating the specific bill, amounts to an acceptance, seems applicable only to the cases of bills payable on demand, or at a fixed time after date, and not to bills payable at or after sight; for, in order to constitute an acceptance in the latter cases, a presentment is indispensable, since the time that the bill is to run cannot be otherwise ascertained.[35] And a mere promise to accept without more, it is thought, applies only to bills payable at the drawee's or payee's place of business.[36]

An offer to accept a draft which is still in the drawer's hands may be withdrawn at any time before it has been actually presented for acceptance.[37]

§ 563. In respect to the person who may avail himself of an acceptance, it is obvious that if it be written upon the bill, every holder acquires it as constituting in chief the instrument itself. And there seems to be no difference in the law when the acceptance is contained in a separate writing, or has been by parol merely, and whether the holder has been informed of its existence or not. Thus, where a letter was written by the drawees of a bill in England to the drawer in America, stating that "they would certainly accept or pay the bill," it was held an acceptance in law, although the bill was refused payment, and the letter was not received by the drawer until after the bill became due.[38] And so, where there had been a parol acceptance of a bill, it was held that the acceptor was bound to the indorsee, although the latter had caused the bill to be protested in ignorance of such acceptance.

"It has been determined in a great variety of cases," said Best,

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That a recovery may be had in an action of the character above indicated, is also held in Cassel v. Dows, 1 Blatchf. 335; Russell v. Wiggins, 2 Story, 213; Lonsdale v. Lafayette Bank, 18 Ohio, 126; Bissell v. Lewis, 4 Mich. 450. See also Storer v. Logan, 9 Mass. 55; Carnegie v. Morrison, 2 Metc. (Mass.) 406; Goodrich v. Gordon, 15 Johns. 6; Schimmelpennich v. Bayard, 1 Pet. 264." "That the promise of the bank in this case so far identified the checks to which it was to be applied as to enable the appellant to maintain an action for its breach, is settled by the foregoing authorities and by others which might be cited." Brinkman v. Hunter, 73 Mo. 172, citing the text.

35. See Story on Bills (Bennett's ed.), § 249; Edwards on Bills, 414; Wildes v. Savage, 1 Story C. C. 28, cited approvingly in Franklin Bank v. Lynch, 52 Md. 270.

36. Michigan State Bank v. Leavenworth, 28 Vt. 209.

37. Ilsley v. Jones, 12 Gray, 260.

38. Wynne v. Raikes, 5 East, 514 (1804).

C. J., "that if a bill comes into a man's hands with a parol acceptance, though the party who receives the bill does not know of that parol acceptance, he has a right to avail himself of it afterward. It is impossible for any man to doubt, on principles of common sense, that such ought to be the law; for if I take a bill, I take it with every advantage the holder had before it came into my hands. * * * If the plaintiffs were ignorant of this (the parol acceptance), it is quite impossible that that which they have done in ignorance can prejudice any right which was before vested in them." [39]

§ 564. **The measure of damages** for nonperformance of an agreement to accept a draft for the drawer's accommodation, which is still in his hands, is the inconvenience and loss thereby occasioned to him, and not the amount of the draft.[40] In case a debt is lost by the negligence of an agent to present the bill for acceptance or payment, the measure of damages is *prima facie* the amount of the bill, but evidence is admissible to reduce the amount to a nominal sum.[41] And where a former agent, without actual authority, and with nothing due him, has drawn on his former principal through a bank instructed by the principal to pay such drafts, in a suit by the bank to recover the amount paid on such draft, it can recover only the amount paid before receiving notice of the agent's want of authority.[42]

§ 565. If, by promise and liability to accept, a drawee induces a drawer to draw upon him, and then refuses to honor the bill, he will be liable for all damages incurred, including protest. In a case before the United States Supreme Court it appeared that the defendant had ordered the plaintiff to purchase salt for him, and drew on him for the amount, and he having so purchased and drawn, it was held that the defendant was bound to accept the bills, and having failed to do so that the plaintiff was entitled to recover the amount of the bills, with damages and costs of protest, upon a count for money paid and expended, and that the bills themselves were good evidence on that count.[43]

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39. Fairlee v. Herring, 3 Bing. 525, 11 Moore, 520 (1826).

40. Ilsley v. Jones, 12 Gray, 260.

41. Allen v. Suydam, 20 Wend. 321; Van Wort v. Woolley, 5 Dowl. & R. See §§ 329, 330.

42. Baeschlin v. Chamberlain Banking House, 67 Nebr. 196, 93 N. W. 412, holding further that the fact that the remainder had been previously placed to the agent's credit in the bank is not sufficient.

43. Riggs v. Lindsay, 7 Cranch, 500. At common law a breach of a verbal

It seems that if a person should write a factor that he had consigned him certain goods, and would draw a bill on the credit thereof for a certain amount, the factor, if he accepted the assignment, would be bound to accept the bill; and that the payee of such a bill could sue the factor as upon a breach of promise to accept.[44]

SECTION II

HOW PAROL ACCEPTANCE IS AFFECTED BY THE STATUTE OF FRAUDS

§ 566. In those States where there is no statute prescribing what shall constitute an acceptance, the question of the validity of a verbal acceptance may become referable to the Statute of Frauds, which declares that all promises to pay the debt of another shall be void unless in writing. An eminent legal writer says on this subject that: "The parol acceptance being no more than a parol promise, it seems to the author that whether or not the acceptance can be charged on such promise may depend on whether the promise is to pay a debt of his own, or to answer for the debt of another. For, in the latter case, no action can be lawfully brought unless the promise, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby or his agent. Such is the provision of the Code of Virginia." [45] This view has been taken in Maine, where it was held that a parol promise to accept an order from a debtor in favor of his creditor, between whom and the maker of the promise there was no privity, was invalid under the Statute of Frauds, as a promise to pay the debt of another.[46] And there are other authorities to the same effect—that acceptance must be in writing if it be to pay the debt of another, otherwise it will be void.[47]

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agreement to accept a bill of exchange when drawn gives sufficient ground for an action against the promisor by the payee if the latter relied on the promise in taking and discounting the draft. Bank of Laddonia v. Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648 (1909).

44. 1 Parsons on Notes and Bills, 291.

45. Conway Robinson, in his Practice, vol. II (new ed.), p. 153; Louisville, etc., R. Co. v. Caldwell, 98 Ind. 250, citing the text.

46. Plummer v. Lyman, 49 Me. 229; Haeberle v. O'Day, 61 Mo. App. 390.

47. Wakefield v. Greenhood, 29 Cal. 600, Sawyer, J., dissenting; Manley v. Geagan, 105 Mass. 445. A verbal acceptance by the drawee of a bill of exchange, who holds no fund belonging to the drawer and is not indebted to him, is within the statute of frauds; and the fact that the order was left with the drawee when

§ 567. Whether the Statute of Frauds restricts the law merchant. —It may well be doubted, however, whether or not the Statute of Frauds applies to that class of engagements which are regulated by the peculiar doctrines of the law merchant, and the weight of reason and of authority incline us to the opinion that it does not. A recent discriminating writer on "Verbal Agreements" lays it down as a cardinal principle, that "contracts, the construction, validity, and evidence of which depend upon so much of the law merchant as the common law recognizes, or the provisions of some other statute, are exceptions to the operation of this clause of the Statute of Frauds;" [48] and the numerous cases which have held a verbal acceptance or promise to accept as binding are generally based upon the open assertion or tacit acknowledgment of this theory. A standard author considers a bill of exchange as a preferable form of security, on the ground that the Statute of Frauds does not apply to it; [49] and such is the general understanding, as we believe, of the commercial world.[50]

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he verbally agreed to pay it does not make any difference. Chicago Heights Lumber Co. v. Miller, 219 Ill. 79, 76 N. E. 52, 109 Am. St. Rep. 314, affirming 117 Ill. App. 468.

48. Throop on Verbal Agreements, p. 159, § 85.

49. Chitty on Bills, page 4, in which it is said: "This security is in some respects preferable to many others of a more formal nature; for each of the parties to a bill, by merely writing his name upon it as drawer, acceptor, or indorser, impliedly guarantees the due payment of it at maturity, and the consideration, in respect of which he became a party to it, can rarely be inquired into; whereas, in the case of an ordinary guaranty, the statute against frauds requires the consideration to be expressed, and other matters of form which frequently render an implied guarantee wholly inoperative." In Nelson v. First Nat. Bank of Chicago, 48 Ill. 41, where a parol promise to pay checks of the drawer was held binding, the court said, per Lawrence, J.: "If a parol promise to accept an existing though nonpresent check is binding, we are wholly unable to discover why it should not be equally so as to a nonexisting bill, under the authority of the American cases, in none of which is any distinction made between parol and written promises of this character, except where a written promise is expressly required by statute." See *ante*, pp. 424, 425.

50. Edward Hine's Lumber Co. v. Anderson, 141 Ill. App. 527, quoting text; Spalding v. Andrews, 48 Pa. Ct. 411; *In re* Goddard's Estate, 66 Vt. 419, 29 Atl. 634. In Butler v. Prentiss, 6 Mass. 430, Parsons, C. J., says: "Neither a bill of exchange on its face nor the indorsements are within the Statute of Frauds." In Pillans v. Van Mierop, 3 Burr. 1674, the defendants, in expectation of having funds of the payee in their hands, agreed to honor the plaintiff's draft to be thereafter drawn to reimburse them for money lent him. After the loan, but before the draft was drawn, the payee failed, and the defendants notified the plaintiff that the draft would not be accepted; but it was drawn nevertheless and dis-

§ 568. It is not necessary, however, as it seems, to maintain that the Statute of Frauds is wholly inapplicable to the cases arising under the law merchant (although such is, as we think, the true doctrine), in order to sustain the validity of verbal acceptances and promises to accept. They may be enforced in some cases upon well-established principles of estoppel. The theory of a bill of exchange is that the drawer puts the payee in his place, and gives him the right to receive funds in the drawee's hands belonging to him. When the drawee accepts or promises to accept, he says, in effect, to the payee, "It is true, I have funds of the drawer, and will pay them to you as he directs." Now, if he really has funds, he does not undertake to pay "the debt of another" than himself, but simply to pay his own debt "to another" than his original creditor, as is conceded; [51] and when an acceptance or promise to accept is communicated to the holder, and he takes the bill on the faith thereof, he has a right to presume the condition of things which the acceptor or promisor to accept impliedly asserts, and such acceptor or promisor should be estopped from denying it. A promise by A. to pay his debt to B., by paying B.'s debt to C., has been well said, in Wisconsin, by Dixon, C. J., not to come under the Statute of Frauds, because simply a promise to pay his own debt "in that particular way." [52]

§ 569. Verbal acceptance without funds.—There are cases which hold that a verbal acceptance without funds, or promise to accept, would not be valid, no consideration being given to the inquiry

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honored. The agreement being by written correspondence, no question arose as to the Statute of Fraud; but Lord Mansfield said he had no idea that "promises for the debt of another" were applicable to the present case; that this was a mercantile transaction, and credit was given upon a supposition "that the person who was to draw upon the undertakers within a certain time had goods in his hands, or would have them. Here the plaintiffs trusted to this undertaking, therefore it is quite upon another foundation than that of a naked promise from one to pay the debt of another." As between the acceptor and the payee, the acceptance of an order is an original and direct undertaking and is not within the statute of frauds. Ragsdale v. Gresham, 141 Ala. 308, 37 So. 367, citing text.

51. Shields v. Middleton, 2 Cranch C. C. 205; Van Reimsdyck v. Kane, 1 Gall. C. C. 633; Pike v. Irwin, 1 Sandf. 14; Strohecker v. Cohen, 1 Spear (S. C.), 349. Brown on Statute of Frauds, §§ 172–174. Agreement to pay one's own debt "to another" is not agreement to pay debt of another. Spadine v. Reed, 7 Bush, 455; Besshears v. Rowe, 46 Mo. 501. See also Spalding v. Andrews, 48 Pa. St. 411; Dunbar v. Smith, 66 Ala. 490.

52. Putney v. Farnham, 27 Wis. 187. See § 570, note 54; *In re* Goddard's Estate, 66 Vt. 419, 29 Atl. 634.

whether or not the holder knew the fact that the acceptance or promise was for accommodation.[53] When the holder knows such promise or acceptance to be for accommodation, it stands on the same footing as a promise to indorse, which must be in writing in order to be valid, being plainly an engagement to answer for the debt of another;[54] but the inferences to be drawn without such knowledge are altogether different, and it would create rather than prevent fraud, to permit the drawee to repudiate his acknowledgment of funds after a third party has contracted upon the faith of it.[55]

§ 570. **When Statute of Frauds does not apply.**—Where there is a new and independent consideration moving at the time from the party to whom the promise is made, the Statute of Frauds does not apply.[56] Thus, the United States Supreme Court held, that if a person verbally undertake to accept a bill in consideration that another will purchase one already drawn, or to be thereafter drawn, and as an inducement to the purchaser to take it, and the bill is purchased upon the credit of such promise for a sufficient consideration, such promise to accept was binding upon the party, and that it was an original promise, and not a promise to pay the debt of another within the Statute of Frauds. In this case the suit was for damages for breach of the contract, and, therefore, it was not decided that such a promise constituted acceptance.[57]

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53. Pike v. Irwin, 1 Sandf. 14; Quin v. Hanford, 1 Hill (N. Y.), 82; Brown on Statute of Frauds, 174. See Townsley v. Sumrall, 2 Pet. 170.

54. Carville v. Crane, 5 Hill (N. Y.), 583; Taylor v. Drake, 4 Strobh. 431; Barnett v. Wing, 62 Hun, 125, 16 N. Y. Supp. 567.

55. See Edward Hine's Lumber Co. v. Anderson, 141 Ill. App. 527.

56. See Brown on Statute of Frauds, § 175, note. A note or memorandum sufficient to take a contract out of the operation of the Statute of Frauds, must state the whole contract with reasonable certainty, so that the names of the parties thereto and the substance thereof may be made to appear from the writing itself, without recourse to parol evidence. See Cheever v. Schall, 87 Hun, 32, 33 N. Y. Supp. 751; Guild & Co. v. Conrad, Q. B. 885 (1894). If goods were sold on the sole credit of an oral promise, given for the benefit of the purchaser, that the promisee "would stand for" a certain amount on a thirty day draft drawn on the promisor, his promise is original and not within the statute; but if any credit was given to the person to whom the goods were delivered, the promise is collateral and within the statute of frauds. Pake v. Wilson, 127 Ala. 240, 28 So. 665.

57. Townley v. Sumrall, 2 Pet. 170, Story, J., said: "This is not a case falling within the object or mischiefs of the Statute of Frauds. If A. says to B., pay so much money to C., and I will repay it to you, it is an original, independent promise; and if the money is paid on the faith of it, it has been always deemed an obligatory contract, even though it be by parol, because there is an original

consideration moving between the immediate parties to the contract. Damage to the promisee constitutes as good a consideration as a benefit to the promisor. In cases not absolutely closed by authority, this court has already expressed a strong inclination not to extend the operation of the Statute of Frauds so as to embrace original and distinct promises made by different persons at the same time upon the same general consideration. D'Wolf v. Rabaud, 1 Pet. 476. * * * The question whether a parol promise to accept a nonexisting bill amounts to an acceptance of the bill when drawn, is quite a different question, and does not arise in this case. If the promise to accept were binding, the plaintiff would be entitled to recover, although it should not be deemed a virtual acceptance; and the point, whether it was an acceptance or not, does not appear to have been made in the court below." Kelley v. Greenough, 9 Wash. 659, 38 Pac. 158, citing the text.

CHAPTER XX

PRESENTMENT FOR PAYMENT

§ 571. The engagement entered into by the acceptor of a bill and the maker of a note is, that it shall be paid at its maturity—that is, on the day that it falls due, and at the place specified for payment, if any place be designated—upon its presentment. This engagement is absolute, but that of the drawer of a bill and the indorser of a bill or note is conditional, and contingent upon the true presentment at maturity, and notice in case it is not paid. The maker and acceptor are bound, although the bill or note be not presented on the day it falls due; [1] but the drawer and indorsers are discharged if such presentment be not made, unless some sufficient cause excuses the holder for failure to perform that duty.[2] It is important, therefore, to ascertain how the presentment should be provided for by the holder of

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1. Sims v. National Commercial Bank, 73 Ala. 251; Wescott v. Patton, 10 Colo. App. 545, 51 Pac. 1021; McNair v. Moore, 55 S. C. 435, 33 S. E. 491, 74 Am. St. Rep. 760. The fact that one is an accommodation maker of a promissory note, does not alter this rule. See Carlton v. White, 99 Ga. 384, 27 S. E. 704, affirming the case of Mayer v. Thomas, 97 Ga. 772, 25 S. E. 961; Steiner & Lobman v. Jeffries *et al.*, 118 Ala. 573, 24 So. 37; Gormley v. Hartray, 105 Ill. App. 625; Bardsley v. Washington Mill Co., 54 Wash. 553, 103 Pac. 822, 132 Am. St. Rep. 1133. Where a contract for the purchase of land was assigned, and the assignee assumed the payment of the notes given for the purchase money, it was not necessary that the payee should demand payment before bringing suit. Baltes Land Stone & Oil Co. v. Sutton, 32 Ind. App. 14, 69 N. E. 179.

2. Chitty on Bills (13th Am. ed.) [*353], 396; Story on Notes, § 201; Bayley on Bills, chap. VII, § 1; Cox v. National Bank, 100 U. S. (10 Otto.) 712; Magruder v. Bank of Washington, 3 Pet. 92; Germania Bank v. Trapnell, 118 Ga. 578, 45 S. E. 446; Westbay v. Stone, 112 Mo. App. 411, 87 S. W. 34; Harvey v. Girard Nat. Bank, 119 Pa. St. 212; Farquhar & Co. v. Higham, 16 N. D. 106, 112 N. W. 557. Where it does not appear in a case whether payment of a note would have been made on presentment and demand, the presumption is that it would have been so paid, and the failure of such presentment and demand injured the indorser to the extent of the full amount of the note and interest, and discharged him from all liability upon the note. Hayward v. Empire State Sugar Co., 93 N. Y. S. 449, 105 App. Div. 21. But if the indorser, who is discharged by such negligence, voluntarily pay the note, he cannot afterward recover from the holder. Oil Well Supply Co. v. Exchange Nat. Bank (Pa.), 18 Atl. 935.

the bill or note, lest by failure to observe the necessary precautions, the drawer and indorsers may be discharged, and the solvency of his debt destroyed or impaired. We shall consider, therefore, in order:

(1) The person by whom the bill or note should be presented.

(2) The person to whom the bill or note should be presented.

(3) The time of presentment.

(4) Days of grace, and computation of time.

(5) The place of presentment.

(6) The mode of presentment.

Under Negotiable Instrument statute.—Under the statute, presentment of the instrument for payment is necessary to charge indorsers,[3] and it is as necessary, when a note provides that the option to declare the whole debt due for nonpayment of interest may be exercised, to make demand in order to charge a mere indorser, as in other cases.[4]

SECTION I

BY WHOM PRESENTMENT FOR PAYMENT MUST BE MADE

§ 572. Any *bona fide* holder of a negotiable instrument, or any one lawfully in possession of it for the purpose of receiving payment, may present it for payment at maturity.[5] A notary public, or any agent duly authorized, may make presentment of the instrument for payment; and it is well settled that this authority need not be in writing.[6]

§ 573. When possession of bill or note evidences holder's right to present it for payment.—The mere possession of a negotiable instrument which is payable to the order of the payee, and is indorsed

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3. Appendix, sec. 70. Williams v. Paintsville Nat. Bank, 137 S. W. 535, 143 Ky. 781, as to accommodation indorsers.

4. Albraith v. Shepard, 43 Wash. 698, 86 Pac. 1113.

5. Lefty v. Mills, 4 T. R. 170; Bachellor v. Priest, 12 Pick. 399; Sussex Bank v. Baldwin, 2 Harr. 487; Hofrichter v. Enyeart, 71 Nebr. 771, 99 N. W. 658. A person in possession under a blank indorsement or with an indorsement to himself will be deemed a holder for this purpose. Ewen v. Wilboe, 99 Ill. App. 132, affirmed 70 N. E. 575, 208 Ill. 492.

6. Seaver v. Lincoln, 21 Pick. 267, in which case presentment was made by a sheriff; Shed v. Brett, 1 Pick. 40; Hartford Bank v. Barry, 17 Mass. 94; Freeman v. Boynton, 7 Mass. 483; Sussex Bank v. Baldwin, 2 Harr. 487; Hartford Bank v. Stedman, 3 Conn. 489; Bank of Utica v. Smith, 18 Johns. 230; Williams v. Matthews, 18 Cow. 252.

by him in blank, or of a negotiable instrument payable to bearer, is in itself sufficient evidence of his right to present it, and to demand payment thereof,[7] and payment to such person will always be valid.

7. Hays v. Dickey, 67 Ark. 169, 53 S. W. 887; Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103; American Agricultural Chemical Co. v. Graham, 9 Ga. App. 479, 71 S. E. 761; South & Lane People's Nat. Bank, 4 Ga. App. 92, 60 S. E. 1087; Henderson v. Davisson, 157 Ill. 379, 41 N. E. 560; Magel v. Milligan, 150 Ind. 583, 65 Am. St. Rep. 382; Crumrine v. Estate of Crumrine, 14 Ind. App. 641, 43 N. E. 322; Carnahan v. Lloyd, 4 Kan. App. 605, 46 Pac. 323; Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; Bachellor v. Priest, 12 Pick. 399; Huntley v. Hitchinson, 91 Minn. 244, 97 N. W. 971; Thomas v. Thomas, 107 Mo. 459, 18 S. W. 27; Weber v. Orten, 91 Mo. 680, citing the text; Lowery v. Danforth, 95 Mo. App. 441, 69 S. W. 39; Kuch v. Cornett, 79 Mo. App. 574; Allen v. Harris, 79 Mo. App. 490; New England Loan & Trust Co. v. Robinson, 56 Nebr. 51, 76 N. W. 415, 71 Am. St. Rep. 657; City Nat. Bank v. Thomas, 46 Nebr. 862, 65 N. W. 895; Brooks v. Holt, 65 Mo. App. 613; Newmarket Sav. Bank v. Hanson, 67 N. H. 502, 32 Atl. 774; Drew v. Phelps, 18 N. H. 572; Havana Cent. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12; National Revere Bank v. National Bank of the Republic, 172 N. Y. 102, 64 N. E. 799; Fourth Nat. Bank v. Mahon, 38 App. Div. 198, 56 N. Y. Supp. 566; Southwick v. Ely, 15 N. H. 541; Beaman v. Ward, 132 N. C. 68, 43 S. E. 545; Triplett v. Foster, 115 N. C. 335, 20 S. E. 475; Jackson v. Love, 82 N. C. 405; Drinkall v. Movins State Bank, 11 N. B. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693; Brynjolfson v. Osthus, 12 N. D. 42, 96 N. W. 261; Price v. Winnebago Nat. Bank, 14 Okl. 268, 79 Pac. 105; Owens v. Snell, 29 Oreg. 483, 44 Pac. 824; Third Nat. Bank v. Angell, 18 R. I. 1, 29 Atl. 500; Watford v. Wingham, 64 S. C. 509, 42 S. E. 597; Mars v. Mars, 27 S. C. 135; Cone v. Brown, 15 Rich. (S. C.) 262; Myrick Bros. Co. v. Jackson, 44 Tex. Civ. App. 553, 99 S. W. 143; Garrett v. Findlater, 21 Tex. Civ. App. 635, 53 S. W. 839; Grant v. Ennis, 5 Tex. Civ. App. 44, 23 S. W. 998; Brooks v. James, 16 Wash. 335, 47 Pac. 751; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. 834; Milwaukee Trust Co. v. Van Valkenburg, 132 Wis. 638, 112 N. W. 1083. See *post*, §§ 812 (especially note 89), 1191, 1230. The fact that such note is past due when possession is received will not alter the presumption. Marshall v. Myers, 96 Mo. App. 643, 70 S. W. 927. Possession of certificates of deposit indorsed by the payee is evidence of the indorsee's title to them. Kavanagh v. Bank of America, 139 Ill. 404, 88 N. E. 171. Production of a note and coupon for interest thereon, but detached therefrom, by a person not named therein as payee, the note and coupon as well being in form payable to order, and the note being duly indorsed, but the coupon having no indorsement, raises a presumption that the owner became the holder of the note when the coupon was attached thereto, and formed a mere incident thereof, and so did not require any indorsement separately from that on the note. Milwaukee Trust Co. v. Van Valkenburgh, 132 Wis. 638, 112 N. W. 1083. If a payee of a note makes an indorsement thereon to G., but delivers it to M., and M. brings action thereon, his possession of the note, with proof that he paid the payee therefor, will raise a presumption that the note was never delivered to G., and is sufficient *prima facie* evidence of M.'s ownership of the note. Menzie v. Smith, 63 Nebr. 666, 88 N. W. 855. The rule does not apply to an agent who has been furnished with money by

unless he is known to the payor to have acquired possession wrongfully. And if the party holding possession of a negotiable instrument which is not indorsed by the payee, or has been indorsed by him specially to another, and has not been indorsed over by such indorsee, but has been placed in the holder's hands as agent, for the purpose of receiving payment, such agent may present it for payment, and payment to him will be valid; even, as it has been held, although made in a manner different from that provided for in the instructions to the agent. The fact that the instrument is not indorsed by the owner is, as has been held, under such circumstances, of no importance. Such indorsement would be necessary to the negotiation of the instrument, but it would not be necessary to the validity of the payment.[8]

Under Negotiable Instrument statute.—Where a note, indorsed in blank, is presented for discount, the person in possession is the bearer,[9] but mere naked possession of paper payable to order, not indorsed, does not prove title.[10]

§ 574. Possession of bill or note unindorsed by payee no evidence of right to present it.—When, however, a bill or note unindorsed by the payee, or indorsed by the payee specially, and unindorsed by his indorsee, is in the possession of another person, the question whether or not its bare possession is evidence of his right to demand payment, is of a different character. Without the indorsement of the payee or special indorsee, such possession would clearly not entitle the holder to the privileges of a *bona fide* holder for value, as at best he would only hold the equitable title to the instrument,[11] and could not sue at law upon it as a ground of action.[12] But it

his principal to purchase notes. Threadgill v. Commissioners, 116 N. C. 616, 21 S. E. 425. The rule stated in the text has been held in Indiana to be inapplicable to nonnegotiable paper. See Mitchell v. St. Mary, 148 Ind. 111, 47 N. E. 564, 50 N. E. 564. See also, §§ 741, 781*a*, 812, 1181*a*.

8. See Doubleday v. Kress, 60 Barb. 196 (1871), and § 575; Snyder v. Moon, 5 Kan. App. 447, 49 Pac. 327; State v. Stebbins, 132 Mo. 332, 33 S. W. 1147, citing text.

9. Appendix, sec. 191. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

10. Swanby v. Northern State Bank (Wis.), 137 N. W. 763.

11. See chapter XXII, on Transfer by Assignment, § 741; also chapter XXIV, section VI; Macky v. Craig, 144 Ind. 223, 43 N. E. 6; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, citing text; Hair v. Edwards, 104 Mo. App. 213, 77 S. W. 1089; Johnson County Savings Bank v. Scroggin Drug Co., 152 N. C. 142, 67 N. E. 253.

12. Hull v. Conover, 35 Ind. 372 (1871); Portern v. Cushman, 19 Ill. 572;

might be contended (and we were at one time of the opinion) that such possession should be regarded as evidence of the holder's right to demand payment as the agent of the payee or special indorsee; and that a payment to him would be valid, although he was in fact not authorized to receive it.[13] But this we are now satisfied was a misconception of the law.[14] Certainly if he were in fact the owner's agent, a payment to him would be valid, although he had produced no other evidence of the fact than the unindorsed instrument at the time when he received it. But the payment without other evidence of ownership or agency would be at the payor's risk. Possession without the indorsement might have been acquired by fraud or theft, and alone could not constitute sufficient evidence of any right to the instrument whatever, being without transfer of title, or any collateral circumstance of a transfer in trust. Had the owner authorized the holder to act as his agent, an indorsement "for collection" in terms, an indorsement in blank, or a written authority to collect it, would be the natural and proper mode of communicating the fact.

§ **575. Presentment by unauthorized person.**—Mr. Chitty says that any person who happens, whether by accident or otherwise (as by the failure of an agent), to be the holder at the time the bill or note becomes due, and although he has no right to require payment for his own benefit, may and ought to demand payment, and give notice of nonpayment so as to prevent loss.[15]

Doubtless the act of such unauthorized person would be sufficient to prevent loss, as the owner's ratification of it would be presumed; but it is not probable that the learned author intended to intimate the opinion that a payment to him would be valid unless ratified, or that his mere possession of the instrument, unless it was payable to bearer or indorsed in blank, was in itself evidence of a right to act as

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Bausmann v. Kelley, 38 Minn. 205; Jackson v. Bank, 92 Tenn. 154, 20 S. W. 802, 36 Am. St. Rep. 81.

13. See Southern Law Review for April, 1873, p. 273.

14. See *ante*, § 573; *post*, § 1230; Story on Agency, § 98; Doubleday v. Kress, 50 N. Y. 413 (overruling same case in 60 Barb. 181), Peckham, J., saying: "Mere possession of the note by the assumed agent, Murray, unindorsed, without any other sustaining facts, is not sufficient to authorize payment to him." Hannon v. Sullivan, 3 Mo. App. 583; Barnett v. Ringgold, 80 Ky. 289.

15. Chitty on Bills (13th Am. ed.) [*365], 410. See also [*394], 445. In a very early case it is said: "If a wrong person do show the bill, by the custom of merchants this is a good payment." Anonymous, Styles, 366 (1652); Edwards on Bills, 494.

or for the owner. The doctrine of the text is sustained by high authority;[16] and since the foregoing was written has been judicially established in New York,[17] and found favor in Ohio.[18] But in North Carolina the contrary view has been taken.[19] If the holder have and exhibit extraneous evidence of his ownership of the instrument, such, for instance, as an assignment and mortgage duly executed, this will suffice without indorsement, and the party to whom it is presented would then have no right to insist on an indorsement.[20] Mere possession of a bond will not justify payment to the holder without authority, express or implied, to collect.[21]

§ 576. Presentment by indorser.—Whether or not an indorser of a bill or note which has upon it a subsequent special indorsement, and no prior indorsement in blank, is shown by mere possession of the paper to be entitled to demand payment, has been much questioned. There are a number of cases which hold that such an indorser cannot demand payment, for the reason that it would seem from the face of the paper itself that he had parted with his title; and that a receipt from the last indorsee, or a reindorsement to him, would be necessary to re-establish it. This doctrine was laid down in an early case by the Supreme Court of the United States,[22] and some of the State tribunals have taken the same view;[23] but in a more

16. Thompson on Bills, 245; Pothier, 168.

17. Wardrop v. Dunlop, 1 Hun, 325 (1874); Doubleday v. Kress, 50 N. Y. 410 (1872); Hannon v. Sullivan, 3 Mo. App. 583 (accord).

18. Dodge v. National Exchange Bank, 30 Ohio St. 1.

19. Jackson v. Love, 82 N. C. 405; Holly v. Holly, 94 N. C. 672.

20. Pease v. Warren, 25 Mich. 9 (1874). The bank denied the right of the holder to insist on payment without proving the payee's indorsement. Cooley, J., said: "The indorsement would have been necessary to enable him (the holder) to sue at law on the notes in his own name, but if he was the real owner he was entitled to demand and receive payment whether they were indorsed or not, and the formal assignment, duly acknowledged and recorded, was the best possible proof of ownership."

21. Brown v. Taylor, 32 Gratt. 135. Query as to commercial paper, p. 137. See article in Virginia Law Journal for January, 1881, p. 1.

22. Welch v. Lindo, 7 Cranch S. C. 159.

23. Thompson v. Flower, 13 Mart. 301, where it was held that the last indorsement being canceled was insufficient. See also Sprigg v. Cuny, 19 Mart. 253. In Dehers v. Harriott, 1 Show. 163, it was held that a bill payable to A., and indorsed by him to B., and by B. to C., might be sued on by B., it appearing, however, that C. had no interest. And in Mendez v. Carreroon, 1 Ld. Raym. 742, the prior indorser suing the acceptor was nonsuited, it appearing that he had been sued by a subsequent indorser, and not appearing that he had paid the bill.

recent case the Supreme Court of the United States expressed the opposite opinion, which seems to us the correct one.[24] Some of the cases hold that possession of the bill by a prior indorser is sufficient where the subsequent indorsements are canceled;[25] but the better view seems to be, and it is sustained by most respectable authority, that it makes no difference that the subsequent indorsements remain uncanceled.[26] The party may not be still the proprietor in interest of the instrument, but his possession of it would be *prima facie* evidence that he had paid it himself to a subsequent indorsee, and had reacquired the right to demand payment.[27] And it would also be consistent with the idea that he was holding it and suing for the benefit of a subsequent indorsee.[28]

§ **577.** It is intimated by Story that a different rule might apply where the note was not originally negotiable to order, or, if negotiable, had been indorsed restrictively to a particular person only; and where, of course, in either case, the holder in possession is not the payee or the special indorsee thereof. Under such circumstances he considers the mere production of the note is not ordinarily deemed a sufficient title or authority to demand payment.[29] This is not in accordance with the views of Chitty, or the *ratio decidendi* of cases already quoted; for while title to the instrument cannot pass without the indorsement, the possession, it has been thought, may still be evidence of agency to demand payment. For reasons already stated, we think the views of Story are correct.[30]

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24. Dugan v. United States, 3 Wheat. 172 (1818). See Domingo Franca v. ——, 12 Mod. 345 (1699).

25. Bank of Utica v. Smith, 18 Johns. 230; Bowie v. Duvall, 1 Gill & J. 175; Chautauqua County Bank v. Davis, 21 Wend. 584; Dollfus v. Frosch, 1 Den. 367; Brinkley v. Going, Breese, 288; Kyle v. Thompson, 2 Scam. 432.

26. See *post*, § 1198; Dugan v. United States, 3 Wheat. 172; Lonsdale v. Brown, 3 Wash. C. C. 404; Picquet v. Curtis, 1 Sumn. 478; Norris v. Badger, 6 Cow. 449; Bank of Kansas City v. Mills, 24 Kan. 610; Bynum v. Hobbs (Tex. Civ. App.), 121 S. W. 900.

27. Gumaer v. Jackson, 37 Colo. 39, 86 Pac. 885; Carolina Locust Pin & Mica Co. v. Chattanooga Machinery Co., 3 Ga. App. 732, 60 S. E. 375; Van Vlissingen v. Roth, 121 Ill. App. 600; Alderton v. Williams, 130 Mich. 626, 90 N. W. 661.

28. See Batchellor v. Priest, 12 Pick. 399; Bank of the United States v. United States, 2 How. 711; Jones v. Fort, 9 B. & C. 764; Merz v. Kaiser, 20 La. Ann. 377; Henderson v. Davisson, 157 Ill. 379, 41 N. E. 560.

29. Story on Notes, § 247.

30. See *ante*, §§ 574, 575.

§ 578. When holder is dead.—If the holder die before the time for presentment for payment, it must be made by his personal representative.[31] If there be no personal representative at the time, presentment and demand within a reasonable time after his appointment will be sufficient to charge subsequent parties, although presentment and demand were not made at maturity.[32]

If the holder's estate has passed to an assignee in bankruptcy, the assignee, or some person authorized by him, should make presentment.[33] If the holder is a *femme sole*, and she has become a married woman at maturity, the presentment should be made by her husband; and a presentment by her, without his consent or authority, would be insufficient to charge the maker, or validate a payment. If the note belonged to a partnership, and one member be dead at maturity, presentment should be made by the survivor.

§ 579. Whether or not demand of payment of a foreign bill by a notary's clerk is sufficient as ground of protest.—There is no doubt, as we have already seen, that any person, whether he be a notary or not, having a bill or note in possession, and whether the bill be foreign or inland, may demand payment and receive the amount due; and that a payment to such person by the drawee will discharge his obligation.

But in respect to foreign bills which are dishonored by refusal of acceptance or payment, the liability of the drawer and indorsers can only be preserved by a protest and notice—notice alone being necessary in the case of inland bills.[34] And the custom is, when a foreign bill is dishonored, to cause it to be placed in the hands of a notary public, and again presented on the same day, if indeed it were not presented by a notary in the first instance, and to be protested by him for nonacceptance or payment, as the case may be.[35] The question has been much debated whether or not a presentment by a notary's clerk will suffice as the foundation of such protest, and the authorities are at war upon it.

§ 580. English authorities.—In Leftly v. Mills,[36] Buller, J.,

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31. 1 Parsons on Notes and Bills, 360; Story on Promissory Notes, § 249.
32. White v. Stoddard, 11 Gray, 528.
33. 1 Parsons on Notes and Bills, 360; Edwards on Bills, 494.
34. Joseph v. Salomon, 19 Fla. 633, citing the text.
35. Brooks' Notary (3d Ed.), 71 (1876).
36. 4 T. R. 170 (1791).

said: "I am not satisfied that it was a proper demand, for it was only made by the banker's clerk. The demand of a foreign bill must be made by a notary public, because he is a public officer." This *dictum* led Mr. Chitty, in an early edition of his work, to give apparent approval of the doctrine that the notary in person must make the demand. A correspondence then ensued between him and the notaries of London, the latter insisting "not only that by mercantile usage such presentment is regular (by a notary's clerk), and is almost invariably adopted, but that as far back as the memory of the oldest notary here can extend, it has always been the custom so to present them." And further, that commercial business must instantly come to a stand if a different rule prevailed; "because it would be just as impossible for all the bills in this country to be presented in person by notaries as by bankers." In reply, Mr. Chitty insisted, after careful consideration, that "it was clear, that strictly the notary himself must in all cases make demand of payment before he protests;" [37] though he observes elsewhere in his work, that "the number of bills requiring presentment is frequently so great as to render a presentment by the notary himself impossible; and the constant practice is for the clerk to make the presentment." [38] And in a recent edition, it is said in a note by the learned editor, that the practice to allow the notary's clerk to make the demand "is amply justified by the law of principal and agent, and not questioned in any case which has occurred before the courts of England." [39] Professor Parsons quotes this language with seeming approbation,[40] and there are considerations which go far to show that at common law demand by the notary's clerk is sufficient. In Scotland it is considered sufficient,[41] and sufficiency of such demand, it has been said, is implied from a case in the Common Pleas,[42] but it seems that in that case the bill was not foreign.

And in another English case,[43] reported more fully in Chitty on Bills,[44] than by the reporters, and cited in New York,[45] it would seem that Buller's, J., *dictum* is considered the law of the realm. It ap-

37. Chitty on Bills (13th Am. ed.) [*490], 519.

38. Ibid. [*333], 374.

39. Ibid. (10th Eng. ed.) 355, note 4.

40. 1 Parsons on Notes and Bills, 360.

41. Thompson on Bills (Wilson's ed.), 311.

42. Poole v. Dicas, 1 Bing. N. C. 649 (1835). See 1 Parsons on Notes and Bills, 641.

43. Vandewall v. Tyrrell, 1 Moody & M. 87, 22 Eng. C. L. 258.

44. Chitty on Bills (8th Lond. ed.), p. 495, note; (13th Am. ed.) 519, note.

45. Onondaga County Bank v. Bates, 3 Hill (N. Y.), 57.

peared that the notary's clerk presented a foreign bill, drawn in Jamaica, on London, and afterward drew up the certificate of protest, which was signed and sealed by the notary himself, in due form. It is stated in Chitty, though not by the reporters, that Lord Tenterden, C. J., said it was a void protest—that it was a false certificate—that the notary had signed a paper stating "I presented and demanded," when it appeared in evidence that only his clerk had presented the bill, and he himself knew nothing of it. And the predominant view is that in England the demand should be made by the notary in person.

§ 581. State of the authorities in the United States.—If it were a question of original impression we should strongly favor the admissibility of demand by a notary's clerk; and upon principle we cannot perceive any sufficient reason why it should not be allowed. In point of fact, the custom is almost universal for the demand to be made by the clerk, and whenever such custom is proved as existing in a particular place, it is recognized as controlling. When the demand is made by the clerk, the responsibility of the notary is nevertheless as binding, as the clerk is merely his agent; and every consideration of convenience would seem to sustain the practice.

But in the United States the courts have, almost without dissent, held that at common law it is necessary that the notary himself should make the demand of a foreign bill; and that in order to establish the sufficiency of a demand by his clerk, a general custom, or a statutory enactment authorizing such practice, must be proved.[46]

In a recent case decided in Missouri,[47] in an action upon a foreign bill drawn in St. Louis on New York, and in its sequel decided in New York [48] in an action against the notary for negligence in not protesting it duly, the necessity of demand by the notary in person was illustrated in the most positive form.

In the first case (Commercial Bank v. Barksdale), it appeared that

46. Sacrider v. Brown, 3 McLean, 481 (1844); Ocean Nat. Bank v. Williams, 102 Mass. 143; Cribbs v. Adams, 13 Gray, 597; Chenowith v. Chamberlin, 6 B. Mon. 60 (1845); Bank of Kentucky v. Carey, 6 B. Mon. 629 (1846); McClane v. Fitch, 4 B. Mon. 600 (1844); Carter v. Brown, 6 Humphr. 548; Commercial Bank v. Barksdale, 36 Mo. 563 (1865); Wittenberg v. Spalding, 33 Mo. 421; Commercial Bank v. Varnum, 3 Lans. 86 (1870), is overruled in 49 N. Y. 275 (1872); Burch v. Hill, 24 Tex. 153; Locke v. Huling, 24 Tex. 311; Donegan v. Wood, 49 Ala. 242.

47. Commercial Bank v. Barksdale, 36 Mo. 563 (1865).

48. Commercial Bank v. Varnum, 49 N. Y. (1872); overruling same case in 3 Lans. 86.

the bill was protested in New York city on the 5th of January, 1861; that payment was demanded by Turney, a notary; that the protest was made out by Varnum, also a notary, who was a copartner with Turney in the notarial business. Holmes, J., delivering the opinion said: "It is well established that the presentment and demand must be made by the same notary who protests the bill; it cannot be done by a clerk, or by any other person as his agent, though he be also a notary. The protest is to be evidence of the facts stated in it, of which the notary is supposed to have personal knowledge, and credit is given to his official statements by the commercial world on the faith of his public and official character." [49]

In court the instrument speaks as a witness. Such statements made merely upon the information of another person would amount to hearsay only, if the notary were himself upon the stand as a witness.

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49. "The notarial protest must state facts known to the person who makes it, and he cannot delegate his official character or his functions to another. The presentment and protest are governed by the law of the place where the bill is payable; and on this principle it has been held that where the statute law of the State (as in Louisiana) authorizes notaries to appoint deputies, a protest made by such deputy, duly appointed, would be recognized as sufficient. Carter v. Brown, 7 Humphr. 548. But no case seems to have gone further than this: Such deputy may be considered as having a semi-official character, and sufficient authority by force of the statute; but without some change in the general rule of law, one notary can neither delegate his functions nor impart his own official character to another. Here two notaries were in partnership in general business, and one of them undertook to present the bill and make the demand, and the other to draw up the protest and give the notice. They were both notaries, but as such they were distinct public officers, and there can be no partnership in such matters. No law or custom was proved to have existed in the State or city of New York which changes the general rule of the law merchant on this subject. It must follow that the protest made by Varnum can have no validity; nor will that made by Turney any more avail. It seems to be clearly established by the general current of authority that the protest must be made on the same day with the presentment and demand, though a noting of the protest on the bill itself may be regarded as an incipient protest, or a preliminary step toward a protest, which may be completed afterward, at any time, by drawing up the protest in form. Here there was no noting of the bill for protest, or any memorandum marked on the bill by Turney; nor is there any proof of any distinct note, entry, or memorandum of protest made by him on that day, in any other way than upon the bill itself. It would appear that he did not make the demand for the purpose of protesting the bill himself, but as the agent of his partner, the other notary. He neither protested the bill nor noted it for protest at the time; and his drawing up of a protest, long afterward, must be regarded as having no basis of contemporaneous fact or present authority, and as being entirely void."

§ **582.** In the case in New York, the Commercial Bank sued the notary, Varnum, into whose hands the bill was placed for demand, and protest if necessary, for negligence in not duly performing his function. And it appeared that he gave the bill to his partner, Turney, who presented it for payment; and on the same day an entry was made in Varnum's protest book under the joint supervision of Turney and himself, stating that the bill was presented and protested by Varnum. This was signed by Varnum; Turney's name not being mentioned, but his initials were placed opposite. It was held that by the common law the defendant would be liable, but that evidence of a general custom would be admissible to show that in New York the practice for a notary's clerk to make the demand was recognized.[50]

To the same effect are numerous cases, and we know of no case in the United States in which a contrary doctrine has been distinctly held; so that however weighty may seem the considerations which uphold a contrary view, in this country the principle may be regarded as settled.[51]

§ **583. Distinction taken in Kentucky between clerk and deputy.** —In Kentucky a distinction exists between the inferences to be drawn

50. Commercial Bank v. Varnum, 49 N. Y. 275 (1872), overruling same case in 3 Lans. 86 (1870), Peckham, J., saying: "Conceding the rule at common law to be, in the absence of any custom or usage on the subject, that the presentment and demand must be made by the notary in person, was the testimony offered, of the universal usage in the city of New York for the clerk of the notary to make such presentment and demand, admissible? It may be remarked that the usage of merchants has established the great body of the law in reference to bills of exchange. It gave grace to such bills, and this changed the contract. It has settled the particular time of demand by the notary. The rule of law that requires a protest of a foreign bill is wholly founded upon the custom of merchants. Dennistoun v. Stewart, 17 How. 606. In the absence of any established rule of law in this State, by decision of the court or by any statute requiring a demand to be made by the notary in person, it is not perceived why a usage such as was approved was not admissible as proof upon the subject. This was the view of the learned justice who tried this case, but he was of opinion that the law had been otherwise settled in this State. In this, I think, he was clearly in error. All the decisions referred to by him or upon the argument at bar were confined to the admissibility of certificates of protest, and notice of bills, and notes under the statute of 1833, p. 395. That statute made no provision as to what constituted a protest, but provided simply what the notary's certificate should *prima facie* prove, and had no reference whatever to the admissibility of this offered evidence, or to the duties of notaries at common law in protesting a foreign bill."

51. Chenowith v. Chamberlin, 6 B. Mon. 60 (1845); Ellis' Admr. v. Commercial Bank, 7 How. (Miss.) 294 (1843); Sacrider v. Brown, 3 McLean, 381 (1844).

from a demand by the notary's clerk and by his deputy, which seems to us too refining, and not to be sustained. There it was held that proof of a general custom for the notary's clerk to make demand prevailing in New Orleans was admissible, and proof of presentment by the clerk sufficient.[52] In a subsequent case, where the presentment was also made in New Orleans by a notary's clerk, it was held insufficient as foundation for the prctest, because nc evidence of the custom authorizing it appeared in the record.[53] These two decisions were, doubtless, correct; but in a still later case it was held that where the notary certified respecting a foreign bill that he "presented the bill for payment by his deputy, Auguste Commandeur," it was sufficient, although there was no evidence that by the laws of Louisiana a deputy was authorized to perform such functions. The court held that official authority or authority of the principal might be implied in the deputy, when no such authority would be implied in a mere clerk. And while it could find no authority, as was observed, for presentation by a deputy, it considered that the impracticability of the notary acting in person in a great commercial city, in all cases, and the seeming necessity for authorizing action by deputy, furnished *prima facie* presumption that the presentation and protest were made in accordance with the law or usage of New Orleans.[54]

This decision is directly controverted by the cases in Missouri and New York, before cited and seems to us objectionable, on the double ground that the notary who makes the presentment must also make the protest, and that departures from the common law, whether by statute, must be proved. Indeed, the courts of Kentucky could take no judicial notice of the statute of Louisiana, which must be placed before them in evidence in authentic form before it can be noticed.

§ 584. The rule applies to protests of inland bills and promissory notes when protest of such instruments is allowable.—The rule requiring the demand and protest to be made by the notary in person applies, in order to give it full force and effect, although the instrument protested may be an inland bill or a promissory note. As to them, no protest is necessary, but by statute in many of the States it may be made, and be accorded the same effect as in the case of a

52. McClane v. Fitch, 4 B. Mon. 600 (1844).

53. Chenowith v. Chamberlin, 5 B. Mon. 60 (1845).

54. Bank of Kentucky v. Gary, 6 B. Mon. 629 (1846). In Louisiana the notary's deputy may make presentment and perform notarial functions. Buckley v. Seymour, 30 La. Ann. 1384.

foreign bill. But in such cases, in order to possess the same effect, it must be made by the same person, and based upon the same preliminary notarial demand, as in the case of a foreign bill. For *quoad* the form and effect of the protest they are placed on the same footing as foreign bills. Thus, in New York, where the protest certified that the notary caused the note to be presented, it was held insufficient, because he could not delegate his functions to another; and that, indeed, such certificate would be objectionable as evidence of presentment, because the notary had no personal or official knowledge of the fact, and it was but hearsay evidence at most.[55] So it was held that certificate of the notary that the note was presented by his clerk would be defective on like grounds.[56]

§ **585.** But it is to be observed respecting inland bills and promissory notes that as no protest is necessary, and although no protest when relied on will be valid unless made by the notary in person, yet demand of payment of an inland bill or of a promissory note may be made by the clerk, which will be sufficient as the foundation of notice from the notary, or other person acting for the holder. But the testimony of the clerk would be necessary to show the due presentment, and the testimony of the notary or other party acting for the holder to show due transmission or service of the notice.[57]

§ **586. Statutory authority or general custom may be proved.**— It is clear upon principle, and it is agreed by the authorities, that where there is a statute authorizing the demand or protest to be made by a notary's deputy or clerk, or by any other official, or where there is a general custom recognizing such practice it may be proved, and that in such cases it will be sufficient to show that the statute or custom was observed. Thus, it has been held by the United States Supreme Court that where, as in Mississippi (as was proved), a justice of the peace is authorized by statute to perform the functions and duties of a notary, his act of protest is equally valid as that of a notary. "*Quoad hoc*," said the court, "he acts as a notary."[58] And so, where it was in evidence that, by the laws of Louisiana, each notary was authorized to appoint one or more deputies to assist him

55. Onondaga County Bank v. Bates, 3 Hill (N. Y.), 56 (1842).

56. Sheldon v. Benham, 4 Hill, 129 (1843); to same effect, Warnick v. Crane, 4 Den. 460 (1847); Gawtry v. Doane, 51 N. Y. 90 (1872).

57. Hunt v. Maybee, 7 N. Y. 269 (1852).

58. Burke v. McKay, 2 How. 66 (1844).

in making protests and delivering notices, and the protest on its face stated that the notary A., by his deputy B., presented the bill, etc., it was held sufficient.[59]

So, it has been held in an number of cases, that evidence of a custom for a notary to act by his clerk is admissible,[60] and in Massachusetts the doctrine was well expressed by Bigelow, J.[61]

In Virginia, the Court of Appeals was unanimous as to this doctrine, but divided equally as to whether or not at common law, presentment by the notary's clerk was sufficient.[62]

It is quite clear that in no case can the clerk make the protest, however it may be determined as to the presentment and demand.[63]

§ 587. Custom for notary's clerk to make presentment must be shown to relate to foreign bills.—There may be a custom for notaries' clerks to make presentment as foundation of protest of inland bills and of promissory notes, and yet it may not extend to include foreign bills. And when a protest of a foreign bill has been based on presentment by a notary's clerk, the plaintiff must not only show a general custom or practice for the clerk to make presentment of bills and notes, but must show distinctly that the custom extended to foreign bills. As said in a Massachusetts case, by Ames, J.:[64] "The plaintiff wholly failed to prove the existence of any well-settled local usage in New York that would authorize a notary in the case of a foreign bill to make a presentment and demand of payment by

59. Carter v. Union Bank, 7 Humphr. 548 (1847).

60. Commercial Bank v. Varnum, 49 N. Y. 275 (1872), overruling 3 Lans. 86 (1870); Commercial Bank v. Barksdale, 36 Mo. 563; Willenberger v. Spalding, 33 Mo. 421; Nelson v. Fotteral, 7 Leigh, 179. See *ante*, § 582, note.

61. In Cribbs v. Adams, 13 Gray, 600, Bigelow, J., said: "By the common law, as we understand it, and according to the uniform practice in the Commonwealth, the duties of a notary must be performed personally, and not by a clerk or deputy. He is a sworn officer, clothed with important public duties, which in their nature imply a public confidence and trust. Doubtless, by well-settled usage in some places, and in others by express provision of statute, notaries are authorized to employ clerks or deputies to perform official acts coming within the sphere of their duty, and are employed to certify and authenticate their acts by their own notarial certificates in like manner as if such acts had been performed by themselves personally. But such usage or provision of law is a fact to be proved by evidence. At the trial of this case the plaintiff offered no evidence that a notary in Louisiana (where the bill was protested) was authorized, either by usage or statute, to employ a deputy, or to authenticate his acts by own certificate."

62. Nelson v. Fotteral, 7 Leigh, 180.

63. Sacrider v. Brown, 3 McLean, 481 (1844).

64. Ocean Nat. Bank v. Williams, 102 Mass. 143.

his clerk or deputy, and to certify and authenticate notarial acts so performed in the same manner as if he had performed them himself. The witnesses who testify that it is customary in the city of New York for the clerks of notaries to present and demand payment of drafts, and for notaries to protest upon such presentment and demand, wholly fail to give any information upon the point whether that custom applies to and includes the case of foreign bills. One of them says that his attention had never been called to that distinction, and the other makes no allusion to it. It hardly need be said that a local usage, in derogation of the general rules of law, requires clearer and better evidence of its existence and validity."

In Pennsylvania, where a promissory note was dishonored, and the plaintiff offered in evidence the certificate of a notary, by which it was certified that the notary had given the indorser notice of non-payment; but the notary, on the trial, testified that the certificate was in the handwriting of his son, then absent in the West Indies; that his son had attended to the presentment and notice; and he himself had no personal knowledge on the subject. This testimony was not objected to, and it was held that, under the peculiar circumstances of the case, and the Pennsylvania statute making notarial certificates competent evidence, that the certificate was admissible as matter of evidence, to be weighed with the rest of the testimony by the jury.[65]

SECTION II

TO WHOM PRESENTMENT FOR PAYMENT MUST BE MADE

§ 588. Presentment for payment must be made to the drawee or acceptor of the bill, or maker of the note, or to an authorized agent. A personal demand is not necessary, and it is sufficient to make the demand at his usual residence or place of business of his wife or other agent; for it is the duty of an acceptor or promisor, if he is not present himself, to leave provision for the payment of his bills or notes.[66]

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65. Stewart v. Allison, 6 Serg. & R. 324.

66. Matthews v. Haydon, 2 Esp. 509; Brown v. McDermott, 5 Esp. 265; Jackson v. McInnis, 33 Oreg. 529, 54 Pac. 884; 55 Pac. 535, 72 Am. St. Rep. 755, citing text. Where a note is payable at a certain bank, and the bank is in the hands of a receiver, it is not necessary to present the note to the receiver personally, as the receiver has no authority to appropriate funds that have come into his

There is no doubt that a clerk found at the counting-room of the acceptor or promisor is a competent party for presentment for payment to be made to, without showing any special authority given him.[67] But where the protest stated the mere fact of presentment "at the office of the maker," it will be considered insufficient, as not showing that the paper was presented to party at the office authorized to pay or refuse payment.[68] A demand upon the servant of the owner "who used to pay money for him," was held sufficient in England.[69]

§ 589. **Presentment to drawee in person.**—It has been indicated by Chitty, in his work on Bills,[70] that while in making presentment for acceptance the holder should, if possible, see the drawee personally, in the presentment for payment it is not necessary, it being sufficient if it be made at the house of the acceptor. But we concur with Story,[71] that there is no just foundation for the distinction. If, indeed, the drawee does not happen to be present when the call is made at his house or counting-room to present the bill for acceptance, the holder, it seems, is not bound to consider it as a refusal to accept, but may wait a reasonable time for the return of the drawee who has as yet incurred no obligation respecting the bill, and may, indeed, be ignorant of its existence. The holder may even wait until the next day to renew his call to present for acceptance.[72] But no such delay is allowable in making presentment to the acceptor for payment.

It is the duty of the acceptor, who is the principal debtor, to provide for the payment of the bill; and if he is not in himself, and there is no one present to answer for him, when the holder calls at his house or counting-room, the bill should be treated as dishonored, and protested for nonpayment.

§ 590. **Presentment to person on premises.**—If presentment be

possession as receiver to the payment of the note. Schlesinger v. Schultz, 96 N. Y. S. 383, 110 App. Div. 356.

67. Stainback v. Bank of Virginia, 11 Gratt. 260; Nelson v. Fotteral, 7 Leigh, 180; Draper v. Clemons, 4 Mo. 52; Stewart v. Eden, 2 Cai. 121; Reynolds v. Chettle, 2 Campb. 596; Bradley v. Northern Bank, 60 Ala. 259.

68. Nave v. Richardson, 36 Mo. 130.

69. Bank of England v. Newman, 12 Mod. 241, 1 Ld. Raym. 442.

70. Chitty on Bills (13th Am. ed.) [*366], 412.

71. Story on Bills (Bennett's ed.), § 350.

72. Ibid.; Bank of Washington v. Triplett, 1 Pet. 25; Mitchell v. De Grand, 1 Mason, 176.

made at the place specified in the instrument, or in the case of one payable generally at the place of business of the acceptor or maker during business hours, or at his domicile during a reasonable hour of the day, it is sufficient if it be made to any person to be found upon the premises, especially if the maker be absent or inaccessible.[73] Where presentment was made to the wife of the maker, she informing the holder that her husband was out of town, it was held sufficient.[74] And so it was deemed sufficient to charge the indorser where the holder presented the bill to an inmate of the maker's house, who was coming out, and who stated that the acceptor had removed—the holder leaving a card containing notice for the acceptor of the maturity of the bill.[75] Where there is no one to answer, presentment at the maker's dwelling is sufficient.[76]

§ 590a. General principles as to presentment and demand.—The general rule as to the presentment and demand of commercial paper may be stated as follows: The presentment and demand must be made within reasonable hours on the day of maturity. For the purpose of fixing the liability of indorsers, the note or bill is payable on demand at any time during those hours. What are reasonable hours will depend upon the question whether or not the note or bill is payable at a place or bank, where, by the established usage of trade, business transactions are limited to certain stated hours. If there are such stated hours where the note or bill is payable, the presentment and demand must be made within those hours; but if there are no stated hours, and no place of payment is designated in the note or bill, the presentment and demand may be made either at the place of business or residence of the maker or acceptor; if at his place of business, it must be within the usual business hours of the city or town; if at his residence, then within those hours when the maker or acceptor may be presumed to be in a condition to attend to business.[77]

§ 591. When acceptor or maker is dead.—If the acceptor or maker be dead at the time of the maturity of the bill or note, it should

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73. Cromwell v. Hynson, 2 Campb. 596; Phillips v. Astberg, 2 Taunt. 206; Draper v. Clemons, 4 Mo. 52.

74. Moodie v. Morrall, 1 Const. Rep. 367.

75. Buxton v. Jones, 1 M. & G. 83, 1 Scott's N. R. 19; Story on Bills (Bennett's ed.), § 350, note 1.

76. Stivers v. Prentice, 3 B. Mon. 461.

77. McFarland v. Pico, 8 Cal. 631; Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

be presented to his personal representative, if one be appointed, and his place of residence can, by reasonable inquiries, be ascertained.[78] If there be no personal representative, then presentment should be made, and payment demanded, at the dwelling house of the deceased, if the instrument were payable generally.[79] But if it was drawn payable at a particular place, then it will be sufficient that it was presented at such place.[80]

Under Negotiable Instrument statute.—Under various provisions of the statute,[81] when no place of payment is specified, there must be due diligence in attempting to present the note to the administrator of the deceased maker.[82]

§ **592. In partnership cases.**—Presentment of a bill drawn upon or accepted by, and of a note executed by, a copartnership firm, is sufficient, if made to any one of the members of such firm.[83] And if the signatures of the parties entitled to presentment be apparently that of a partnership, as, for instance, if signed "Waller & Burr," presentment to either is sufficient.[84]

Even after the dissolution of the firm, presentment to any one of the partners is sufficient, for as to the bill or note upon which they are liable, the liability continues until duly satisfied or discharged.[85] As said in Maryland, where presentment of a partnership note was made to one of the firm after dissolution, by Archer, C. J.: [86] "It might be sufficient to say that this dissolution had, by no evidence in

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78. Gower v. Moore, 25 Me. 16; Price v. Young, 1 Nott & McC. 438; Story on Notes, §§ 241–253; Magruder v. Union Bank, 3 Pet. 87; Juniata Bank v. Hale, 16 Serg. & R. 167; Piper v. Hayward, 127 N. Y. S. 240.

79. Ibid.; Story on Notes, § 253; Story on Bills, § 346. See chapter XVII, § 458.

80. Boyd's Admr. v. City Sav. Bank, 15 Gratt. 501; Price v. Young, 1 Nott & McC. 438; Philpot v. Byrant, 1 Moore & P. 754, 3 Car. & P. 244, 4 Bing. 717; Holtz v. Boppe, 37 N. Y. 634; Thompson on Bills (Wilson's ed.), 285. See *ante*, § 455.

81. Appendix, secs. 76, 83, 89.

82. Reeds v. Spear, 94 N. Y. S. 1007, 107 App. Div. 144. See also, *post*, sender § 790, as to the indorser being entitled to notice of dishonor under such circumstances.

83. Branch of State Bank v. McLeran, 26 Iowa, 306; Shed v. Brett, 1 Pick. 401; Thompson on Bills (Wilson's ed.), 281.

84. Erwin v. Downs, 15 N. Y. 375.

85. Crowley v. Barry, 4 Gill, 194; Fourth Nat. Bank v. Heuschuk, 52 Mo. 207; Hubbard v. Matthews, 54 N. Y. 50; Brown v. Turner, 15 Ala. (N. S.) 632; Coster v. Thomason, 19 Ala. (N. S.) 717.

86. Crowley v. Barry, 4 Gill, 194.

the case, been brought home to the knowledge of the holder of the note. But we do not desire to determine the question on this ground, because we are clearly of opinion that a demand on one of the partners was sufficient, as each partner represents the partnership. Before a dissolution, it clearly would not be necessary to make a demand on both, nor could it be necessary after a dissolution, for the partnership as to all antecedent transactions continues until they are closed."

And it has been held that demand on the agent of one partner after dissolution, in the absence of the other partner, was sufficient.[87]

§ 593. Presentment when one member of firm is dead.—In the event of the death of one of the members of the firm to which presentment should be made before the maturity of the bill or note, the presentment should be made to the survivors, and not to the personal representative of the deceased, because the liability devolves upon the surviving partner.[88]

§ 594. Where there are several promisors not partners.—When the note is executed by several joint promisors who are not partners, but liable only as joint and several promisors, it has been held, and, as we think, correctly, that presentment should be made to each, in order to fix the liability of an indorser.[89] But a difficulty presents itself which might seem to characterize this doctrine as harsh and unreasonable, and which has caused it to be held that *quoad hoc* the promisors are to be regarded as promisors, and presentment to one equivalent to presentment to all. "Now, suppose," it has been said, in Ohio, by Hitchcock, J.,[90] "the makers resided in different States, or in different and distinct parts of the same State, how could demand

87. Brown v. Turner, 15 Ala. 832.

88. Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635; Story on Bills, §§ 346–362; 1 Parsons on Notes and Bills, 362; Barlow v. Coggan, 1 Wash. Ter. 257.

89. Blake v. McMillen, 22 Iowa, 258, 33 Iowa, 150 (1871); Union Bank v. Willis, 8 Metc. (Mass.) 504; Arnold v. Dresser, 8 Allen, 435. In Britt v. Lawson, 15 Hun, 123, it was held that the rule applies where one maker is principal debtor, and the others are sureties; unless their relations appeared on the face of the note, or the indorser is proved to have known them. See also *ante*, § 455, and Gates v. Beecker, 60 N. Y. 523; Benedict v. Schmieg, 13 Wash. 477, 43 Pac. 374, 52 Am. St. Rep. 61; Closz & Mickelson v. Miracle, 103 Iowa, 198, 72 N. W. 502.

90. Harris v. Clark, 10 Ohio, 5; McClelland v. Bishop, 42 Ohio St. 120. In this case the note was the joint obligation of husband and wife, and while void as to the latter, it was held that presentment to her, the husband having absconded, was sufficient to bind the indorser.

be made of all in order to charge an indorser? It must be made on the day the note falls due, or, where days of grace are allowed, on the last day of grace. Will it be said that the demand can be made at different and distant places on the same day through the agency of letters of attorney? I believe such a practice has not been heard of, at least we have found nothing like it in the books." And the court concluded that they were to be regarded as partners.

Under Negotiable Instrument statute.—Under the statute, an informal demand on one of the two joint debtors is not such a demand as will charge an indorser.[91]

§ 595. Distinction between joint promisors and partners.—These views are more plausible than satisfactory, and the argument *ab inconvenienti* is well presented. But joint promisors are no more partners than joint indorsers. To construe them to be partners is to make a new contract between them, and to vary the condition precedent of the indorser's liability. And although it might be more convenient if they were partners, the inconvenience in enforcing their contract does not change it.

If they were in different places at the maturity of the note, and it could be only presented to one, due diligence would only require its presentment to the others in such time as they could be reached; and the impossibility of presenting to all on the day of maturity would excuse nonpresentment to those at other places. Such, at least, is our conception of the true solution of the question, and it is borne out by high authority, and certainly by much more satisfactory reasoning than that above quoted.[92]

§ 596. Where the note is several as well as joint, the indorser might be held as indorser of the maker to whom the note was duly presented, as the holder would have the right to treat the note as the several note of each maker. But he would have lost recourse against the indorser as upon the joint note of the comakers, or the several note of the maker as to whom no presentment was made or excuse given.[93]

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91. Appendix, sec. 78. State of New York Nat. Bank v. Kennedy, 130 N. Y. S. 412, 145 App. Div. 669.

92. See 1 Parsons on Notes and Bills, 363, note *w;* Story on Notes, § 239, and especially § 255, and note 2. There seems to be no English precedent on the question. Luning v. Wise, 64 Cal. 422, citing the text. See cases cited in note 82 to § 594.

93. Story on Promissory Notes, § 255, note 2.

In the event of the death of a joint maker, presentment should be made to the survivor, upon whom the debt devolves. If the note were several also, it might be different, as the holder is at liberty to elect "upon whom he will make demand." [94]

SECTION III

TIME OF PRESENTMENT FOR PAYMENT

§ 597. **Upon what day presentment should be made.**—In respect to the maker of a note and the acceptor of a bill, it is not important upon what day the presentment is made, provided it be made at some time before the Statute of Limitations bars action against them.[95] And provided, also, that the note is not made, nor the bill drawn or accepted, payable at a certain place. In such cases only is it desirable that, as respects the maker or acceptor, the bill or note should be presented on the exact day of its maturity; and even in such cases it makes no difference that the presentment was not punctually made on that very day, unless the maker or acceptor should suffer some loss or damage by the delay.

§ **598.** In respect, however, to the drawer of a bill and the indorser of a bill or note, it is essential to the fixing of their liability that the presentment should be made on the day of maturity, provided it is within the power of the holder to make it.[96] If the presentment be

94. Story on Promissory Notes, § 256.

95. Chitty on Bills (13th Am. ed.) [*354], 396; Milmo Nat. Bank v. Cobbs, 53 Tex. Civ. App. 1, 115 S. W. 345; Netzger v. Waddell, 1 N. Mex. Ter. 409. In Greeley v. Whitehead, 35 Fla. 523, 17 So. 643, 48 Am. St. Rep. 258, it was held that the maker of such note is still liable to pay though the note be not presented at time and place designated, and it devolves upon him to show as matter of defense a readiness at time and place to meet the note, and such defense must be set up by plea, and can only be in bar of damages and cost of suit.

96. 1 Parsons on Notes and Bills, 373; Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. 170; First Nat. Bank of Omaha v. Whitmore, 177 Fed. 397; Hoyland v. National Bank, 137 Ky. 682, 126 S. W. 356; Nevius v. Moore, 221 Mo. 330, 120 S. W. 43; McBride v. Illinois Nat. Bank, 121 N. Y. S. 1041, 138 App. Div. 339; Galbraith v. Shepard, 43 Wash. 698, 86 Pac. 1113. Where a draft was drawn payable sixty days after sight on a consignment with the bill of lading attached, with a stipulation in the draft "to be surrendered upon payment of this bill before maturity under discount on or before arrival of vessel," the fact that the bill was drawn against the proceeds of the consignment and had the bill of lading attached does not change the date of maturity fixed by the drafts, and it was not

made before the bill or note is due, it is entirely premature and nugatory, and, so far as it affects the drawer or indorser, a perfect nullity.[97] And if it be made after the day of maturity, it can, as matter of course, be of no effect, as the drawer or indorser will already have been discharged, unless there were sufficient legal excuse for the delay.[98] The evidence must be distinct as to the promptness of the presentment or the excuse for delay, as the burden of proof is on the plaintiff.[99]

Under Negotiable Instrument statute.—The statute declares the common law rule as to the time of presentment for payment.[1]

§ 599. **If a note be payable in instalments,** the presentment should be made on each consecutive instalment as it falls due, as if it were (as in fact it is legally considered) a separate note in itself.[2] It would be different, probably, if the condition were annexed to the note that upon failure to meet any instalment, the whole should fall due, in which case notice should be communicated to the drawer or indorser that the whole sum was due, and the holder looked to him for payment.[3]

§ 600. **At what hour of the day presentment should be made.**—When the bill or note is made payable at a bank, it should be presented during banking hours, the parties executing their paper payable at a particular place, being bound by its usage; and in such case a presentment after banking hours is insufficient.[4] But it is settled that

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the duty of the holder of the draft to present it for payment on the arrival of the vessel. Hammond, Snyder & Co. v. American Express Co., 107 Md. 295, 68 Atl. 496 (1908). An indorser of a nonnegotiable promissory note is not entitled to have demand and protest made, or notice of nonpayment. Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466; Tilden v. Goldy Mach. Co., 9 Cal. App. 9, 98 Pac. 39.

97. Griffin v. Goff, 12 Johns. 423; Jackson v. Newton, 8 Watts, 401; Farmers' Bank v. Duvall, 7 Gill & J. 78; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 13; Closz & Michelson v. Miracle, 103 Iowa, 198, 72 N. W. 502; Demelman v. Prazier, 193 Mass. 588, 79 N. E. 812.

98. Windham Bank v. Norton, 22 Conn. 213; Rauer v. Broder, 107 Cal. 282, 40 Pac. 430.

99. Robinson v. Blen, 20 Me. 109; Pendleton v. Knickerbocker Life Ins. Co., 7 Fed. 170.

1. Appendix, sec. 71. Hampton v. Miller, 78 Conn. 267, 61 Atl. 952.

2. Oridge v. Sherborne, 11 M. & W. 374.

3. See 1 Parsons on Notes and Bills, 374; Creteau v. Glass Co., 40 App. Div. 215, 57 N. Y. Supp. 1103.

4. 1 Parsons on Notes and Bills, 419; Parker v. Gordon, 7 East, 385; Elford v. Teed, 1 Maule & S. 28; Thompson on Bills (Wilson's ed.), 302; Byles on Bills

when a bill or note is payable at a bank, a demand made at the bank after banking hours, the officers being there, and a refusal, the cashier or teller stating that there were no funds, is sufficient.[5]

And likewise, if any person is left at the bank to give an answer,[6] and it matters not that the notary making the presentment enters by the back door.[7] It seems that if the maker of a note payable at a bank goes, and remains there during business hours, prepared to pay, or places funds in bank and holds them there until the close of business, and then withdraws them, in consequence of the non-presentment of the note, the indorser would be discharged, notwithstanding presentment to an officer found at the bank after business hours.[8]

In an action against the acceptor on a bill payable in London, and accepted payable at D. & Co.'s, a presentment at D. & Co.'s between 7 and 8 o'clock in the evening was proved, and that a boy returned, as answer, "no orders." Lord Ellenborough said that if the banker appointed a person to give an answer, a presentment at any time while that person was in attendance, was sufficient.[9]

Where, by usage of the bank at which the instrument is payable, the payor is allowed until the expiration of banking hours for payment, a demand made before that time, unless the instrument continues in bank until banking hours have expired, is sufficient.[10]

§ 601. If the bill or note be payable generally " at bank "—no particular bank being named—the hour will be determined by the usual banking hours at the several banks of the place where it is

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(Sharswood's ed.), 340; Story on Bills, §§ 236, 349; Story on Notes, § 235; Citizens' Nat. Bank, etc. v. Third Nat. Bank, etc., 19 Ind. App. 69, 49 N. E. 171, citing text; Clough v. Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393, citing text.

5. Salt Springs Nat. Bank v. Burton, 58 N. Y. 432; Bank of Syracuse v. Hollister, 17 N. Y. 46; Bank of Utica v. Smith, 18 Johns. 230; First Nat. Bank v. Owen, 23 Iowa, 185; Goodloe v. Godley, 13 Smedes & M. 227; Cohen v. Hunt, 2 Smedes & M. 227; Flint v. Rogers, 15 Me. 67; Reed v. Wilson, 41 N. J. L. (13 Vroom) 20; Niblack v. Park Nat. Bank, 169 Ill. 517, 48 N. E. 438, 61 Am. St. Rep. 203.

6. Garnett v. Woodcock, 1 Stark. 475, 6 Maule & S. 44; Salt Springs Nat. Bank v. Burton, 58 N. Y. 432.

7. Commercial Bank v. Hamer, 7 How. (Miss.) 448.

8. Salt Springs Nat. Bank v. Burton, 58 N. Y. 432.

9. Garnett v. Woodcock, *supra*.

10. Planters' Bank v. Markham, 5 How. (Miss.) 397; Harrison v. Crowder, 6 Smedes & M. 464.

payable.[11] It is for the jury to say what are business hours, and in fixing them otherwise than in respect to the banks, they are to have reference to the general hours of business at the place, rather than to the custom of any particular trade.[12] The courts of England take judicial notice of the banking hours of London,[13] but not of outside cities or places.[14] Morse says: "American courts are wont to take judicial notice of the banking hours of any large city lying within the area of the jurisdiction of the court; though there is no authority for supposing that the banking hours of the city of New York would be considered as judicially known to the courts of Boston or Chicago, or *vice versa.* Unquestionably proof would have to be introduced." [15]

Under Negotiable Instrument statute.—Under the rule that what constitutes business hours of a bank, within the meaning of the statute, has reference to the general custom at the place of the particular transaction in question, it has been held that where the evidence shows that a draft, after taking its course through the clearing house, was presented to the drawee for payment on the afternoon of the same day between the hours of three and six o'clock, and that such was the customary way of doing such business where the drawee was located, the statute was satisfied.[16]

§ **602. When the instrument is not payable at a designated place,** presentment may be made at any reasonable hour during the day—during what are termed "business hours," which, it is held, range through the whole day to the hours of rest in the evening.[17] But the mere fact that the payor had retired to rest would not vitiate the presentment, unless it was at an hour when, according to the habits and usages of the community, it might be expected that he

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11. United States Bank v. Carneal, 2 Pet. 543; Church v. Clark, 21 Pick. 310.

12. Thompson on Bills, 302.

13. Parker v. Gordon, 7 East, 385; Jameson v. Swinton, 2 Taunt. 225.

14. Hare v. Henty, 10 C. B. (N. S.) 65.

15. Morse on Banking, 371; Clough v. Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393, citing text.

16. Appendix, secs. 72, 75. Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, the court holding further that in case of a transaction occurring in a foreign jurisdiction, as in the instance in question, the court cannot take judicial notice of what constitutes reasonable hours on a business day, but the matter is open to proof.

17. Nelson v. Fotterall, 7 Leigh, 194; Cayuga County Bank v. Hunt, 2 Hill (N. Y.), 635; Salt Springs Nat. Bank v. Burton, 58 N. Y. 432; Skelton v. Dunsten, 92 Ill. 49; Vaughan v. Potter, 131 Ill. App. 334.

had retired.[18] If the presentment be during the hours of rest it will be entirely unavailing.[19]

§ 603. Business hours in reference to business places, and places of residence.—When presentment is at the place of business it must be during the hours when such places are customarily open,[20] or, at least, while some one is there competent to give an answer. It is only when presentment is at the residence that the time is extended to the hours of rest.[21] But presentment at any hour cannot be considered unreasonable if any person competent to answer be found there who gives an answer refusing to pay,[22] and an averment of presentment and demand at the maker's office has been held to import that it was during the usual hours of business.[23]

Where, however, a bill was presented for payment at a bank in the morning, and refused for want of effects, and afterward presented at 6 o'clock in the evening (effects being lodged in the meantime), and again refused, business hours having closed at 5 o'clock, it was decided that they were not liable in damages to the drawer, their customer, for the refusal—they had paid the bill and expense of notary next day.[24]

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18. Farnsworth v. Allen, 4 Gray, 453, in which case presentment was made at 9 P. M., at the maker's residence, ten miles from Boston. He and his family had retired. Held sufficient. In Barclay v. Bailey, 2 Campb. 527, Lord Ellenborough sustained a presentment made as late as 8 P. M., at the house of a trader; Waring v. Betts, 90 Va. 46, 17 S. E. 739.

19. Wilkins v. Jadis, 2 B. & Ad. 188, in which case the bill was presented at the place named in the acceptance, between 7 and 8 P. M., but the door was shut and no one answered. Dana v. Sawyer, 22 Me. 294, in which presentment was a few minutes before midnight, the maker being waked up at his residence.

20. Lunt v. Adams, 17 Me. 230, in which case presentment at 8 A. M., at the maker's storehouses, was held insufficient. See Dana v. Sawyer, 22 Me. 244. Presentment at 8 P. M., at an attorney's office, was held sufficient in Triggs v. Neuenham, 1 Car. & P. 631; and in Morgan v. Davison, 1 Stark 114, presentment at a counting-room between 6 and 7 P. M. was held sufficient.

21. In Barclay v. Bailey, 2 Campb. 427, presentment at 8 P. M., at the maker's residence was held sufficient; Clough v. Holden, 115 Mo. 336, 31 S. S. 1071, 37 Am. St. Rep. 393, citing text.

22. Henry v. Lee, 2 Chitty, 125; Garnett v. Woodcock, 1 Stark. 475, 6 Maule & S. 44; Thompson on Bills, 303; Chitty (13th Am. Ed.) [*387], 438.

23. Wallace v. Crilleo, 46 Wis. 577. Presentment after 5 P. M., to the indorser and last manager of a bank at his place of residence when the bank at which the note was payable, had ceased to exist. Held sufficient. Waring v. Betts, 90 Va. 36, 17 S. E. 739.

24. Whittaker v. Bank of England, Tyrwh. 268.

§ 604. Within what time bills and notes specifying no time of payment must be presented for payment.—If no time for payment be named in the bill or note it is payable on demand; [25] all the text-writers and the adjudicated cases tell us that a bill payable at sight, or at a fixed time after sight, or on demand, and a note payable on demand, must be presented for acceptance or payment, as the case may be, "within a reasonable time." But in determining what is reasonable time we are left a riddle which it is difficult to solve.[26] The maker of the note, who is the principal debtor, is bound to pay whenever payment is demanded (unless it be barred by limitation), no matter what period of time may have elapsed since its execution, and when a bill payable at so many days after sight has been presented and accepted, the acceptance fixes the period at which it must be presented to the acceptor for payment. But within that time such a bill must be presented in order to preserve the liability of the drawer and indorsers, and the note presented in order to preserve that of the indorsers, is a problem which has puzzled courts and juries no little. And an eminent jurist has said in respect to the time within which it is necessary to present for payment a note payable on demand in order to charge an indorser, that "it depends upon so many circumstances to determine what is a reasonable time in a particular case, that one decision goes but little way in establishing a precedent for another." [27] Some of the text-writers treat of bills, promissory notes, bankers' cash notes and checks, as falling within one rule; and a failure to discriminate between these various classes of commercial paper has confused the decisions upon the subject, and left them in a state of contrariety and antagonism which it is impossible to reconcile. In a previous chapter on presentment for acceptance we have discussed the question of reasonable time in respect to the presentment for acceptance of bills; and the doctrines there laid down are almost entirely applicable to the presentment of bills for payment.[28] The reasonable time for presentment of checks, which

25. Thompson v. Ketcham, 8 Johns. 189; Cornell v. Moulton, 3 Den. 12; Michigan Ins. Co. v. Leavenworth, 30 Vt. 11; Piner v. Clary, 17 B. Mon. 663; Bowman v. McChesney, 22 Gratt. 609; Whitlock v. Underwood, 2 B. & C. 157. See *ante*, §§ 88, 89; Collins v. Trotter, 81 Mo. 278, citing the text.

26. Bacon v. Bacon, 94 Va. 688, 27 S. E. 576; Foley v. Emerald Brewing Co., 61 N. J. L. 430, 39 Atl. 650.

27. Shaw, C. J., in Seaver v. Lincoln, 21 Pick. 267; Bacon v. Bacon, 94 Va. 688, 27 S. E. 576; Morgan v. United States, 113 U. S. 501, 5 S. Ct. 583; Oleson v. Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 638.

28. Chapter XVII, section III.

are of a different nature, will hereafter be discussed;[29] and we shall endeavor here to give the principles which determine within what time a bill or note payable on demand must be presented for payment.

§ 605. In the first place, respecting bills payable on demand.—Such instruments would seem to be closely assimilated to bank checks, and to contemplate the immediate payment of the amount called for. They are payable immediately on presentment, without grace, and if the drawee and the payee or indorsee reside in the same place, it is laid down by a number of the authorities that they must be presented within business hours of the day on which they are drawn in order to hold the drawer in the event of the failure of the drawee to honor them.[30] And that if the drawee resides in a different place they must be forwarded by the regular post of the day after they are received.[31] But these rules are not inflexible. What is reasonable time must depend upon circumstances and in many cases upon the time, the mode, and the place of receiving the bills, and upon the relations of the parties between whom the question arises.[32] Where the draft required indorsement by a school board, which had to be convened, delay of a week to forward it was held justifiable.[33] The question, in so far as it relates to sight drafts, has been heretofore considered, and the cases collated.[34]

§ 606. Promissory notes payable on demand would seem to stand on a different footing. An action lies against the maker of a demand note without preliminary demand.[35] With respect to fixing

29. Chapter XLIX, on Checks, section III, vol. II.

30. Byles on Bills (Sharswood's ed.), 337–338; Thompson on Bills (Wilson's ed.), 297; Chitty on Bills (13th Am. ed.), 431; Piner v. Clary, 17 B. Mon. 645; Kampmann v. Williams, 70 Tex. 571, citing the text; McMonigal v. Brown, 45 Ohio St. 504, citing the text; Burnham, etc., v. W. S. McCormick, etc., 18 Utah, 42, 55 Pac. 77; Anderson v. Gill, 79 Md. 312, 29 Atl. 527, 47 Am. St. Rep. 402, citing and approving text; Angaletos v. The Meridian Nat. Bank of Indiana, 4 Ind. App. 573, 31 N. E. 368.

31. Ibid.; Chitty on Bills, 432; Parker v. Reddick, 65 Miss. 246, citing the text.

32. Story on Notes, § 493. See *ante*, §§ 468–478, inclusive; Morgan v. United States, 113 U. S. 501; Marbourg v. Brinkman, 23 Mo. App. 513, citing the text; Dyas v. Hanson, 14 Mo. App. 386; Nutting v. Burked, 48 Mich. 241; Collingwood v. Merchants' Bank, 15 Nebr. 121.

33. Muncy Borough School District v. Commonwealth, 84 Pa. St. 464.

34. Montelius v. Charles, 76 Ill. 305; *ante*, § 472.

35. Knecht v. Boshold, 138 Ill. App. 430; Hyman v. Doyle, 103 N. Y. S. 778,

the liability of an indorser, it is difficult to perceive why the maker should execute his promise to pay on demand if immediate payment were contemplated; and although the holder may present it at once for payment, if he be so inclined, this would seem to be a privilege rather than a duty. Why not pay the money at once, if the note must be presented at once in order to charge the indorser? In England, a note on demand is regarded as a continuing security which it is not necessary to present for payment on the next day when the parties reside in the same place; or to send by the post of the next day when they reside in different places; [36] but in the United States, as a general rule, a different view is taken, and payment must be speedily demanded, in order to preserve recourse against the indorser, and to preserve the note from defenses which may be made against overdue paper.[37] It is better in all cases where the question is not settled, to decline taking a note on demand by indorsement; or if taken, to present it with the utmost dispatch.

§ 607. **When note given for a loan.**—When the note payable on demand has been given for a loan of money, it would then seem clear that it was intended as a continuing security, and the immediate presentment would not be necessary in order to charge the in-

53 Misc. Rep. 597; Field v. Sibley, 77 N. Y. S. 252, 74 App. Div. 81, affirmed 174 N. Y. 514, 66 N. E. 1108; Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540.

36. Brooks v. Mitchell, 9 M. & W. 15; Morgan v. United States, 113 U. S. 501. Statute of Limitations runs from date of note on demand. Wheeler v. Warner, 47 N. Y. 519; Finch v. Skilton, 79 Hun, 531, 29 N. Y. Supp. 925. See authorities cited in § 1215.

37. See 1 Parsons on Notes and Bills, 376, 377; Keys v. Fenstermaker, 24 Cal. 331. Delay of two weeks held to discharge indorser. In a recent case, the Supreme Court of North Carolina, decided that a note payable on demand is due on the day of its date, and that the purchaser of such note takes it subject to all the defenses available against it in the hands of the payee. Causey v. Snow, 122 N. C. 326, 29 S. E. 359. As to the rule in New Jersey, see Foley v. Emerald Brewing Co., 61 N. J. L. 430, 39 Atl. 650; Oleson v. Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 638. In Michigan it has been held that in order to bind an indorser upon a demand note, demand must be made for payment in a reasonable time in order to bind the indorser; and that a delay of two and a half years, where the parties reside in the same city, would discharge the indorser. Home Sav. Bank v. Hosie, 119 Mich. 116, 77 N. W. 625. On an issue whether presentment for payment was made in a reasonable time, it may be shown that it was the custom of banks to hold for years demand paper with an indorser, if the parties were good and the bank did not require the funds. State of New York Nat. Bank v. Kennedy, 130 N. Y. S. 412, 145 App. Div. 669.

dorser.[38] In Scotland, as well as in the United States,[39] this view has been taken; and though high authority has maintained a different doctrine,[40] we can but regard it as one that strikes the mind with the utmost force.[41] Where demand was not made for twenty-one months, it has been considered sufficient in such a case; [42] and in Scotland, where a bill on demand was granted as a loan and not as a remittance, presentment six months after date was held sufficient.[43]

§ 608. Notes payable on demand " with interest."—When the note is payable on demand with interest, it would seem to have been intended as a continuing interest-bearing security; but upon this question, as upon those already discussed respecting notes payable on demand, the authorities are in painful contrariety.

In England where a note of £1,000 payable on demand with interest had been indorsed and transferred several years after its date, and the question was whether the indorsee took it subject to equities between prior parties, the court said: "If a promissory note, payable on demand, is after a certain time to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note, payable on demand, is intended to be a continuing security. It is quite unlike the case of a check, which

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38. Thompson on Bills (Wilson's ed.), 301, citing Leith Banking Co. v. Walker's Trustees, 14 S. B. D. 332; Bacon v. Harris (R. I.), 10 Atl. 650, citing the text; McDonnell v. Burns, 28 C. C. A. 174, 83 Fed. 866, citing text.

39. Vreeland v. Hyde, 2 Hall, 429, the court saying: "The rule requiring presentment within a reasonable time was intended for and is applicable to negotiable instruments made for commercial purposes only. It was not intended for cases of suretyship or notes of a like description, and the present one is evidently excluded from the rule by the peculiar circumstances attending it. Here the holder was an old man, not connected with business, residing at some distance from the city. The defendant knew the circumstances, and cannot claim any peculiar indulgence from a consideration of these facts, as each case must be governed by the circumstances attending it. In this there must be judgment for the plaintiff."

40. 1 Parsons on Notes and Bills, 380, note *d;* Bayley on Bills, chap. VII, p. 142, note; Perry v. Green, 4 Harr. 61; Sice v. Cunningham, 1 Cow. 397, in which case a delay of five months, all the parties residing in New York city, was held to discharge the indorser; Martin v. Winslow, 2 Mason, 241, seven months' delay held fatal; Field v. Nickerson, 13 Mass. 131, seven months' delay held fatal, although the accommodation indorser was told by one of the makers that the note would not be demanded immediately.

41. Bacon v. Bacon, 94 Va. 688, 27 S. E. 576.

42. Vreeland v. Hyde, 2 Hall, 429.

43. Note, *supra*, Thompson on Bills, 301.

is intended to be presented speedily." [44] The circumstance that the note bore interest did not control the decision of the court; but in New York that feature was considered material; and where such a note was transferred three or four weeks after date, it was said, "It would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half a year, a year, etc.," and it was held that the note was not overdue so as to admit a plea of want of consideration.[45] But in a later case, where the note, payable on demand, with interest, was transferred nearly three months after date, the parties having their places of business in the same street of the same city, it was held overdue, so as to admit equities; [46] and in an earlier case a similar note, transferred two and a half months after date, was held open to defense of part payment before transfer.[47] In Vermont the note was held overdue at time of indorsement, ten months after date.[48] In Connecticut, a note payable "on demand, with interest," need not be demanded for four months, by statute.[49]

§ 609. **Conflicting authorities.**—In respect to the time within which a note, payable on demand, with interest, must be presented, in order to charge an indorser, the like contrariety exists. Eight months' delay was held to discharge an indorser in one case; [50] seven months in another; [51] five months and a half in another, all the parties residing in the same place.[52]

On the other hand, a delay of twenty-one months to present a note payable on demand with interest, has been held not to discharge the indorser.[53] And in a later case, in New York, where the note, payable on demand, with interest, was indorsed for accommodation at the time of its date, which was the 5th of May, 1852, and the interest was paid by the maker for three years, and demand of payment

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44. Brooks v. Mitchell, 9 M. & W. 15. See also Borough v. White, 4 B. & C. 225; Gascoyne v. Smith, 1 M. & Y. 338.

45. Wethey v. Andrews, 3 Hill (N. Y.), 582.

46. Herrick v. Woolverton, 41 N. Y. 581.

47. Losee v. Dunkin, 7 Johns. 70.

48. Morey v. Wakefield, 41 Vt. 24.

49. Rhodes v. Seymour, 36 Conn. 6.

50. Field v. Nickerson, 13 Mass. 131.

51. Martin v. Winslow, 2 Mason, 241.

52. Sice v. Cunningham, 1 Cow. 397. See also Perry v. Green, 4 Harr. 61.

53. Vreeland v. Hyde, 2 Hall, 429. See *ante*, § 607.

was made and refused, and notice given on the 24th of December, 1855, it was held that the indorser was still bound.[54]

Seven days' delay was not considered too long in Massachusetts, under the circumstances, the court not paying consideration to the fact that the note bore interest.[55] In California, the matter is regulated by statute.[56]

§ 610. The true principle to be deduced.—Where these questions remain undetermined, the authorities are so much at war that it would be difficult to predict what rule would commend itself to the court. It seems to us that where the note was indorsed at the time of making, and whether it bore interest or not, it should be regarded as a continuing security, and would not be overdue in the hands of the payee, either so as to open equities or to discharge the indorser until payment was demanded and refused. But when transferred by indorsement, it would become, by the very act of indorsement, a draft by the indorser upon the maker; and the indorsee holding it should regard it, as it is in fact, a demand through him for the amount due the indorser. And it should, therefore, be presented immediately, subject only to such qualifications as apply to a bill payable at sight.[57]

The following observations, in "Byles on Bills," [58] on this subject, seem to us worthy of quotation. Says the author: "A common promissory note payable on demand differs from a bill payable on demand, or a check, in this respect: the bill and check are evidently intended to be presented and paid immediately, and the drawer may have good reasons for desiring to withdraw his funds from the control of the drawee without delay; but a common promissory note payable on demand is very often originally intended as a continuing security, and afterward indorsed as such. Indeed, it is not uncommon for the

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54. Merritt v. Todd, 23 N. Y. 28 (1861). This case has been questioned in Thillman v. Guible, 32 La. Ann. 260 (1880), where delay of four years to present a demand note bearing interest was held unreasonable, and the accommodation indorser was discharged. See Parker v. Stroud, 98 N. Y. 379, approving Merritt v. Todd, *supra;* Crim v. Starkweather, 88 N. Y. 339; Turner v. Iron Mining Co., 74 Wis. 359, approving Thillman v. Guible, *supra;* National Hudson River Bank v. K. & H. R. Co., 17 App. Div. 232, 45 N. Y. Supp. 588.

55. Seaver v. Lincoln, 21 Pick. 267.

56. See Machado v. Fernandez, 74 Cal. 362; Wills v. Booth, 6 Cal. App. 197, 91 Pac. 759.

57. Bassenhorst v. Wilby, 45 Ohio St. 339, citing the text.

58. Sharswood's ed. 338.

payee, and afterward the indorsee, to receive from the maker interest periodically for many years on such a note. And sometimes the note is expressly made payable with interest, which clearly indicates the intention of the parties to be, that though the holder may demand payment immediately, yet he is not bound to do so. It is, therefore, conceived that a common promissory note payable on demand, especially if made payable with interest, is not necessarily to be presented the next day after it has been received in order to charge the indorser; and when the indorser defends himself on the ground of delay in presenting the note, it will be a question for the jury whether, under all the circumstances, the delay of presentment was or was not unreasonable."

§ 611. Presentment for payment when the instrument was overdue at time of indorsement.—When a negotiable instrument is indorsed after maturity, payment must be demanded of the payor within a reasonable time, and notice, in the event of a refusal, given to the indorser, in order to charge him—it being regarded as equivalent to one payable on demand.[59]

59. Beer v. Clifton, 98 Cal. 233, 33 Pac. 204, 35 Am. St. Rep. 172, citing text; Wills v. Booth, 6 Cal. App. 197, 91 Pac. 759; Hawkins v. Shields (Miss.), 57 So. 4; Light v. Kingsbury, 50 Mo. 331; McKewer v. Kirtland, 33 Iowa, 352; Graul v. Strutzel, 53 Iowa, 712; Tyler v. Young, 6 Casey, 143; McKinney v. Crawford, 8 Serg. & R. 351; Patterson v. Todd, 18 Pa. St. 426; overruling Bank of North America v. Barriere, 1 Yeates, 360; Leavitt v. Putnam, 1 Sandf. 199; Berry v. Robinson, 9 Johns. 121; Beebe v. Brooks, 12 Cal. 308; Bishop v. Dexter, 2 Conn. 419; Goodwin v. Davenport, 47 Me. 112; Dwight v. Emerson, 2 N. H. 159; Levy v. Drew, 14 Ark. 334; Jones v. Middleton, 29 Iowa, 188; Benton v. Gibson, 1 Hill (S. C.), 56; Poole v. Tolleson, 1 McCord, 199; Course v. Shackleford, 2 Nott & McC. 283; Ecpert v. Condres, 3 Const. Rep. 69; Union Bank v. Ezell, 10 Humphr. 385; Stothart v. Parker, 1 Tenn. 260. See vol. II, § 996; Bassenhorst v. Wilby, 45 Ohio St. 336, citing the text; Smith v. Caro, 9 Oreg. 280, citing the text; Rosson v. Carroll, 90 Tenn. 90, 16 S. W. 66, citing the text. After quoting the text in approval, the court says: "It will be observed that the latter author, Mr. Daniel, does not in terms state *when the notice* shall be given; but he does say, in effect that the same rule as to notice is applicable to a note indorsed after maturity *as to one* payable on demand. He makes substantially the same statement in section 996 of the same learned and valuable treatise, and at the same time mentions the fact that some of the cases have been less strict on the subject of notice, thereby departing from the principle by him deemed clearly correct." After an elaborate review of the authorities and quoting from Parsons, Chitty, Byles, Tiedeman, Wade, and others, the court says: "The irresistible conclusion from the authorities is that the rule with respect to the time within which notice of nonpayment must be given to the indorser is the same, whether the indorsement be made before, or after, the maturity of the note."

The same circumstances and considerations which determine the question whether or not a bill or note payable on demand has become overdue, so as to let in equitable defenses by the original parties against the transferee, alike determine the question whether or not the presentment has been in a reasonable time so as to charge the drawer or indorser.[60] Such at least is the doctrine in the United States according to the weight of authority, though there are cases which dissent from it. Some of them maintain that when the note is overdue at the time of transfer, the rule requiring presentment is to be less stringent than where it has some time to run.[61] While by others a more stringent rule is applied; [62] and it has been said that, "if the indorsement be made after the note falls due, the demand of payment must be made as if the note fell due the day of indorsement." [63]

§ 612. **How question of reasonable time determined.**—Many of the authorities hold that the question of reasonable time is for the jury to determine as matter of fact; [64] while others maintain that it is matter of law for the court.[65] But neither is strictly correct. It is a mixed question of law and fact in most cases, to be determined upon hypothetical instructions of the court, like all other contested matters. And those authorities seem to us unassailable which hold that when the facts are few and simple, or are presented upon a special verdict or demurrer to evidence, it is within the province of the court to

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60. Field v. Nickerson, 13 Mass. 131; Berry v. Robinson, 9 Johns. 121; Sice v. Cunningham, 1 Cow. 397; Bishop v. Dexter, 2 Conn. 417; Course v. Shackleford, 2 Nott & McC. 283; Kennon v. McRea, 7 Port. 175; Bull v. First Nat. Bank, 14 Fed. 613, citing the text. "A bill negotiated after day of payment is like a bill payable at sight." Dehers v. Harriott, 1 Show. 163; 1 Parsons on Notes and Bills, 372–376, 382; Bayley on Bills, chap. VII, § 1, p. 125.

61. Rugby v. Davidson, 2 Const. Rep. 33; Hall v. Smith, 1 Bay, 330; McKinney v. Crawford, 8 Serg. & R. 351.

62. Nash v. Harrington, 2 Aik. 9; Aldis v. Johnson, 1 Vt. 136.

63. Aldis v. Johnson, 1 Vt. 136; Landon v. Bryant, 69 Vt. 203, 37 Atl. 297.

64. Hawkins v. Shields (Miss.), 57 So. 4; Field v. Nickerson, 13 Mass. 131; Hankey v. Trotman, 1 W. Bl. 1; Goupy v. Harden, 7 Taunt. 159; Straker v. Graham, 4 M. & W. 721. In case of notes indorsed after maturity, it has been so held in Eccles v. Ballard, 2 McCord, 388; Gray v. Bell, 2 Rich. 67, and other decisions in South Carolina.

65. Himmelman v. Hotaling, 40 Cal. 111; Gray v. Bell, 2 Rich. 67; Sylvester v. Crapo, 15 Pick. 92; Sice v. Cunningham, 1 Cow. 408; Dennett v. Wyman, 13 Vt. 485

determine.[66] When they are complicated and doubtful, and are not so presented, they must, of course, be left for the ascertainment and judgment of the jury, under instructions from the court. When the facts are ascertained it is for the court to determine what is reasonable time as matter of law.[67]

Under Negotiable Instrument statute.—The statute provides that where an instrument is payable on demand, presentment must be made within a reasonable time after its issue.[68] The statute further

66. See chapter XVII, on Presentment for Acceptance, § 3; Derbishire v. Parker, 6 East, 3; Tindal v. Brown, 1 T. R. 167 (reasonable notice which stands on same footing); Mellish v. Rawdon, 9 Bing. 416; Wyman v. Adams, 12 Cush. 210; Taylor v. Breden, 3 Johns. 136 (case of notice); Anderson v. Royal Exchange Assurance Co., 7 East, 43; Ball v. Wardell, Willes, 204.

67. Muncy Borough School District v. Commonwealth, 84 Pa. St. 471; Bassenhorst v. Wilby, 45 Ohio St. 338, citing the text; Bacon v. Harris (R. I.), 10 Atl. 650, citing the text.

68. Appendix, sec. 71. In Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020, holding that defendant need not plead in the answer that the note was not presented within a reasonable time after its issue, the court said: "The burden is on the holder of a note, when seeking to charge an indorser, to prove due and timely presentment and the giving of notice to the indorser of its dishonor. The obligation of the indorser is conditional upon all the steps having been taken by the holder, which the statute has prescribed as to presentment and as to notice of nonpayment, etc. The Negotiable Instrument Law is the codification of the law merchant upon the subjects treated and, in setting forth what is required of the holder of a note, it casts upon him the burden to prove that the requirements were all complied with. They were necessary conditions of his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute and the liability of the indorser to make good the contract of the maker, unlike that of guarantor, is conditional and depends upon the holder's having made a case under the statute of an obligation, which he has caused to mature and, by appropriate legal steps, to become an indebtedness of the contracting parties." Compare German-American Bank v. Mills, 91 N. Y. S. 142, 99 App. Div. 312. Where a note was not expressly payable on demand, and blanks were left in which to put in the dates, and the payee was expressly authorized by the maker to fill in the blanks, to which permission the indorser assented, such note was not a demand note, and the payee did not lose his rights against the indorser by not presenting the note and protesting the same within a reasonable time after receiving the note. Usefof v. Herzenstein, 119 N. Y. S. 290, 65 Misc. Rep. 45. See also appendix, secs. 7, 14, 124. In Hampton v. Miller, 78 Conn. 267, 61 Atl. 952, the Negotiable Instrument statute was evidently overlooked, as under a previous statute declaring that diligence requires a demand for payment at the end of four months, if there had been no previous demand, and upon nonpayment to give an indorser notice, it was held that where from the terms of an indorsed note payable on demand it was understood that payment was not intended to be required at the expiration of four months from its date, this was a waiver of the statutory requirements, and the parties placed themselves

declares that in determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument, and the facts of the particular case.[69] The question of the usage of trade or business has been held to be one of fact, and in the absence of any evidence to bring the case within the statute by evidence of "the usage of trade or business, if any, with respect to such instruments," a demand should be made according to the law existing before this statute was enacted.[70] The statute has been understood as abolishing the distinction which had theretofore been recognized by some courts between notes payable on demand and notes payable on demand "with interest." [71] With respect to the time of present-

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under the common law rule that when a negotiable instrument is payable on demand, demand of payment must be made upon the maker within a reasonable time or the indorser will stand discharged.

69. Appendix, sec. 193. Sheffield v. Cleland, 19 Idaho, 612, 115 Pac. 20; German-American Bank v. Mills, 91 N. Y. S. 142, 99 App. Div. 312. When a demand note, with indorsers, was given a friendly arrangement between the parties, with the understanding that the payee should ask for payment when she needed the money, the indorsers cannot defend on the ground that the note was not presented within a reasonable time because it was not presented until seven months after date. Becker v. Horowitz, 114 N. Y. S. 161.

70. Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987, holding further that when the holder of a note payable on demand seeks to hold an indorser, the burden is on him to show that a demand was made upon the maker within a reasonable time, and if there is any usage of trade or any part or circumstances to excuse a delay, the burden is on him to show it, and that protest must be made within 60 days. See also Toole v. Crafts, 196 Mass. 397, 82 N. E. 22. Where a demand note was indorsed three years after its date by which the indorser waived "demand, notice and protest," it was held to be a question for the jury upon the evidence whether the parties had in mind a protest made within 60 days of the date of the note, which would have fixed the liability of the indorser, under section 71, and the ruling in Merritt v. Jackson, *supra*, construing section 193 of the act, or a protest to be made in the immediate future which would have been wholly inefficacious to affect the rights of the parties. Toole v. Crafts, 196 Mass. 397, 82 N. E. 22.

71. Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020, holding that in the case of a demand note bearing interest, indorsed for the maker's accommodation, and the payment secured by the deposit of certain securities, and where the payee had complained to the indorser two years after the making of the note of its nonpayment, and twice, a year later, had written that the maker was in default as to interest, delay in taking steps to charge the indorser by presentment for payment and by protest for nonpayment until more than three and a half years had elapsed, was an unreasonable delay. In Schlesinger v. Schultz, 96 N. Y. S. 383, 110 App. Div. 356, it was held that a note payable "on demand after date * * * with interest" is a demand note written within the provisions of

ment of a bill of exchange the statute provides that presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.[72]

SECTION IV

DAYS OF GRACE, AND COMPUTATION OF TIME

§ 613. A bill of exchange, or a negotiable promissory note importing in its language to be payable upon a certain day, is not in reality payable to all intents and purposes upon that day; but ordinarily not until three days after, according to the rules of the law merchant, as it prevails in England and the United States. This period of extension of time of payment is termed "days of grace."

§ 614. Origin and nature of days of grace.—They were originally days allowed by way of favor to the drawee of a foreign bill to enable him to provide funds for its payment without inconvenience; and were called "days of grace," or "respite days," because they were gratuitous, and dependent on the holder's pleasure, and not to be claimed as a right by the person on whom it was incumbent to pay the bill.[73] By custom, however, they became universally recognized; and, although still termed "days of grace," they are now considered wherever the law merchant prevails as entering into the constitution of every bill of exchange and negotiable note, both in England and the United States, and form so completely a part of it that the instrument is not due in fact or in law until the last day of grace.[74] There-

section 7, and not at a determinable future time, within the provisions of section 4, and need not be presented for payment the day after it bore date under section 71, and that presentation within ten months was timely to hold the indorser.

72. Appendix, sec. 71. In Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, the court said: "A bill of exchange payable on demand, regardless of its character, put in circulation, so long as its circulating character is preserved may be outstanding without impairing the liability of the indorsers thereof. Formerly the length of time within which a bill of exchange might circulate without impairing such liability was more or less uncertain, rendering it very difficult to determine any one case by the decision in another. That difficulty was removed so far as practicable, by the provision that only the time need be considered intervening between the last negotiation and the presentment. That is recognized as a radical change in the law as it formerly existed."

73. Chitty on Bills (13th Am. ed.) [*374], 422.

74. Chitty, 422; Bank of Washington v. Triplett, 1 Pet. 25; Odgen v. Saunders,

fore, a demand of payment on the day before or after the third day of grace would not authorize a protest, or charge drawer or indorser.[75] And interest is chargeable on the period of grace allowed without impeachment as usurious.[76] This indulgence was often important to the drawee, who might not be instantly in funds, nor advised that the bill would at that time be presented for payment; and also even when it was accepted, because of the scarcity of the precious metals in which payment was to be made. And they fixed a limit to the time which the holder might indulge the payor without being guilty of laches in not protesting it.[77]

§ 615. **All the parties to the bill or note,** being parties to the same contract, are bound by one construction, and the law which fixes grace for drawer or maker fixes it also as to the indorser, and *vice versa;*[78] and a special usage varying the allowance of grace from that recognized by the law merchant, as to notes discounted in bank, will be binding upon indorser as well as maker, although he had no knowledge of it.[79]

§ 616. **Grace on inland bills and promissory notes.**—It was doubtful at one time whether grace was allowable on inland bills as well as foreign;[80] but this was in the remote past.[81] In England it was also at one time questioned whether or not promissory notes were entitled to grace;[82] but it was long since settled that they were, the statute of 3 & 4 Anne (1704) placing them on the same footing

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12 Wheat. 213; Bell v. First Nat. Bank, 115 U. S. 373; Ferris v. Saxton, 1 South. 17; Blacker & Co. v. Ryan, 65 Mo. App. 230.

75. Bank of Washington v. Triplett, 1 Pet. 25; Donegan v. Wood, 49 Ala. 242.

76. Bank of Utica v. Wager, 2 Cow. 712; Ogden v. Saunders, 12 Wheat. 213.

77. Story on Bills, § 333.

78. Central Bank v. Allen, 16 Me. 41; Hogan v. Cuyler, 8 Cow. 203; Love v. Nelson, Mart. & Y. 237.

79. Mills v. Bank of the United States, 11 Wheat. 431.

80. Cramlington v. Evans, 2 Ventr. 307 (1691), no mention of grace; Tassell v. Lewis, 1 Ld. Raym. 743 (1696).

81. Brown v. Harraden, 4 T. R. 148 (1791), Lord Kenyon, C. J., said: "It has been settled for more than half a century that they are payable at the same time as foreign bills of exchange." Leftly v. Mills, 4 T. R. 170 (1791).

82. May v. Cooper, Fortescue, 376 (1722); Dexlaux v. Hood, Buller N. P. 274 (1752).

as bills.[83] In the United States some cases have denied that grace was allowable on inland bills,[84] or promissory notes;[85] but they have generally been declared to be as much entitled to it as foreign bills, and except where a statute provides otherwise they are so everywhere regarded.[86]

§ 617. What bills and notes entitled to grace; whether sight bills entitled to.—All bills of exchange and negotiable notes are entitled to grace;[87] except those payable on demand[88] or without specification of time, in which case on demand without grace is understood,[89] or those expressly payable without grace.[90] And where a coupon note is negotiable within the meaning of a statute, it is entitled to the days of grace provided for by the statute.[91] The authorities are uniform in support of this statement of the law, except in respect to its inclusion of sight bills and notes, which by some is denied and by others doubted. In England there has not been, that we are aware of, a direct decision of the question; but it has been taken for granted in some cases, and distinctly intimated in others, that a sight bill or note is entitled to three days' grace;[92] and the authority

83. Brown v. Harraden, 4 T. R. 148 (1791).

84. 1 Parsons on Notes and Bills, 322.

85. Jones v. Fales, 4 Mass. 245; Cook v. Gray, Hempst. C. C. 47 (1827); Harrel v. Bixler, Walk. 176.

86. Ogden v. Saunders, 12 Wheat. 213, note; Norton v. Lewis, 2 Conn. 478 (1818), note; Cook v. Darling, 2 R. I. 385, note; Hudson v. Matthews, Morris (Iowa), 94 (1841), note; Crenshaw v. M'Kiernan, Minor, 295, note; Beck v. Thompson, 4 Harr. & J. 531 (1819), note; Green v. Raymond, 9 Nebr. 299. When a statute abolishes days of grace on certain kinds of notes, unless stipulated therein, and such notes do not contain such stipulation, notice of nonpayment given at the time the notes mature is not premature. Lowell Trust Co. v. Pratt, 183 Mass. 379, 67 N. E. 363.

87. Brown v. Harraden, 4 T. R. 148; Cook v. Darling, 2 R. I. 385; Brown v. Chancellor, 61 Tex. 440, citing the text; 1 Parsons on Notes and Bills, 404; Story on Bills, § 342; Story on Notes, § 224.

88. Ibid.; Chitty (13th Am. ed.) [*377], 426; Byles [*201]; Edwards, 523; Oridge v. Sherborne, 11 M. & W. 374; Barbour v. Bayen, 5 La. Ann. 303; Cammer v. Harrison, 2 McCord, 246; Woodruff v. Merchants' Bank, 25 Wend. 673; Wood River Bank v. First Nat. Bank, 36 Nebr. 744, 55 N. W. 239.

89. Story on Bills, § 343. First Nat. Bank v. Price, 52 Iowa, 570, the bill bore interest. Held, nevertheless, payable on demand without grace. 1 Parsons on Notes and Bills, 381; Dunkle v. Nichols, 101 Ind. 474, in which case the note was payable "on or before Dec. 25th, 1881, after date."

90. See *post*, § 633.

91. Hartsuff v. Hall, 58 Nebr. 417, 78 N. W. 716.

92. In Webb. v Fairmauer, 3 M. & W. 473 (1838), Bolland, B., said: "In

of text-writers, both foreign and American, as well as of adjudicated cases in this country, greatly preponderates in favor of such allowance. It seems clearly reasonable that bills at sight should have grace, as they are never presented for acceptance, but for payment; and the theory of indulgence to the drawee, upon which grace is allowed upon drafts payable at a specified time after date, or after sight, would apply with greater force to those payable at sight. And we have no hesitation in saying, in concurrence with the doctrine expressly stated, or to be derived from what is said by Chitty, Chitty, Jr., Bayley, Byles, Maxwell, Roscoe, Edwards, Story, Parsons, Kent, and others, that negotiable instruments payable at sight are, and should be, entitled to grace,[93] though there is respectable authority and opinion to the contrary.[94] The weight of authority in the United States is to this effect.[95] In Scotland the question does not appear to have been decided, but the inclination of opinion is to the allowance of grace.[96]

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the case of a bill payable at sight, it has been decided over and over again that the holder cannot sue upon it until after the expiration of the third day after sight." In Coleman v. Sayer, 1 Barn. 303 (1728), the chief justice said that by the custom of London grace was allowed on sight bills. In Dehers v. Harriot, 1 Show. 163 (1691), it seemed agreed that sight bills should be demanded on the third day of grace. In Jansen v. Thomas, 3 Doug. 421 (1784), Lord Mansfield said: "I believe there is great doubt as to the usage about the three days' grace." Buller, J., said: "In a case before Willes, C. J. (1743), a special jury certified that on bills at sight three days were allowed. That was an action on an inland bill. I know that they differ about it in the city, but in general it is taken." The decision was that a bill at sight should have been stamped, not coming within the provisions of the Stamp Act excluding bills on demand. Thornburg v. Emmons, 23 W. Va. 336, citing the text.

93. In Chitty on Bills (13th Am. ed.), 426, and Bayley on Bills, 151, it is so distinctly laid down. Chitty, Jr., on Bills, 50. In Byles on Bills (Sharswood's ed.), 336, it is said: "The weight of authority has been considered to incline in favor of such an allowance." Maxwell on Bills, 81–82; Roscoe's Digest, 162; Edwards on Bills, 523; Story on Notes, § 224; Story on Bills, §§ 228, 342. In § 342 Story says: "The doctrine seems now well established, both in England and America, that days of grace are allowed on bills payable at sight." 1 Parsons on Notes and Bills, 405–406; 3 Kent Com. 103; Redfield & Bigelow Lead. Cas. 307. See also 1 Bell Com. 416; Selwyn's N. P., Bills of Exchange, 6; Benjamin's Chalmers' Digest, 30.

94. Johnson on Bills, 9; Kyd on Bills, 10; Beawes, by Chitty, vol. I, p. 608; Trask v. Martin, 1 E. D. Smith, 505.

95. The following cases are to this effect: Walsh v. Dart, 12 Wis. 635; Cribbs v. Adams, 13 Gray, 597; Hart v. Smith, 15 Ala. 807; Knott v. Venable, 42 Ala. 186; Lucas v. Ladew, 28 Mo. 596; Nimick v. Martin, 1 Month. Law Mag. 15, 17 West. L. J. 380; Thornburg v. Emmons, 23 W. Va. 334, citing the text.

96. Forbes on Bills, 142.

A bill payable one day after sight is really payable four days after sight, three days' grace being added.[97]

§ **618.** Such being the rule of the law merchant, it will be presumed that a bill or note payable at sight is entitled to grace. In a number of the States, however, it is provided by statute that such instruments shall not have grace, and in others that they shall have grace. In some States it may be that well-established custom or usage has settled the practice to disallow it.[98] If such be the law or custom of a particular State or locality, it will be incumbent on the party alleging to show it; and otherwise the rule of the general law merchant prevailing throughout the United States must govern.[99]

§ **619. The expression "after sight"** in a bill of exchange has a different signification from the like expression in a promissory note. In a bill of exchange it means after acceptance, or protest for nonacceptance, and not after a mere private exhibition to the drawee, for the sight must appear in a legal way.[1] But a note is incapable of acceptance, and the words "at or after sight" used in it would merely import that payment was not to be demanded until it had been again exhibited to the maker.[2] Marius says: "A bill payable so many days after sight is to be accounted so many days next after the bill shall be accepted, or else protested for nonacceptance, and not from the date of the bill, nor from the day that the same came to hand or was privately exhibited to the party on whom it is drawn, to be accepted, if he do not accept thereof; for the sight must appear in a legal way, which is approved either by the parties underwriting the bill, acceptance thereof, or by protest made for nonacceptance." [3]

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97. Craig v. Price, 23 Ark. 634.

98. This is supposed to be the case in Virginia. In Indiana sight bills have grace by statute. A statute relating to checks, etc., drawn upon banks, banking associations, etc., governs the case of a check drawn upon a national bank and payable "ninety days after date," and under the particular statute the check matured at the expiration of the time without any days of grace. Jocque v. McRae, 142 Mich. 370, 105 N. W. 874.

99. See Cribbs v. Adams, 13 Gray, 497.

1. Campbell v. French, 6 T. R. 212; Mitchell v. De Grand, 1 Mason, 176; Byles [*76], 170; [*201], 336.

2. Holmes v. Kerrison, 2 Taunt. 323; Sutton v. Toomer, 7 B. & C. 416; Dixon v. Nuttall, 1 Cromp., M. & R. 307.

3. Marius, 19, cited and approved in Campbell v. French, *supra*, by Lord Kenyon.

§ 620. **Only those instruments which are negotiable** by the law merchant, or those which are placed upon the same footing by statute, and are, strictly speaking, commercial instruments, are entitled to grace. In England, where, under the statute of 3 & 4 Anne, a note payable to a particular person is negotiable, although the words "or order" or "or bearer" be not added, it would have grace; [4] and so whenever such a note is not negotiable; [5] but where such a note is not negotiable, it would be otherwise.[6]

§ 621. **Grace on instalments.**—If the bill or note be payable in instalments, it is entitled to grace on each instalment, for it is really so many instruments in one form.[7] If it is payable "on demand at sight," it is the same as if payable "at sight." [8]

The days are always calculated exclusively of the nominal day of payment.[9]

§ 622. **Number of days allowed by law merchant and by custom.** —The law merchant, as it prevails in England and the United States, limits the allowance of grace to three days,[10] and, although it is settled that by specially established usage in a particular locality it may be denied altogether, or a different number of days may be granted,[11] the courts take judicial notice of the period fixed by the law merchant, and will recognize that only unless the usage varying it is alleged and proved.[12] In the District of Columbia the usage at

4. Smith v. Kendall, 6 T. R. 123 (1794); Crain v. Bode, 5 Wyo. 255, 39 Pac. 747.

5. See Dutchess Cotton Mfg. Co. v. Davis, 14 Johns. 238; Downing v. Backenstoes, 3 Cai. 137.

6. Backus v. Danforth, 10 Conn. 297; Avery v. Stewart, 10 Conn. 69; Lamkin v. Nye, 43 Miss. 241; Tranter v. Hibberd, 108 Ky. 265, 56 S. W. 169, quoting text.

7. Oridge v. Sherborne, 11 M. & W. 374. Not so as to mere instalments of interest. Macloon v. Smith, 49 Wis. 200.

8. Dixon v. Nuttall, 1 Cromp., M. & R. 307.

9. Story on Bills, § 335.

10. Chitty on Bills (13th Am. ed.); Hill v. Lewis, Skin. 410 (1694); Wood v. Corl, 4 Metc. (Mass.) 203.

11. Jackson v. Henderson, 3 Leigh, 197; Renner v. Bank of Columbia, 9 Wheat. 581; Mills v. Bank of the United States, 11 Wheat. 431; Wood v. Corl, 4 Metc. (Mass.) 203; Kilgore v. Bulkley, 14 Conn. 362; Bank of Columbia v. Magruder, 6 Harr. & J. 172; City Bank v. Cutter, 3 Pick. 414; Morse on Banking, 335; but *contra*, Woodruff v. Merchants' Bank, 25 Wend. 673, 6 Hill (N. Y.), 174; Bowen v. Newell, 8 N. Y. 190; Edwards on Bills, 520, 521.

12. Jackson v. Henderson, 3 Leigh, 197; Renner v. Bank of Columbia, 9 Wheat.

one time prevailed to allow four days, and it was sustained as binding upon parties to negotiable instruments there payable, by the United States Supreme Court.[13] It extended, however, only to notes discounted in bank.[14] In Louisiana, at one time, ten days were allowed; but this was changed by statute to conform to the law merchant in the United States,[15] and, of course, no custom can affect a positive enactment.[16]

§ 623. **Usages of banks as to grace.**—The Supreme Court of the United States has, by several decisions, sanctioned the usages of banks in particular localities, in making demand, and giving notice of nonpayment, in a manner or at a time varying from the general law merchant,[17] and its views are concurred in by other high authorities. The following principles on this subject may be regarded as established: *First,* That the usage be notorious, in order that an inference may be drawn that it is known to the public, and especially to those dealing with the bank, and, therefore, create the further inference of expressed or implied assent. *Second,* That when a usage has been sanctioned by judicial decision it becomes settled law. No further proof is necessary to establish it, and no evidence is admissible to controvert the law laid down by the court.[18] *Third,* That it should apply to a place rather than to a particular bank.[19] *Fourth,* That it need not be known to the party dealing with the bank at a particular place.[20]

581; Bank of Columbia v. Magruder, 6 Harr. & J. 172; Dollfus v. Frosch, 1 Den. 367; Wood v. Corl, 4 Metc. (Mass.) 203; Lucas v. Ladero, 28 Mo. 242; Reed v. Wilson, 41 N. J. L. (13 Vroom) 29. In Kentucky it has been held to be entirely a matter of local custom. Goddin v. Shepley, 7 B. Mon. 575.

13. Renner v. Bank of the United States, 11 Wheat. 431. See Fowler v. Brantley, 14 Pet. 318.

14. Cookendorfer v. Preston, 4 How. 317.

15. In 1805, and see Stat. of 1855–1858; Dubreys v. Farmer, 22 La. Ann. 478.

16. Perkins v. Franklin Bank, 21 Pick. 483.

17. Renner v. Bank of Columbia, 9 Wheat. 587; Adams v. Otterback, 15 How. 539.

18. Cookendorfer v. Preston, 4 How. 317; Edie v. East India Co., 2 Burr. 1221.

19. Renner v. Bank of Columbia, 9 Wheat. 587; Mills v. Bank of the United States, 11 Wheat. 430; Adams v. Otterback, 15 How. 539; Dorchester, etc., Bank v. Milton Bank, 1 Cush. 177.

20. Mills v. Bank of the United States, 11 Wheat. 431; Fowler v. Branily, 14 Pet. 318; Lime Rock Bank v. Hewett, 52 Me. 531; Morse on Banking, 372–373.

§ 624. The term "month," and computation of months.—By the common law of England a month is deemed a lunar month, and is computed accordingly in construing common-law contracts and statutes; [21] but by the law merchant, both in England and the United States, a month is construed to mean a calendar month in all cases of negotiable instruments, and of mercantile contracts.[22] Therefore, a bill dated the first day of January, and payable one month after date, would be payable (grace included) on the fourth day of February; and one dated February 1st, payable one month after date, would likewise be payable (grace included) on the fourth day of March, although February is two or three days (in leap-year) shorter than January. When one month is longer than the next succeeding month, the computation of a month does not carry it into a third month. Thus a month dating from the 31st of January would expire on the 28th or 29th of February, as the case might be; and in leap-year, a month counting from the 31st, 30th, or 29th of January, would end on the 29th of February, and the last day of grace would be March 3d. But if a bill or note were dated January 28th, a month therefrom would terminate on February 28th, and presentment should be on March 2d.[23] The general rule was stated in a New York case [24] by Folger, J.: "In computing the time when a note, payable at a certain number of months after date, will become due, the rule is to exclude the day of the date from the calculation, and include the day of payment, when no days of grace are allowed.[25] When a promissory note is dated on a day of any month, and made payable at a specified number of months after date, without days of grace, it accrues due and payable on the same day in the stipulated number of months afterward with the day of the date of the note." [26]

§ 625. Computation of time when instrument payable on last day

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21. Chitty on Bills (13th Am. ed.) [*373], 420.

22. Thomas v. Shoemaker, 6 Watts & S. 179; McMurchey v. Robinson, 10 Ohio St. 496: Lang v. Gale, 1 Maule & S. 111; Matter of Swonford, 6 Maule & S. 226.

23. Wagner v. Kenner, 2 Rob. (La.) 120; Chitty (13th Am. ed.) [*373], 421; 1 Parsons on Notes and Bills, 409.

24. Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 163 (1875).

25. Citing Bellasis v. Hester, 1 Ld. Raym. 280; Campbell v. French, 6 T. R. 212.

26. Citing Hartford Bank v. Barry, 17 Mass. 94; Ripley v. Greenleaf, 2 Vt. 129. See also Doyle v. First Nat. Bank of Birmingham, 131 Ala. 294, 30 So. 880, 90 Am. St. Rep. 41.

of month.—And whenever a note is made on the last day of a month, the corresponding day of the next month is estimated as the termination of a month from date. Thus, if payable a month from February 29th, in leap-year, presentment should be on the 1st of April, and if on the 30th of September, presentment should be on the 2d of November.[27] If dated on an impossible date, such as the 31st of September, the law adopts the nearest day by the doctrine of *cy pres* (as near as may be); and the computation will be from the 30th of September.[28]

§ **626. As to the computation of days.**—In computing the number of days which a bill or note, payable at or in so many days from date, has to run, the day of date is always excluded; [29] and if payable at so many days after sight, after demand, or after a particular event, the day of sight,[30] demand, or of the happening of the event is likewise excluded.[31] So, if it be presented on one day, and accepted on another, the day of acceptance is excluded.[32] The expressions, "in thirty days,"—"in thirty days from date,"—"at thirty days,"—and "thirty days after date," are synonymous.[33] As said in Maine, by Howard, J.: "If there be several notes of the same date, some payable in six months, some in six months from date, and some in six months after date, they all have the same pay-day. In all of them the day of the date is excluded." [34]

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27. Wagner v. Kenner, 2 Rob. (La.) 129; Wood v. Mullen, 3 Rob. (La.) 299; Chitty [*373], 421; 1 Parsons on Notes and Bills, 409; Story on Notes, § 213*a*; Story on Bills, § 330; Edwards, 515.

28. Wagner v. Kenner, 2 Rob. (La.) 120; 1 Parsons on Notes and Bills, 410.

29. Coleman v. Sayer, 1 Barn. 303; Henry v. Jones, 8 Mass. 453; Ammidown v. Woodman, 31 Me. 580; Taylor v. Jacoby, 2 Pa. St. 495; Hill v. Norvell, 3 McLean, 583. Formerly otherwise, Bellasis v. Hester, 1 Ld. Raym. 303.

30. Coleman v. Sayer, 1 Barn. 303; Lester v. Garland, 15 Ves. 248; Sturdy v. Henderson, 4 B. & Ald. 592; Loring v. Halling, 15 Johns. 120; Mitchell v. De Grand, 1 Mason, 176.

31. Ibid.; Barlow v. Planters' Bank, 9 How. (Miss.) 129.

32. Mitchell v. De Grand, 1 Mason, 176.

33. Ammidown v. Woodman, 31 Me. 580; Henry v. Jones, 8 Mass. 453. In this case the court said: "In the case at bar the note was made payable at sixty days, without adding, as is customary, from the date. But the intention is apparent, and the court will supply the omission. The meaning must be the same as in sixty days from the date, otherwise a note payable in one day would be payable immediately, which would be an absurdity."

34. Ammidown v. Woodman, *supra*.

§ 627. How Sundays and days of religious observance and holidays counted.—There is a peculiarity about the calculation of grace, which denotes its origin as arising from indulgence. If a bill or note without grace, or any noncommercial instrument for payment of money, falls due on a Sunday or a legal holiday, it is not payable until the next regular business day, for the payor is not compellable by law to pay on the exact day named, and the next day is the first day that the creditor can demand payment.[35] But the debtor cannot require the creditor to extend his indulgence beyond three calendar days; and, therefore, when grace on a bill or note entitled to it expires on a Sunday or other nonbusiness day, the bill or note would fall due on the day preceding. Thus, if grace expired on Sunday, it would fall due on Saturday;[36] and if a holiday (such as Christmas-day) fell on the Saturday before the Sunday of its maturity, it would fall due on the Friday preceding.[37] The latest business day within or before the period of grace is the day of payment,[38] even though all grace be excluded.[39] If a holiday or Sunday intervenes, or is the nominal day of grace, it is counted as one of the days of grace.[40] Courts take judicial notice of the almanac, and, therefore, of the dates on which Sunday falls.[41]

§ 628. Days of religious observance.—Days observed according to the religious usages of a race or sect differing from those which generally prevail, as days of religious worship, fasts or festivals, stand on the same footing as the Christian Sabbath, in respect to those who belong to such race or sect. Religious liberty and freedom of conscience require this. Thus, a Jew, it is said, could not be com-

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35. Avery v. Stewart, 2 Conn. 69; Salter v. Burt, 20 Wend. 205; Kuntz v. Temple, 48 Mo. 75; Barrett v. Allen, 10 Ohio St. 426; Colms v. Bank, 4 Baxt. 422; Brennan v. Vogt & Son, 97 Ala. 647, 11 So. 893; Capital Nat. Bank v. American Exch. Bank, 51 Nebr. 707, 71 N. W. 743.

36. Bussard v. Levering, 6 Wheat. 192; Kuntz v. Temple, 48 Mo. 75; Barrett v. Allen, 10 Ohio, 426; Tassell v. Lewis, 1 Ld. Raym. 743; Reed v. Wilson, 41 N. J. L. (13 Vroom) 29; Morris v. Richards, 45 L. T. R. (N. S.) 210, Alb. L. J., Jan. 21, 1882, p. 53. *Contra*, see First Nat. Bank v. McAllister, 33 Nebr. 646, 50 N. W. 1040; National Bank v. American Exch. Bank, 51 Nebr. 707, 71 N. W. 743, citing text; Bartlett v. Leathers, 84 Me. 241.

37. Story on Bills, § 338.

38. Story on Bills, § 338.

39. 1 Parsons on Notes and Bills, 402.

40. Wooley v. Clements, 11 Ala. 229; Bartlett v. Leathers, 84 Me. 241.

41. Reed v. Wilson, 41 N. J. L. (13 Vroom) 29; Brennan v. Carl, Vogt & Son, 97 Ala. 647.

pelled to pay or receive payment on Saturday, if he observed it as a day of abstinence from secular business.[42] "The law merchant respects the religion of different people." [43]

§ 629. **What days are legal holidays** are determined by statute law and by the decisions of the courts in the various States. Christmas is universally regarded as a legal holiday. The Fourth of July is everywhere regarded so in the United States; and in many of them the 22d of February and fast and Thanksgiving days and New Year's day, likewise. In most of the States there are statutes specifying the legal holidays and prescribing the practice with respect to them; but, independent of them, usage would determine whether any day was to be so regarded, and also the regulations concerning it.[44] In Massachusetts, it has been held that although commencement day at Harvard University was not a legal holiday, yet that a usage of any bank in respect to notes falling due on that day, to make a demand and to send notice the day previous, would bind an indorser, conusant of the usage of a note discounted for him at that bank; and whether the note was payable at the bank or not was immaterial.[45]

But the usage of a bank in a particular city to regard New Year's day as a holiday, would not justify a demand the day previous, so as to charge an indorser, unless he had express knowledge of the usage, or previous dealings with the bank, from which such knowledge could be inferred.[46]

It has been held that a law making a legal holiday, and thereby affecting notes as to grace, does not impair the obligation of a contract.[47] This view, however, has been questioned.[48]

§ 630. **A bill or note operates as from its date** as soon as it is delivered, whether it be truly dated, or antedated, or postdated, although it does not become an operative contract until it is delivered.[49] When there is no date or an impossible one, it operates

42. Story on Bills, § 340; 1 Parsons on Notes and Bills, 530.
43. Lindo v. Unsworth, 2 Campb. 602, Lord Ellenborough.
44. 1 Parsons on Notes and Bills, 403.
45. City Bank v. Cutter, 3 Pick. 414.
46. Dabney v. Campbell, 9 Humphr. 680. See Mills v. Bank of U. S., 11 Wheat. 431.
47. Barlow v. Gregory, 31 Conn. 261.
48. See Duerson's Admr. v. Alsop, 27 Gratt. 238 (1876), Staples, J.
49. Powell v. Waters, 8 Cow. 699. See *ante*, §§ 83–85.

from its delivery;[50] and if no date or delivery is shown, from the time when it appears to have first been in existence.[51] The object of the date is simply to fix the time of maturity;[52] and parol evidence cannot be admitted to vary it,[53] unless between the immediate parties upon application to equity on the ground of fraud or mistake.

§ **631. As to usance.**—When bills are drawn in one country of Europe upon another, they are frequently made payable at one, two, or more usances, instead of at so many months or days. "Usance" is a French term, and signifies the time which, according to the usage of the countries between which the bills are drawn, is appointed for payment of them.[54] The length of the usance differs in different countries; and what period it signifies is not taken judicial notice of by foreign courts, but must be averred and proved.[55] Between the United States and the European nations, it seems that no usances are established;[56] and in Europe the practice of drawing bills at a certain number of days or months is taking the place of drawing at usance.[57] When a month constitutes the usance, a half usance is fifteen days, and bills may be drawn at half, or double, or treble usance.[58] Usance is calculated exclusively of the day of date, and grace is allowed as in other cases.[59]

§ **632. Style.**—The Gregorian calendar, or new style of computing time, is adopted in the United States, and everywhere else, except in Russia, and those countries where the Greek Church is the established religion. They use the Julian calendar, or old style, as it is called. There is the difference of twelve days between the two styles; and the addition of that number to the old makes the new style. The 1st of January in St. Petersburg, Russia, is, therefore, the 13th of January in England and the United States. The style of the place of payment, however, always prevails; and if a bill were drawn in London on the 1st of September, payable in St. Petersburg on the

50. Mechanics' Bank v. Schuyler, 7 Cow. 337.
51. Mahier v. LeBlanc, 12 La. Ann. 207.
52. Brewster v. McCardle, 8 Wend. 478.
53. Huston v. Young, 33 Me. 85.
54. Chitty on Bills (13th Am. ed.) [*371], 418; Story on Bills, §§ 50, 144, 332.
55. Chitty [*371], 418.
56. 1 Parsons on Notes and Bills, 389.
57. Chitty, 418.
58. Ibid.
59. Ibid.

1st of January, it would fall due on the day corresponding to the 13th of January in England; and *vice versa*.[60] This is because the parties are to be regarded as contracting in reference to the meaning of terms at the place of their fulfilment.[61]

§ 633. How grace dispensed with.—By any language in the bill or note of that import, grace may be disallowed. And such words as "without grace," or "no grace," obviously disallow it;[62] and the word "fixed" has been held to have the same import.[63] But the expression "without defalcation" does not;[64] nor would a mere marginal memorandum of the day of the month and year on which the time after date at which the instrument was expressed to be payable fell due.[65] But where a bill at sixty days' sight was accepted on September 14th, payable November 16th, it was held that November 16th was indicated by the acceptor to be the absolute day of payment, he having intended to allow for grace in his calculation; and that presentment on that day was necessary.[66]

§ 634. Place of payment regulates grace.—The allowance of grace is always determined by the law of the place where the bill or note is payable.[67] But the law merchant allowing grace, and fixing it at three days, will be followed unless it be affirmatively proved that the law of such place is different. Thus, if executed and sued on in this country, where three days are allowed, and payable in France, where grace is abolished,[68] three days' grace would be accorded, unless the law of France were proved.[69]

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60. Story on Bills, § 331; 1 Parsons on Notes and Bills, 388.

61. Chitty on Bills [*369], 417.

62. Perkins v. Franklin Bank, 21 Pick. 483.

63. Durnford v. Patterson, 7 Mart. 460.

64. McDonald v. Lee, 12 La. 435; Bell v. First Nat. Bank, 115 U. S. 382.

65. Perkins v. Franklin Bank, 21 Pick. 483.

66. Kenner v. Creditors, 19 Mart. 540, 20 Mart. 36; Bell v. First Nat. Bank, 115 U. S. 382

67. Chitty on Bills (13th Am. ed.) [*376], 425; Story on Notes, § 216; Story on Bills, § 334; Byrant v. Edson, 8 Vt. 325; Bowen v. Newell, 13 N. Y. 290; Bank of Washington v. Triplett, 1 Pet. 25; Kilgore v. Buckley, 14 Conn. 362; Skelton v. Dunsten, 92 Ill. 49. See *post*, § 908.

68. Code of Commerce, art. 135.

69. Dollfus v. Frosch, 1 Den. 367.

SECTION V

PLACE OF PRESENTMENT FOR PAYMENT

§ 635. At what place presentment should be made, when bill or note is payable generally.—The presentment of the bill or note for payment should be made at the city, town or other place in which the acceptor or maker has his home or domicile, or his place of business, provided there be no place designated in the instrument or agreed upon by the parties as the place where it shall be paid at maturity.[70] If such place is designated or agreed upon, it will be sufficient to make presentment there.[71] And averment of presentment there is always sufficient, without any addition.[72] If the bill be addressed to the drawee in a particular city, as for instance, to "A. B., New York," the city named would be regarded as the place of presentment for payment, if the acceptance be without explanation or condition.[73] If the maker or acceptor has both a dwelling-house and a business house in the same city, town or other place, the presentment may be made at either.[74] And if the maker or acceptor have a

70. Oakley v. Beauvais, 11 La. 487; Mitchell v. Baring, 10 B. & C. 11; Cox v. National Bank, 100 U. S. (10 Otto) 713; People's Bank v. Lutterloh, 95 N. C. 495. Where a note provided that if the interest were not paid monthly the whole sum of both principal and interest should become due immediately, and the note was not by its terms payable at a special place but the maker had an established place of business, ready and willing to pay the interest when due, the owner could not exercise the option to declare the whole due on failure to pay interest without giving the maker an opportunity to pay by presentment and demand at his place of business. Bardsley v. Washington Mill Co., 54 Wash. 553, 103 Pac. 822, 132 Am. St. Rep. 1133.

71. Brent's Exrs. v. Bank of Metropolis, 1 Pet. 92; Eason v. Isbell, 47 Ala. 456 (1868); Ewen v. Wilbor, 99 Ill. App. 132, affirmed 208 Ill. 492, 70 N. E. 575. Where a note on its face was made payable in a named city, and the maker added to his signature a certain address in that city, presentation of the note at the address so given, in the absence of any change of address and notice thereof to the payee or holder, would be sufficient, although the maker was on that day absent from the city. Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319.

72. Hawkey v. Borwick, 4 Bing. 136 (13 Eng. C. L.); Cox v. National Bank, 100 U. S. (10 Otto) 716.

73. Cox v. National Bank, 100 U. S. (10 Otto) 704. See *post*, § 640.

74. Story on Bills, § 236. Under a statute providing that presentment must be made at the place specified for payment, a demand by letter addressed to the maker at a business building in the same city not the place of payment mentioned

dwelling-house or domicile in one city, and a place of business in another, it will, as it seems, be sufficient to present the instrument at either.[75] If a bill be payable in a particular town, a presentment at all of the banker's houses there will suffice.[76] In such case, where the maker used due diligence to find at what bank the note was left for presentment without success, he was relieved from a penalty for failure to pay it the instant of maturity.[77] In an action upon a draft upon N. F. Mills, "care of M. S. & Co., No. 114 South Main st., St. Louis, Mo.," the notarial certificate stated that the notary presented it "at the place of business of N. F. Mills, St. Louis, to the person in charge thereof." It appeared that N. F. Mills had two places of business in St. Louis, one of which was No. 114; and it was held that the certified presentment was insufficient to show due diligence, to charge the indorsers.[78]

When the bill is presented for acceptance, the drawee may detain it for twenty-four hours, if he desire, before acting, to examine his accounts; but when a bill or note is presented for payment, it must be paid immediately; and the place of presentment for payment would, therefore, seem more important than the place of presentment for acceptance. Presentment for acceptance at the private dwelling of the drawer is sufficient;[79] and the authorities support the doctrine that it is equally sufficient to make presentment there for payment.[80] In New York, the rule is thus stated by Folger, J.: "Demand of payment at the usual place of business of the maker, though he be absent, is sufficient; or at his residence; or to him in person."[81]

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in the note, is not sufficient. Merchants' Nat. Bank of Santa Monica v. Bentel, 15 Cal. App. 170, 113 Pac. 708.

75. Story on Bills, §§ 236, 351; 1 Parsons on Notes and Bills, 422, note *m*.

76. Hardy v. Woodroofe, 2 Stark. 319; Byles [*207], 323; Clough v. Holden, 115 Mo. 336, 21 S. W. 1071, 37 Am. St. Rep. 393, citing text; Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

77. Ansel v. Olson, 39 Kan. 767.

78. Brooks v. Higby, 11 Hun, 236 (1877), Smith, J.: "As it appears that the acceptor had two places of business in St. Louis, the certificate furnished no evidence whatever that the presentment and demand were at the place where the draft was payable. The proof was fatally defective."

79. Chitty on Bills (13th Am. ed.) [*278], 316.

80. M'Gruder v. Bank of Washington, 9 Wheat. 198, the court saying: "It is enough if the demand be made at his place of abode, or generally at the place where he ought to be found." Sanderson v. Judge, 2 H. Bl. 509, it being said, "It is sufficient if it (demand) be made at the house of the maker of the note." Shamburgh v. Comagere, 10 Mart. 18; Stivers v. Prentice, 3 B. Mon. 461.

81. Gates v. Beecher, 60 N. Y. 522.

Under Negotiable Instrument statute.—Under the statute prescribing the place of presentment for payment, it has been held that where a note expresses on its face that it is payable at a certain store, a presentment of such note at such store for payment on the day of its maturity is a proper place for presentment to charge an indorser, as no personal demand on the maker of the note is necessary.[82]

§ 636. When payor has well-known place of business.—When, however, the maker or acceptor has a well-known house or place of business where he is accustomed to transact his financial affairs, and where demand may be made, it would be safer and more appropriate to present it there. Certainly it would seem unreasonable to expect, during the business hours of the day, to find any one at a private residence to answer respecting the payment of a negotiable instrument, when the maker or acceptor, if he have any place of business, would be presumably there; and during such business hours due diligence would not appear to have been exerted in demanding payment at his house.[83] If, however, business hours had closed, a presentment at the dwelling would seem sufficient. It is undoubted that a presentment and demand of payment at the place of business of the maker or acceptor is sufficient.[84] Where it was contended that the demand should have been made at the maker's house, it was held otherwise.[85] But if the place of business cannot be

82. Appendix, sec. 73. Nelson v. Grondahl, 13 N. D. 363, 100 N. W. 1093. The phrase "a place of payment" does not mean an individual, a corporation, or institution, and when a note was by its terms made payable at a designated branch of a trust company, this referred to the place of payment and not to the corporation, and presentment at the principal office of the trust company on the date due was not sufficient to change indorsers. Ironclad Mfg. Co. v. Sackin, 114 N. Y. S. 42, 129 App. Div. 555.

83. 1 Parsons on Notes and Bills, 423.

84. Lanussa v. Massicot, 3 Mart. 361.

85. Sussex Bank v. Baldwin, 2 Harrison, 487. In this case it was contended that demand should have been at the dwelling, but the court said: "It appears by the evidence that the office in question was the regular place of business of the maker; and I have no doubt where a person has an office, or known and settled place of business for the transaction of his moneyed concerns, whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, a presentment and demand at that place, as well as a presentment and demand at his residence, is sufficient. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting-room of a banker or merchant may be a proper place for a demand, though the manufactory or work-

found,[86] then demand should be made at the maker's house.[87] If a bill be accepted payable at a banker's, and the banker is holder at maturity, that fact alone amounts to presentment;[88] so if it be left there for collection.[89]

§ 637. Usual place of business; rule when it is closed and abandoned.—The place of business must be the "usual place of business" of the party, and not that used for a mere temporary occupation;[90] though if it be really the place where he transacts his financial concerns, it matters not that it is a mere office, or desk-room in an office with others, and a demand there in his absence made during business hours will be sufficient.[91] If the party has closed and abandoned his place of business at the time the bill or note matures, but has a place of residence in the city or other place where his business was conducted, which could be ascertained by reasonable inquiry, the presentment for payment should be made at his residence, and a presentment at the former place of business will not suffice.[92] And, of course, where the party has no place of business other than the dwelling, the presentment must be at the dwelling.[93] And so, if a partnership place of business be closed and abandoned when the note matures, and one of the partners resides in the town or city, presentment at his residence must be made.[94] But ordinarily the statement of the notary's certificate that he called at the place of business of the acceptor or maker to make demand, during the usual hours of bus-

shop would not. Yet, if the manufacturer or mechanic have an office or known place of business for the purpose aforesaid, a good demand may be made there.

86. Glaser v. Rounds, 16 R. I. 236, 14 Atl. 863.

87. Jarvis v. Garnett, 39 Mo. 271.

88. Bailey v. Porter, 14 M. & W. 44. And if the bank has meanwhile become insolvent, demand of payment may be made and notice of nonpayment given to the bank or some one in possession. Auten v. Manistee Nat. Bank, 67 Ark. 243, 54 S. W. 337.

89. Nichols v. Goldsmith, 7 Wend. 160.

90. Sussex Bank v. Baldwin, 2 Harr. 457.

91. West v. Brown, 6 Ohio St. 542; Williams v. Hoogewerff, 25 Md. 128; Bank of Commonwealth v. Mudgett, 44 N. Y. 514 (case of protest).

92. Granite Bank v. Ayres, 16 Pick. 392. See vol. II, § 1118; Farnsworth v. Mullen, 164 Mass. 112, 41 N. E. 151; Reinke v. Wright, 93 Wis. 368, 67 N. W. 737, citing and approving text.

93. Packard v. Lyon, 5 Duer. 82. Maker was a married woman who kept a boarding-house, but her name was not in the directory. Demand at a bank where note was deposited, with inquiry as to place of residence, was held insufficient, and indorser was discharged.

94. Granite Bank v. Ayres, 16 Pick. 392.

iness, and found it closed, is sufficient; for, unless he has abandoned and permanently closed it, his duty is to keep some one there to answer business demands during business hours.[95]

§ 638. When presentment is to party in person, place generally unimportant.—When the presentment is made to the maker or acceptor personally, the place is not important, provided there is an express or implied refusal to pay. Presentment at the barn-yard has been held sufficient, the party "making no objection, and intimating no readiness to pay";[96] and even in the street presentment would seem to be usually good, unless objected as improper, or some reason were given for the refusal.[97] This view seems to us correct.[98] But it would be more businesslike not to make demand at such a place, and there are authorities which hold that the party is not bound to pay any attention to a demand so entirely outside of the custom of merchants.[99] In a case in Maine, demand on the street of the maker, he having no place of business, and raising no objection, was held sufficient to charge the indorser, and the law was laid down with discrimination and sound judgment by Virgin, J., who said:[1] "it would seem that such a demand would be more satisfactory than a mere formal ceremony of a demand gone through at his place of residence during the maker's absence. And we have no hesitation in declaring the demand sufficient under the circumstances, so far as the place is

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95. See vol. II, § 1118.

96. Baldwin v. Farnsworth, 1 Fairfax, 414.

97. 1 Parsons on Notes and Bills, 421.

98. King v. Crowell, 61 Me. 244 (1873); Parker v. Kellog, 158 Mass. 90, 32 N. E. 1038, citing text.

99. King v. Holmes, 11 Pa. St. 456, Rogers, J., saying: "The court correctly instructed the jury that a demand in the street of an acceptor of a bill of exchange is not a sufficient demand; that when a bill is payable generally, and not at a particular place, the demand must be at the place of business of the acceptor. But if the notary, on his way to the place of business of the acceptor, meets him on the street, and informs him of his business and where he is going, and the acceptor offers, if he will go to his place of business, to give him only a check on a broker, it is not necessary for the notary to proceed further. The demand at the place of business is waived by the payor or acceptor. It is, in effect, a refusal to pay, for an offer to pay by a check on a banker, in legal contemplation, is nothing. It is not such a tender as the notary would be justified in accepting. In this case, the acceptor had no cause of complaint, for the notary offered to receive a check on one of the banks in payment of the bill."

1. King v. Crowell, 61 Me. 244 (1873); Townsend v. Dry Goods Co., 85 Mo. 508, citing the text.

concerned, to charge the defendant (an indorser). We are aware that Byles on Bills, 196, declares that a demand on the street is not sufficient. Such is the doctrine expressed, too, in the author's notes in Lead. Cas. on Bills, 328, 329. And there are several cases containing the *dictum* in general terms that a demand must be made either at the maker's place of business or place of residence. But our attention has been called to no case, neither have we, after considerable research, been able to find any, wherein the court having the question before it, decided adversely to a demand made on the street, under circumstances similar to those in this case."

§ 639. **Place of date prima facie place of payment.**—The place of date in a note does not, of itself, make it payable there, and when a note is payable generally, the parties may agree upon the place where it shall be presented, and parol evidence is admissible to prove such an agreement.[2] It has been held that where the maker and indorsers have agreed where a note payable generally shall be presented for payment, presentment at such place is sufficient to charge the indorsers as well as the maker; [3] and the grounds upon which the

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2. 1 Parsons on Notes and Bills, 424; Redfield & Bigelow's Lead. Cas. 326. *Contra*, Story on Notes, 49; Pierce v. Whitney, 29 Me. 188; McNair v. Moore, 55 S. C. 435, 33 S. E. 491.

3. Cox v. National Bank, 100 U. S. (10 Otto) 713; Brent's Exrs. v. Bank of the Metropolis, 1 Pet. 92, Marshall, C. J., saying: "The plaintiffs in error contended that the testimony ought not to have been admitted, because it was an attempt by parol proof to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand at a stipulated place, instead of a demand on the person of the maker, and this does not alter the instrument so far as it goes, but supplies extrinsic circumstances which the parties are at liberty to supply. No demand is necessary to sustain a suit against the maker. His undertaking is unconditional; but the indorser undertakes conditionally to pay, if the maker does not, and this imposes on the holder the necessity of taking proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent." This case was based on evidence that the indorsers, as well as the maker, had agreed that demand should be made at a particular place—the Bank of the Metropolis. State Bank v. Hurd, 12 Mass. 171; Meyer v. Hibscher, 47 N. Y. 265; Thompson v.

decisions to this effect are based are broad enough to establish the sufficiency of presentment at any place agreed upon by the maker. The contract of the indorsers is to pay if due diligence to obtain payment from the maker is used without effect. Due diligence requires presentment to the maker at his dwelling or place of business; and if the maker designates a place of payment, it is as much as to say, I will accept presentment at the place named, and make it my place of business so far as this transaction is concerned. Every object which would require presentment at the place of business is attained.[4]

§ 640. Due diligence in seeking maker to make presentment.—Whether or not due diligence to find the maker of a note at the place where it is dated, will be sufficient, has been debated. The place of date is *prima facie* evidence that it is the place of the maker's residence and place of business; and it is sufficient, we should say, to charge an indorser to have the note in that place at the time of maturity, and to make proper inquiry after the place of the maker's residence or place of business, provided that the holder does not know that his residence is elsewhere.[5] And if it were proved that the maker resided elsewhere, it would not devolve upon the holder the burden of showing that he made inquiries as to his residence.[6] This doctrine is

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Ketchum, 4 Johns. 285. But see Anderson v. Drake, 14 Johns. 114; Rose v. McCracken, 20 Tex. Civ. App. 637, 50 S. W. 152, citing text.

4. 1 Parsons on Notes and Bills, 424; Sussex Bank v. Baldwin, 2 Harrison, 487, on the ground of estoppel. This doctrine is doubted in Redfield & Bigelow's Lead. Cas. 427.

5. Britton v. Nichols, 104 U. S. 757; Bank of Fayetteville v. Lutterloh, 95 N. C. 499, citing the text; Salisbury v. Bartleson, 39 Minn. 366. In Meyer v. Hibscher, 47 N. Y. 270, it is said by the court, per Folger, J.: "In such case (the note being dated at a place and payable generally) the note must be presented and payment asked for at the place of business therein of the maker if he has one; and if he has no place of business, then at his place of residence. And if he have neither place of business nor residence, then, if the holder of the note is at the place where it is in general made payable, on the day of payment, with the note, ready to receive payment, it is sufficient to constitute a presentment and demand." Apperson v. Bynum, 5 Coldw. 348; Staylor v. Williams, 24 Md. 199; Moodie v. Morrall, 3 Const. Rep. 367; Stewart v. Eden, 2 Cai. 121. But see Apperson v. Pritchard, 9 Heisk. 793; Hazard v. Spencer, 17 R. I. 566, 23 Atl. 729, citing text; Rose v. McCracken, 20 Tex. Civ. App. 637, 50 S. W. 152, citing text; Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

6. In Smith v. Philbrick, 10 Gray, 252, Merrick, J., said: "This is an action brought by indorsers against a prior indorser to recover the contents of a promissory note. At its maturity the holder placed it in the hands of a notary public who, by his direction, went with it to the place of business which the maker form-

sustained by high authority in America, and is that adopted in Scotland;[7] and it seems to us correct, notwithstanding that there are cases in which a contrary view is taken, and that it has been criticised by an eminent author.[8] It is true that the execution of a note, and the dating of it at a particular place, does not make it necessarily payable there,[9] and this is the ground on which Professor Parsons bases the opinion that due diligence is not exercised in presenting it there without inquiry; but the question seems to us not one as to the contract of payment, but simply as to the likelihood of the maker's whereabouts. And in the absence of other information, it seems reasonable to presume that he will be found at the place where he executes his business paper, and that if it had been intended that it should be payable elsewhere, it would be so expressed on its face.[10]

And when the bill or note is made on terms payable in a city, without specification of a particular place, and the acceptor or maker has no residence or place of business there, it will certainly be sufficient to charge the drawer or indorser if the holder have the bill or note

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erly occupied in the city of Boston, and there made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action cannot be maintained. The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then, and has ever since, resided at Port Lavacca, in the State of Texas, where he had his only place of business. At the trial no evidence was produced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston or elsewhere; there was no evidence whatever upon that question. * * * The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party may controvert this presumption, and overcome it by proofs introduced. But no evidence to the contrary having been laid before the court, this presumption is to stand."

7. Thompson on Bills (Wilson's ed.), 286.

8. 1 Parsons on Notes and Bills, 458. But see p. 453, of the same volume, in which the opinion concords with the text substantially, and varies from that subsequently given; also p. 442. And see chapter XXIX, on Notice, section VI; Mason v. Pritchard, 9 Heisk. 797. In this case the maker signed himself as "Captain of the steamboat Southerner."

9. Taylor v. Snyder, 3 Den. 145; Lightner v. Hill, 2 Watts & S. 140; Anderson v. Drake, 14 Johns. 114; Fisher v. Evans, 5 Binn. 541.

10. Davis v. Eppler, 38 Kan. 631, approving the text.

in the city at maturity, ready to be presented and delivered up, if the maker or acceptor should appear; [11] and certainly due inquiry in the city named in the address for the acceptor would be sufficient presentment to charge drawer or indorser.[12] And, indeed, it seems that it would be idle to make a bill payable in a particular city, without naming a particular place therein, if the drawee does not reside or have a place of business there. The law requires no useless ceremony, and the absence of the party from the place of payment would dispense with the necessity of going where it is known he would not be found, and it is not necessary that the bill should be sent there and protested.[13]

§ 641. Presentment of notes made, and of bills drawn or accepted, payable at a particular place in England.—In England, the steps necessary to fix the liability of parties to notes and bills made, drawn, or accepted, payable at a particular place, were for a long time the subject of much disputation, the history of which it is no longer necessary to follow minutely in order to appreciate fully the settled condition of the law, or to understand its bearings upon the decisions in the United States. A case came finally before the House of Lords, in which the effect of an acceptance in the following language was discussed: "Accepted, payable at Sir John Perring & Co., bankers, London;" [14] and that body, overruling the views of eight of the twelve judges whose opinion had been taken on the question, decided that the acceptance was conditional, restricting the place of payment, and that the holder was bound to present the bill at the bankers named in order to charge the acceptor. If the holder brought an action against the acceptor, it was held necessary that he should aver and prove such presentment, otherwise the declaration would be bad upon demurrer. This decision led to the passage of the statute 1 & 2 Geo. IV. (generally called Sergeant Onslow's Act), by which it was enacted that an acceptance payable at the house of a banker, or other place, without further expression, should be deemed a general acceptance; but if it were expressed payable at a banker's, or other place, "only, and not otherwise or elsewhere," it should be a qualified acceptance,

11. Root v. Franklin, 3 Johns. 207; Mason v. Franklin, 3 Johns. 202; Edwards on Bills, 500. Compare Williams, Admr. v. Planters' & Mechanics' Nat. Bank, 91 Tex. 651, 45 S. W. 690.

12. Cox v. National Bank, 100 U. S. (10 Otto) 704. See *ante*, §§ 90, 635.

13. Ibid.; Edwards on Bills, 158.

14. Rowe v. Young, 2 Brod. & B. 165, Bligh, 391.

and the acceptor should not be liable except upon due demand at the place named.

§ 642. English statute not applicable to notes.—This statute, it will be observed, did not apply to promissory notes,[15] and the liability of the drawer or indorser of a bill remained unchanged.[16] Where the place, therefore, is mentioned in the body of a note, presentment must, in England, be averred and proved,[17] but if a place were mentioned in a memorandum beneath the maker's signature, it would be regarded as directory only.[18] Where a bill is drawn with the expression of a particular place only, and not elsewhere in the body, and accepted without further expression in the acceptance, it would be within the rule of the statute making it a qualified acceptance.[19] And the words, "and not elsewhere," alone would be sufficient to incorporate the qualification.[20]

The same principles apply where the place of payment is specified in the body of the bill, and the acceptance is simply according to its tenor; and it will be necessary, in order to charge the drawer, to present the bill at the particular place, if one be named.[21]

§ 643. Presentment at a particular place in the United States.—The Supreme Court of the United States, and almost all the courts of last resort of the several States, have coincided with the views presented by a majority of the judges in the case of Rowe v. Young (quoted in a note to the foregoing paragraph), and differing from the decision of the House of Lords in that case; and in the United States it may be considered as settled that where a note is made payable at a particular banker's, or other place,[22] or a bill is drawn or

15. Emblem v. Dartnell, 12 M. & W. 830.

16. Gibb v. Mather, 8 Bing. 214.

17. Sanderson v. Bowes, 14 East, 500.

18. Sanderson v. Judge, 2 H. Bl. 509; 1 Parsons on Notes and Bills, 428. But see § 643, *post* as to rule in the United States.

19. Halsted v. Skelton, 5 Q. B. 86.

20. Higgins v. Nichols, 7 Dowl. 551.

21. Boydell v. Harkness, 3 C. B. 168 (54 Eng. C. L.); Selby v. Eden, 3 Bing. 611, 11 J. B. Moore, 511; Fayle v. Bird, 6 B. & C. 531, 2 Car. & P. 303, 9 Dowl. & R. 639. See the decisions as to Promissory Notes, Byles on Bills (Sharswood's ed.) [*246], 342; 1 Parsons on Notes and Bills, 308, note *z*.

22. Wallace v. McConnell, 13 Pet. 136; Cox v. National Bank, 100 U. S. (10 Otto) 714; Schoharie County Nat. Bank v. Bevard, 51 Iowa, 258; Armistead v. Armistead, 10 Leigh, 525; Watkins v. Crouch, 5 Leigh, 522; Ruggles v. Patten, 8 Mass, 480; Caldwell v. Cassidy, 8 Cow. 271; McNairy v. Bell, 1 Yerg. 502;

accepted, payable in like manner,[23] it is not necessary, in respect to the maker or acceptor, to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterward, in order to maintain an action against him.[24] The only consequence of neglect of the holder to present, as said by President Tucker in a Virginia case,[25] is "that the maker, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs; but he must, at the same time, bring the money into court which the plaintiff will be entitled to receive. A further consequence, indeed, might follow, if any loss had been sustained by his failure to present; but this must be set up as matter of defense." [26] And he is only discharged to the extent of the loss or injury sustained.[27] If the maker has funds in the bank, and withdraws them after time of payment, the holder is entitled to principal and interest against him.[28]

It has been held that another consequence of failure to present

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Thiel v. Conrad, 21 La. Ann. 214; Renshaw v. Richards, 30 La. Ann. 398; Hills v. Place, 48 N. Y. 520 (1872); Howard v. Bowman, 17 Wis. 459; McCullough v. Cook, 34 Ind. 334; Montgomery v. Tutt, 11 Cal. 307; Reeve v. Pack, 6 Mich. 240; Yeaton v. Berney, 62 Ill. 62; Hill v. Allen, 37 Ind. 541. Kent and Story inclined to the English rule. Story on Notes, §§ 227, 229, 3 Kent Com. 99; Picquet v. Curtis, 1 Sumn. 478; Merchants' Bank v. Evans, 9 W. Va. 373; Baltzer v. Kansas Pacific R. Co., 3 Mo. App. 574; Yeaton v. Berney, 62 Ill. 61; Insurance Co. v. Wilson, 29 W. Va. 543, citing the text; McIntyre v. Insurance Co., 52 Mich. 188; Callanan v. Williams, 71 Iowa, 363; Lazier v. Horan, 55 Iowa, 77, citing the text. The same rule has been held to apply to the case of one who was a joint maker in form, though in fact a surety. Chafoin v. Rich, 77 Cal. 476; Hinkley v. Fourth Nat. Bank, 77 Ind. 475, citing the text; Central Nat. Bank v. Stoddard, 83 Conn. 332, 76 Atl. 472; Farmers' Nat. Bank v. Venner, 192 Mass. 531, 78 N. E. 540; Hillman v. Stanley, 56 Wash. 320, 105 Pac. 816.

23. Foden v. Sharp, 4 Johns. 183; Blair v. Bank of Tennessee, 11 Humphr. 84.

24. Contrary decisions have been rendered in a few cases in the United States. In Indiana, Palmer v. Hughes, 1 Blackf. 328; Gilly v. Springer, 1 Blackf. 257; Alden v. Barbour, 3 Ind. 414, agreed with the English doctrine, but are now overruled; Hall v. Allen, 37 Ind. 541. The decisions in Louisiana, formerly of the same tenor, have been overruled, and the general doctrine now prevails there also. Riley v. Cheeseman, 75 Hun, 387, 27 N. Y. Supp. 1453; Brockway v. Gadsden Mineral Land Co., 102 Ala. 620, 15 So. 431.

25. Armistead v. Armistead, 10 Leigh, 525, reaffirming Watkins v. Crouch, 5 Leigh, 322.

26. To the same effect, see Story on Bills, § 356; Bank v. Zorn, 14 S. C. 444.

27. Lazier v. Horan, 55 Iowa, 75. But the maker has also been held to be relieved from liability for future accruing interest on the note. Cheney v. Bilby, 20 C. C. A. 291, 74 Fed. 52.

28. Hills v. Place, 48 N. Y. 520 (1872).

at the place of payment as to the maker, is, that where the performance of any contract which he has made is dependent upon the payment of such paper, he cannot be held to be in default unless the paper was presented at maturity at the place at which it was made payable.[29]

Under Negotiable Instrument statute.—In an action against the maker of a note payable at a particular time and place, a demand need not be averred and proved. If the maker was ready and offered at the time and place to pay it, this is a matter of defense, to be pleaded and proved by him.[30]

§ 644. **Liability of indorser and drawer.**—In respect to the indorser of a bill or note, or the drawer of a bill, payable at a particular bank or other place, the rule is different. He is not the original debtor, but only a surety. His undertaking is not general, but conditional upon due diligence being used against the principal debtor, and such diligence requires presentment at the place specified, where it is to be presumed that funds have been provided to meet the bill or note at maturity.[31] When it is necessary to present the paper at the bank it is insufficient to show a demand of the cashier.[32] It has been held that presentment at a different place from that at which the note is payable, and an absolute refusal of the maker to pay, and a statement that any further presentment at the place specified would be useless, because there were no funds there, would not charge an indorser.[33] And where a note payable at one bank was by the consent

29. Robinson v. Cheney, 17 Nebr. 673; Rose v. McCracken, 20 Tex. Civ. App. 637, 50 S. W. 152, citing text; Bank of Saline v. Wingfield, 68 Mo. App. 335.

30. Appendix, sec. 70. Florence Oil & Refining Co. v. First Nat. Bank, 38 Colo. 119, 88 Pac. 182.

31. Bank of the United States v. Smith, 11 Wheat. 171; Cox v. National Bank, 100 U. S. (10 Otto) 712; Watkins v. Crouch, 5 Leigh, 522; Brown v. Hull, 23 Gratt. 27; Shaw v. Reed, 12 Pick. 132; Nichols v. Poole, 2 Jones (N. C.), 33; Lawrence v. Dobyns, 30 Mo. 196; Ferner v. Williams, 37 Barb. 9; Chitty on Bills (13th Am. ed.), 409; Story on Notes, § 230; Parker v. Stroud, 98 N. Y. 379; Brown v. Jones, 113 Ind. 46, citing the text; Dailey v. Sharkey, 29 Mo. App. 519; Townsend v. Dry Goods Co., 85 Mo. 508, citing the text; Hazard v. Spencer, 17 R. I. 566, 23 Atl. 729, citing text; May v. Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, note, citing text; Claflin County v. Feibelman & Co. *et al.*, 44 La. Ann. 518, 10 So. 862, citing text; McBride v. Illinois Nat. Bank, 121 N. Y. S. 1041, 138 App. Div. 339; Merchant's Nat. Bank of Santa Monica v. Bentel, 15 Cal. App. 170, 113 Pac. 708.

32. Seneca County Bank v. Neass, 5 Den. 329; Insurance Co. v. Wilson, 29 W. Va. 544, citing the text.

33. Smith v. McLean, 2 Taylor, 72.

of an indorser negotiated at another, it was held that demand at the latter would not charge the indorser, although there were no funds in the bank where the note was made payable.[34]

§ 645. Where the instrument is payable "on demand," or "on demand after a certain time."—A distinction has been taken by some of the courts in respect to bills and notes payable "on demand," or payable "on demand after a specified time," and the opinion expressed that in such cases averment and proof of demand are necessary as well against the acceptor or maker as against the drawer or indorser. In Virginia, the Supreme Court of Appeals, while deciding according to the current of American authority in respect to a note payable at a fixed time, expressly restricted its application, and Stanard, J., said:[35] "This decision does not embrace the case of a note or obligation payable in terms on demand, at a particular place after the lapse of a specified time. In such cases it would probably be held, that there is no default of the maker or acceptor, until such demand be made, and, consequently, that no action would accrue to the payee until such demand should be made."

In England, it was said by Lord Ellenborough, that in such cases "the time of payment depends entirely on the pleasure of the holder of the note,"[36] and that consideration seemed to him to render it impracticable for the maker or acceptor to set up the defense of readiness to pay. The Supreme Court of the United States has followed the same line of opinion, Thompson, J., saying:[37] "Where the promise is to pay on demand at a particular place, there is no cause of action until the demand is made, and the maker of the note cannot discharge himself by an offer of payment, the note not being due until demanded."

§ 646. Comments on views presented.—Striking as these views may seem, they do not appear to us to bear analysis as affording ground for departure from the general principle. A bill or note payable on demand is payable immediately, and if on demand after a certain time, immediately upon that time arriving. Although

34. Watkins v. Crouch, 5 Leigh, 522.

35. Armistead v. Armistead, 10 Leigh, 521.

36. Sanderson v. Bowes, 14 East, 500.

37. Wallace v. McConnell, 13 Pet. 136; Savage, C. J., to same effect in Caldwell v. Cassidy, 8 Cow. 271, but overruled by Haxtun v. Bishop, 3 Wend. 1, same judge.

payable at a particular place, the payor may, if he apprehends loss by delay, or desires to discharge it, pay it anywhere. And the mere circumstance that it might be more difficult for the payor to show a loss resulting from a failure to present when his liability was continuing to be always ready, than when he is only required to shoulder the responsibility of being ready at a fixed time, does not seem to us sufficient to change the rule. He has the advantage of not being subjected to a protest until demand is made; he may pay at any time if he pleases, and thus avoid all contingency of loss; he may still show loss if any occurs. Suit brought is itself a demand; and as presentment at the particular place, although it be expressed, is no condition precedent as to him, we cannot perceive how the words "on demand," which relate to time and not to place, can impliedly create a condition which even express words without the addition of "not elsewhere" do not create. The difficulty of the defense does not change the principle which requires it; and the cases which so determine seem to us to adopt the true philosophy of the subject.[38]

§ 647. **In respect to bank notes,** it has been held that when payable on demand—or on demand after a certain time—at a designated place, the demand must be averred and proved against the bank; [39] and they have been distinguished from individual notes by some of the cases.[40] But there are also express decisions the other way; and we can perceive no sufficient reason for the distinction.[41] Loss, if any, may be shown by the bank as well as by the individual.

§ 648. **When instrument is payable at either of the several places.** —If a bill of exchange be drawn payable at either of two places, and is accepted accordingly, as, for example, if drawn payable at Maidstone or London, the holder has his choice to present it at either place for payment; and the like rule applies to a note made payable at either of two places. If the bill or note be not duly paid at the place where it is presented, the holder may protest it and give notice to the

38. McKinney v. Whipple, 21 Me. 98; Gammon v. Everett, 25 Me. 66; New Hope D. Bank v. Perry, 11 Ill. 467; Cook v. Martin, 5 Smedes & M. 379 (note payable on demand five months after date). Undoubtedly, however, if pleaded that the money was there and remained there for payment, and so proved, it would be treated as a tender, and stop interest and costs. Hibernia Bank & Trust Co. v. Smith (Miss.), 42 So. 345.

39. Bank of North Carolina v. Bank of Cape Fear, 13 Ired. 75.

40. Dougherty v. Western Bank, 13 Ga. 87.

41. Montgomery v. Elliott, 6 Ala. 701; Haxtun v. Bishop, 3 Wend. 1.

drawer and indorsers, who will be bound by its presentment and dishonor at the place of his election; although if presented at the other place it would have been duly paid; for in such cases all the parties agree to pay the bill or note upon due presentment at either place.[42]

§ 649. Bills and notes payable at either of several banks.—Sometimes a promissory note is made payable at any or either of the banks in a particular place, by some such expression as "payable at bank in Boston," [43] or "at either of the banks in Boston," [44] or "at any bank in Boston," [45] or by being dated at a particular place and made payable "at bank." [46] In all such cases, the stipulation as to the place of payment is understood to be for the accommodation of the payee or holder, who is given the right to elect the bank at which the note should be presented in order to charge the indorsers; and if, upon presentment at any or either bank in the place named, payment is refused, the indorsers, as well as the maker, are bound. The maker's promise is to pay the note at any of the banks in the place, and the duty is imposed upon him to look at all the banks for it, or provide funds to pay it at all of them when it is due.[47] The office of a private banker is not a bank within the terms of a note payable "at any bank in Boston."

§ 650. A bill of exchange accepted, payable in like manner, stands upon the same footing as a promissory note, and the drawer and indorsers, as well as the acceptor, will be bound if it be presented at any or either of the banks in the place named.[49] This principle applies to large cities with many banks, as well as to small cities with few; [50] and the opinion once intimated that where there are several banks in

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42. Beeching v. Gower, 1 Holt, 313; Story on Bills, § 354; Story on Notes, § 231; Benjamin's Chalmers' Digest, 163; Bartholomew v. First Nat. Bank, 18 Wash. 683, 52 Pac. 239. Held in this case that a draft drawn upon a business house in Monte Cristo "via Everett Nat. Bk." could be presented to the latter place for payment, and there be protested for nonpayment.

43. Malden Bank v. Baldwin, 13 Gray, 154.

44. Page v. Webster, 15 Me. 249; Freeman's Bank v. Ruckman, 16 Gratt. 126.

45. Langley v. Palmer, 30 Me. 467; Brickett v. Spalding, 33 Vt. 109; Voit v. Corr, 54 Ala. 113.

46. Hazard v. Spencer, 17 R. I. 561, 23 Atl. 729.

47. Malden Bank v. Baldwin, 13 Gray, 154, and cases cited above; Hazard v. Spencer, 17 R. I. 561, 23 Atl. 729.

48. Way v. Butterworth, 108 Mass. 509.

49. Jackson v. Packer, 13 Conn. 342.

50. Langley v. Palmer, 30 Me. 467.

a large city, the holder must give notice to the promisor where the paper is,[51] may be regarded as overruled.

It has been urged against this doctrine in every case which has adopted it, that the holder should give notice at what particular bank he elected to make the demand. But it has been well answered that "to require the holder to give such previous notice would not only defeat the object of relieving him from trouble and risk, but would subject him to much greater than if the bill or note were made payable at one bank only;" [52] and that "if the parties wish for more certainty as to the place of payment, let them be more explicit in the bill." [53]

§ 651. When drawee or acceptor resides in one place, and bill is payable in another.—Where the drawee of a bill resides in one place, and it is drawn payable in another place, it would be sufficient to present the bill for acceptance to the drawee at the place where he resides, and if acceptance were refused, it might be there protested.[54] And if the bill, not accepted, were presented to the drawee at his place of residence for payment, and payment refused, and there is no particular place designated in the bill for presentment, it would be sufficient, although the bill was payable in a certain city. Thus, where a bill was drawn in Liverpool, and was payable in London, and was protested for nonacceptance, and also for nonpayment in Liverpool, where the drawee resided, Kent, C. J., said: [55] "A general refusal to pay was a refusal to pay according to the face of the bill. It was equivalent to a refusal to pay in London. We do not mean to say that the demand for payment at Liverpool was indispensable. The bill being payable at London, it would have been sufficient for the holder to have been there when the bill fell due, ready to receive payment. In the present case, a protest at London, or a demand and protest at Liverpool, were sufficient, and the holder might take either course." So, if the bill, drawn upon the drawee on one place and payable in another, be not accepted by the drawee, but is accepted *supra protest* for his honor by a third person, the presentment and demand should be made of the drawee at the place where he resides, and not

51. North Bank v. Abbott, 13 Pick. 465, Shaw, C. J., expressed this opinion, but the question was not directly before the court.

52. Page v. Webster, 15 Me. 24, Shepley, J.

53. Jackson v. Packer, 13 Conn. 342, Waite, J.

54. Mason v. Franklin, 3 Johns. 202.

55 Mason v. Franklin, 3 Johns. 202.

at the place where it is made payable, because there has been no acceptance of the bill, and, consequently, the drawee has not authorized any presentment upon him, except at his place of residence.[56]

§ **652.** When the bill has been accepted by the drawee, and is drawn payable in another place, the case is different. There the acceptor only authorizes the presentment at the place designated, and the drawer or indorsers will be discharged if the bill be not there presented, or ready for presentment at maturity.[57]

§ 653. Allegations in pleading as to place of payment.—While it is not necessary in a declaration to aver that a bill or note, when due, was presented at the place of payment and not paid, the place of payment is a material part in the description of the note, and must be set out in the declaration.[58] And it has been said by the United States Supreme Court: "Nothing is better established, both upon principle and authority, than that if the place where a note is payable is omitted in the declaration, it is fatal." [59] As to the allegations of the declaration, however, it has been held, that if the legal effect of the instrument be that it is payable only at a particular place, it must

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56. Mitchell v. Baring, 10 B. & C. 6, 7. The decision in this case led to the passage of the act of 2 & 3 Wm. IV., chap. 98, by which it was provided that "All bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not, on the presentment for acceptance thereof, be accepted, shall, or may be without further presentment to the drawee or drawees, protested for nonpayment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amounts owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted." Chitty on Bills (13th Am. ed.) [*349], 390. This act seems practically to affect only acceptors *supra protest.* See chapter XVIII, on Protest, section II, vol. II.

57. Mitchell v. Baring, 10 B. & C. 7; Story on Bills, §§ 282, 353.

58. Covington v. Comstock, 14 Pet. 43. "A note made payable at a particular time and place does not impose upon the payee or his assignee the necessity of averring or proving a demand at the time and place fixed in the note; but the payor may show a readiness to pay such demand at such time and place." Kerbaugh v. Nugent (Ind. App.), 95 N. E. 336, holding that the maker of a promissory note, payable at a particular bank, cannot discharge such obligation by depositing in such bank the funds with which to pay said obligation, unless the holder of the note has deposited it in the bank for collection.

59. Sebree v. Dorr, 9 Wheat. 558.

be so averred in the declaration; when, on the other hand, if according to its legal effect it be payable generally, it would be a misdescription to aver it to be payable only at a particular place.[60]

SECTION VI

MODE OF PRESENTMENT FOR PAYMENT

§ 654. Presentment of the bill or note, and demand of payment, should be made by an actual exhibition of the instrument itself;[61] or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand, ready to be delivered, and such must really be the case.[62] This is requisite in order that the

60. Childs v. Laflin, 55 Ill. 159. In this case the note was payable "to the order of Laflin, Butler & Co., at their office," and was dated at Chicago, which is in Cook county, Illinois. McAllister, J., said: "The note in question is not payable generally, but at the office of the appellees. If they had offices in two counties, as it appears they had, these extrinsic facts might show an ambiguity which would require explanation. But is it the legal effect of this instrument, that it is payable only at their office in Cook county? There is nothing upon the face of the instrument itself, except the place of the date, which has any tendency to such a conclusion. But the place of date is not part of the contract. It is not material to the validity of the note, and is always open to be explained. It does not make the place of payment. The place of the date being only *prima facie* evidence, and subject to be rebutted, has no tendency to establish the legal effect of the instrument, that it was payable only at their office in Cook county, because it is a well-established principle, that the legal effect of an instrument in writing can no more be varied by parol evidence than its express terms."

61. Musson v. Lake, 4 How. 262. In Draper v. Clemens, 7 Mo. 52, demand was held insufficient because the bill was not produced. In Freeman v. Boynton, 7 Mass. 483, the demand was held insufficient because it appeared that the party demanding payment did not have the bill with him. To same effect, see Shaw v. Reed, 12 Pick. 132; Arnold v. Dresser, 8 Allen, 435; Posey v. Decatur Bank, 12 Ala. 802; Nailor v. Bowie, 3 Md. 251; Smith v. Gibbs, 2 Smedes & M. 479. See § 463.

62. While it may not be necessary to actually produce the note if the maker refuses to pay it, it must be there at the place for presentment. Gilpin v. Savage, 95 N. E. 656, 201 N. Y. 167, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912 A 861, reversing judgment, 118 N. Y. S. 1108, 132 App. Div. 948. While it may not be necessary to actually produce the note if the maker refuses to pay it, it must be there at the place for presentment. Gilpin v. Savage, 95 N. E. 656, 201 N. Y. 167, 34 L. R. A. (N. S.) 417, Ann. Cas. 1912 A 861, reversing judgment 118 N. Y. S. 1108, 132 App. Div. 948. Gilpin v. Savage, 95 N. E. 656, 201 N. Y. S. 34, L. R. A. (N. S.) 417, Ann. Cas. 1912 A 861, reversing judgment, 118 N. Y. S. 1108,

drawee or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of it upon paying the amount. If, on demand of payment, the exhibition of the paper is not asked for, and the party to whom demand is made declines to pay on other grounds, a more formal presentment by actual exhibition of the paper will be considered as waived.[63]

It was so held where, on demand of payment of a note, exhibition of it was not asked for, the party saying he was not authorized to represent the bank, at which it was payable.[64]

Where the note was in bank, a few rods from the maker's house, and the maker was informed by note from the cashier that it was there and requested payment, it was held sufficient;[65] and it was likewise so held, where the statement in the protest was that the notary went, with the draft, to the bank and demanded payment.[66] So, if the maker calls on the holder on the day of payment, at his place of business, declares his inability to pay it, and requests him to give notice to the indorser, it is sufficient to charge the indorser, as an exhibition of the paper would have been useless.[67] But it is better in

132 App. Div. 948, Gipin v. Savage, 95 N. E. 656, 201 N. Y. 167, 34 L. R. A. (N. S.) 417, Am. Cas. 1912 A 861, reversing 118 N. Y. S. 1108, 132 App. Div. 948, and quoting text; Crandallro v. Scheppel, 1 Hun, 557; Etheridge v. Ladd, 44 Barb. 69. See *ante*, §§ 462, 463; Read v. Marine Bank of Buffalo, 59 Hun, 578, 13 N. Y. Supp. 855. The fact that the indorser notified the makers that their notes were due falls far short of answering the requirements of the law relative to presentment, demand and notice. Nevins v. Moore, 221 Mo. 330, 120 S. W. 43.

63. Lockwood v. Crawford, 18 Conn. 361; King v. Crowell, 61 Me. 244. See Fall River Union Bank v. Willard, 5 Metc. (Mass.) 216, and chapter XVII, on Presentment for Acceptance, § 463; Porter v. Thom, 40 App. Div. 34, 57 N. Y. Supp. 479, citing the text; Waring v. Betts, 90 Va. 51, 17 S. E. 739, 44 Am. St. Rep. 890, citing text.

64. Waring v. Betts, 90 Va. 51, 17 S. E. 739, 44 Am. St. Rep. 890, citing text.

65. Tredick v. Wendell, 1 N. H. 80. Where notes were not presented to the maker, but were placed in a bank and a letter written to the maker some time before their maturity that they would be in the bank on the dates they matured, to be paid, and the bank was not named in the notes as the place where they were payable, this was not a sufficient presentation and demand to hold the indorser. Bayless v. Marbut, 124 Mo. App. 234, 101 S. W. 617. In Barnett v. Elwood Grain Co., 153 Mo. App. 458, 133 S. W. 856, it was held that demand drafts must be presented to the drawee, and notice that they are in the hands of a third person for collection is not sufficient, but that this rule is subject to variation according to the usage of a bank and its customers.

66. Bank of Vergennes v. Cameron, 7 Barb. 143.

67. Gilbert v. Dennis, 3 Metc. (Mass.) 495.

all cases to make an actual exhibition of the paper, in order to avoid all questions. It seems that delivery of written demand to a servant at the house of the promisor is insufficient.[68] The demand of payment should not vary from the tenor of the paper; and if it be payable simply in money, without specifying the kind, a demand for gold coin would be insufficient to charge an indorser.[69]

§ 654a. Presentment, and transmission for presentment, by mail.—Bills of exchange are most frequently drawn on parties at distant places, and it is undoubtedly legal, customary, and proper to forward them by mail to correspondents or other agents at the place where the drawee is addressed, to be by them presented, in due course. And in such cases if by accident or default in the postal service they are not received in due time to be presented at maturity, the delay occasioned is excused, and the drawer and indorsers are held liable, provided that, when the delay is over, due diligence is exercised in making the presentment afterward.[70] It has been said that presentment through the post-office may be sufficient.[71] But such method of presentment of bills seems to be unknown to the law merchant, and it might prove a hazardous and fatal experiment to those who relied upon it. It has been held that checks may be so presented,[72] but the reasons for the permissibility of such mode of presentment do not seem to apply to bills drawn on others than bankers, and Professor Parsons has well observed: "It is not easy to see how a sufficient demand can be made with safety through the post-office." [73]

Presentment through the mail by a bank acting as collecting agent,

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68. Duke of Norfolk v. Howard, 2 Show. 235 (1681). But query in cases of sickness when the promisor is inaccessible on account of sickness. See 1 Parsons on Notes and Bills, 271, 272, note *y*.

69. Langenberger v. Kroeger, 48 Cal. 147.

70. See §§ 1068, 1069, 1070; Pier v. Heinrichshoffen, 67 Mo. 163, cited § 1068.

71. Benjamin's Chalmers' Digest, 161; Ames on Bills and Notes, vol. II, p. 359, note 1.

72. Vol. II, § 1599.

73. 1 Parsons on Notes and Bills, 371. Story says presentment "cannot be made by a written demand sent to him (the acceptor) through the post-office." Story on Bills, § 325; Chitty on Bills (13th Am. ed.) [*366], 412. In M'Gruder v. Bank of Washington, 9 Wheat. 598, the United States Supreme Court said as to the holder of a bill, by Johnson, J.: "Nor is the benefit of the post-office allowed him as in the case of notice to the indorser." See also Stuckert v. Anderson, 3 Whart. 116; King v. Holmes, 11 Pa. St. 458; Hartford Bank v. Green, 11 Iowa, 476 (*semble*); Barnes v. Vaughan, 6 R. I. 259.

has been held not sufficient to exonerate it from liability in case of loss resulting from the failure of the drawee, who had remitted exchange on New York in payment, instead of cash.[74]

§ 655. Leaving instrument in debtor's hands.—A bill or note, when presented for payment, cannot be left in the debtor's hands as when presented for acceptance; and if it is so left, presentment cannot be considered as made until payment is demanded. And if, in the meantime, the debtor has stopped payment, the holder would suffer to the extent of the difference between the value of the instrument at the time it was handed the debtor and the time payment was actually demanded.[75] The earlier cases take a contrary view, and seem to us more reasonable, for the physical presentment of the paper would seem to imply in itself a demand of payment.[76]

§ 656. As to mode of presentment of negotiable paper payable at a bank.—When a bill or note is made payable at a bank, it is considered a sufficient presentment of it if it is actually in the bank at maturity, ready to be delivered up to any party who may be entitled to it on payment of the amount due; and if, at the close of business hours, the bill or note remains unpaid, it is considered as dishonored, and notice should be immediately given to the proper parties.[77] Such also is the case when the instrument is payable at a particular place.[78] Sometimes a formal presentment of the bill or note, in such cases, at the bank, or upon the maker, is made; and the cases are uniform in holding that such a presentment at the bank is suffi-

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74. Harvey v. Girard Nat. Bank, 119 Pa. St. 212; Merchants' Nat. Bank v. Goodman, 109 Pa. St. 424; Drovers' Nat. Bank v. Provision Co., 117 Ill. 108; German Nat. Bank v. Burns, 12 Colo. 539; Kinney & Co. v. Paine, Receiver, *et al.*, 68 Miss. 258, 8 So. 747.

75. Hayward v. Bank of England, 1 Stra. 550; Thompson on Bills (Wilson's ed.), 304.

76. Turner v. Mead, 1 Stra. 416; Hoar v. Da Costa, 2 Stra. 910.

77. Chicopee Bank v. Philadelphia Bank, 8 Wall. 641; Bank of the United States v. Carneal, 2 Pet. 543; Fullerton v. Bank of the United States, 1 Pet. 604; People's Bank v. Brooks, 31 Md. 7; Graham v. Sangston, 1 Md. 68; Goodloe v. Godley, 13 Smedes & M. 233; Allen v. Miles, 4 Harr. (Del.) 234; Woodin v. Foster, 16 Barb. 146; Nichols v. Goldsmith, 7 Wend. 160; Folger v. Chase, 18 Pick. 63; Berkshire Bank v. Jones, 6 Mass. 524; Apperson v. Union Bank, 4 Coldw. 445; State Bank v. Napier, 6 Humphr. 270; Ward v. Northern Bank, 14 B. Mon. 351; Reynolds v. Chettle, 2 Campb. 596; Saunderson v. Judge, 2 H. Bl. 509; Huffaker v. National Bank, 13 Bush, 649.

78. Hunt v. Maybee, 7 N. Y. 266.

cient,[79] even when the place is mentioned in the memorandum;[80] but it is settled that nothing more than the presence of the paper there is necessary.[81] But it has been held by the United States Supreme Court,[82] that though commercial paper be physically in the bank at which it is payable, yet if the bank is ignorant of this by reason of the fact that the letter in which it was sent slipped through a crack in the cashier's desk and disappeared before it had been seen by him, then there would be no presentment, though the acceptor had no funds there, and did not mean to pay the bill. And such a disappearance carried with it a presumption of negligence in the collecting bank, and threw upon it the burden of proof to rebut it; and that in the absence of such proof the bank would be responsible to the holder for the amount of the bill or note.

§ **657. When paper is property of bank.**—If the paper is the property of the bank at which it is payable, its presence there at maturity need not be proved by the plaintiff, as the presumption of law is that the paper was in the bank, and the burden rests on the defendant to show the contrary.[83] Even when it is not the property of the bank, it is not necessary to show that it was in the hands of the proper officer;[84] nor is this material, its presence in the bank being sufficient.[85] Sometimes the accounts of the promisor are examined to see if there are funds to meet the paper payable at the

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79. Hunt v. Maybee, 7 N. Y. 266. See also Woodbridge v. Brigham, 13 Mass. 556; Bank of Utica v. Smith, 18 Johns. 230; Anderson v. Drake, 14 Johns. 114; Bank of Syracuse v. Hollister, 17 N. Y. 46; Gale v. Kemper, 10 La. 205; Commercial Bank v. Hamer, 7 How. (Miss.) 448; Jensk v. Doylesburg, 4 Watts & S. 505; Rahm v. Philadelphia Bank, 1 Rawle, 335; Cohen v. Hunt, 2 Smedes & M. 227; Evans v. St. John, 9 Port. 186; Apperson v. Union Bank, 4 Coldw. 445.

80. Saunderson v. Judge, 2 H. Bl. 509.

81. State Bank v. Napier, 6 Humphr. 270; Gillett v. Averill, 5 Den. 85; Ogden v. Dobbin, 2 Hall, 112; Gilbert v. Dennis, 3 Metc. (Mass.) 495; Fullerton v. Bank of the United States, 1 Pet. 604; Merchants' Bank v. Elderkin, 25 N. Y. 178; First Nat. Bank v. Crittenden, 2 Thomp. & C. 118; Douglass v. Bank, 97 Tenn. 133, 36 S. W. 874, citing text; Dykman v. Northbridge, 1 App. Div. 26, 36 N. Y. Supp. 962.

82. Chicopee Bank v. Philadelphia Bank, 8 Wall. 641.

83. Chicopee Bank v. Philadelphia Bank, 8 Wall. 641; Fullerton v. Bank of the United States, 1 Pet. 604; Bank of the United States v. Carneal, 2 Pet. 543; Seneca County Bank v. Neass, 5 Den. 329; State Bank v. Napier, 6 Humphr. 270; Folger v. Chase, 18 Pick. 63; Berkshire Bank v. Jones, 6 Mass. 524.

84. Folger v. Chase, 18 Pick. 63.

85. State Bank v. Napier, 6 Humphr. 270.

bank;[86] but this is unnecessary, any competent evidence being available to show that there were no funds there to meet it, and that no one offered payment.[87] It is doubtful, at least, whether the mere fact that the bank had funds of the promisor in its possession which constitute any defense for the indorser, as the direction of the promisor is necessary to give the right to appropriate the money to the payment of the paper; but it is conceived that if the bank in such case has become the owner of the paper, it would constitute a defense to the indorser. Such is the opinion of Professor Parsons.[88] Where a note was payable at the "Union Bank of Memphis," and there was no such bank there, but a "Branch of the Union Bank," it was held sufficient to make presentment at such branch.[89] If, upon repairing to the bank at which the paper is made payable, during business hours, it is found closed, without any one there to answer, the protest may be made without demand or further inquiry.[90]

§ 658. **Conventional demand by notice that bill or note is held in bank.**—In some of the States it has become customary for banks of a particular place, which are the holders of negotiable paper, to issue a notice to the promisor a few days before maturity, informing him that the paper is in bank, setting forth the date when it will become payable, and requesting him to come there and pay it. Such notice constitutes a conventional demand, and a neglect to comply with it is such a refusal as amounts to dishonor of the paper. The custom prevails where the paper is payable at the bank giving the notice,[91] and has been sustained by judicial decision, as well where it is not made so payable, but is placed there for collection.[92] In Massachusetts this custom has become so general and universal that every one who incurs the liability of maker and indorser is presumed to have contracted in reference to it, and knowledge on his part may

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86. Saunderson v. Judge, 2 H. Bl. 509; Bank of South Carolina v. Flagg, 1 Hill (S. C.) 177; Maurin v. Perat, 16 La. 276.

87. State Bank v. Napier, 6 Humphr. 270; Gillett v. Averill, 5 Den. 85.

88. Vol. I, Notes and Bills, 437.

89. Worley v. Waldran, 3 Sneed, 548.

90. Thompson v. Commercial Bank, 3 Coldw. 46; Carter v. Union Bank, 7 Humphr. 548.

91. Lincoln & Kennebec Bank v. Page, 9 Mass. 155; Same v. Hemmatt, 9 Mass. 159; Camden v. Doremus, 3 How. 515.

92. Jones v. Fales, 4 Mass. 245; Widgery v. Munroe, 6 Mass. 449; Weld v. Gorham, 10 Mass. 366; Whitewell v. Johnson, 17 Mass. 449; Mechanics' Bank v. Merchants' Bank, 6 Metc. (Mass.) 24.

be presumed.[93] Before the law had there become so settled, it was held that proof of the party's being conversant with the usage was requisite; [94] but where, by the usage, demand was made in this form upon the maker, it was immaterial to the indorser to prove that he was acquainted with it—it being sufficient that he received due notice of dishonor.[95] Evidence of the usage is sufficient in proof of an averment of presentment to the maker.[96] In Maine the custom is sanctioned by judicial decisions,[97] but it has elicited adverse expressions in New Hampshire; [98] and in Maryland, the evidence of its existence was regarded as insufficient, with a distinct intimation from the court that it would not be respected if proved.[99] In Rhode Island such conventional demand is declared to be contrary to the law merchant, and insufficient,[1] and a recent writer well characterizes the practice in Massachusetts and Maine as provincial.[2] When a bill or note is payable at a bank, a presentment to a bank officer must be taken to have been at the bank.[3]

§ 659. In respect to the maker of a note or the acceptor of a bill in terms payable at a particular place, this custom to inform him

93. Grand Bank v. Blanchard, 23 Pick. 505. Shaw, C. J., said, respecting this customary notice, as constituting a demand, that "It has become so universal and continued so long, that it may well be doubted whether it ought not now to be treated as one of those customs of merchants of which the law will take notice, so that every man who is sufficiently a man of business to indorse a note may be presumed to be acquainted with it, and assent to it, at least until the contrary is expressly shown. It is to be recollected that the rules respecting presentment, demand, and dishonor of bills of exchange and promissory notes, and indeed the *lex mercatoria*, generally originated in the custom of merchants, which custom was a matter of fact to be proved by the party relying on it, and to be determined by the jury. But when a custom has been definitely settled by judicial decisions, it is taken notice of as a part of the law of the land, and need not be proved as a fact in each case."

94. Weld v. Gorham, 10 Mass. 366. So held also in Leavitt v. Simes, 3 N. H. 14; Edwards on Bills, 509.

95. Whitewell v. Johnson, 17 Mass. 449.

96. North Bank v. Abbot, 13 Mass. 466; Boston Bank v. Hodges, 9 Mass. 420; City Bank v. Cutter, 3 Pick. 414.

97. Marine Bank v. Smith, 18 Me. 99; Gallagher v. Roberts, 11 Me. 489; 1 Parsons on Notes and Bills, 370, 371.

98. Moore v. Waitt, 13 N. H. 415.

99. Farmers' Bank v. Duvall, 7 Gill & J. 78.

1. Barnes v. Vaughn, 6 R. I. 259; Ames on Bills and Notes, vol. II, p. 358.

2. Ames on Bills and Notes, vol. II, p. 862, index heading, 24. See also 2 Ames on Bills and Notes, 359, note 1, and *post*, § 661.

3. Barbaroux v. Waters, 3 Metc. (Ky.) 304.

that his paper is there, and that he is requested to meet it, amounts to nothing more than a reminder from creditor to debtor that it is hoped he will comply with his agreement. When the bill or note, however, is payable generally, the acceptor or maker can only discharge his contract by seeking the payee or holder, at maturity, and paying the amount; and notification that his paper may be paid at a particular place is information where his agent to receive payment may be conveniently found. But it is difficult to see how the holder can restrict the acceptor or maker to payment at that particular place, except upon the ground that the bank itself is to be regarded as in law the holder, and it is the duty of the principal party to pay such holder at its only locality—its place of business.

§ **660. In respect to the drawer or indorser,** the holder's contract, when the bill or note is payable generally, is, that he will present the instrument to the acceptor of maker. It is the holder's duty, in order to hold the drawer or indorser, to go to the acceptor or maker with the bill or note, and demand payment; and it is stretching the principle which authorizes proof of custom in certain cases very far to permit the holder to reverse the established rule of law in respect to drawer or indorser, and notify the acceptor or maker to come to him, at a place designated by himself, to suit his own convenience.[4]

The theory upon which the custom is regarded as controlling, is that the holder is bound to use due diligence to demand payment—that the maker or acceptor waives any further demand than at the place designated by the maker—and that the drawer or indorser consents to this customary waiver by entering into the contract where the custom exists. Its convenience, as a commercial usage—and the fact that the apprehension of dishonor in bank will probably operate as forcibly to constrain prompt payment by the maker or acceptor as a demand at his counting-room or residence—have doubtless gone far to gain it countenance from the courts which have sustained it.

§ **661.** We regard those decisions more in consonance with principles which have not admitted this relaxation. Where the instrument is in terms payable at a bank in a particular place, or it has been agreed by the drawer or indorsers that it shall be presented

4. Edwards on Bills, 510.

in a particular place, where a custom prevails as to the mode of presentment, an entirely different principle applies. By consenting to presentment there, the drawer or indorser consents to the established customary mode which prevails there, and should for that reason be bound by it.[5] It is carrying the doctrine too far to hold that he is bound by such custom when the paper has been merely placed in a bank there for collection, but it is not payable there in terms or by agreement.[6] And the usage cannot be applied by one bank alone, but must be a prevalent custom of the place;[7] otherwise the arbitrary will of an individual banker or banking institution will prevail over the established law or custom of a whole community.

§ 662. Knowledge of conventional method of demand.—Knowledge by the drawer or indorser of the custom has been regarded as essential to its establishment as against him in some cases.[8] But the United States Supreme Court say that parties are bound by an established usage of a bank at which the paper is payable "whether they have a personal knowledge of it or not;"[9] and as the custom must be general, in order to obtain recognition as such, we cannot perceive that knowledge of it enters into the question any more than knowledge of any other rule of law. A custom is not a special personal contract, but a general and controlling rule. "The parties are presumed by implication to be governed by the usage of the bank at which they have chosen to make the security itself negotiable."[10]

Under Negotiable Instrument statute.—Several sections of the stat-

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5. Mills v. Bank of the United States, 11 Wheat. 431; Camden v. Doremuse, 3 How. 515; Edwards on Bills, quoted *supra*.

6. Pearson v. Bank of Metropolis, 1 Pet. 89; Morse on Banking, 336, 337; Barnes v. Vaughan, 6 R. I. 259. In this case the cashier of the bank mailed a printed blank notice to the maker, that the note was in bank for collection. The note was not there payable. Held, indorser discharged.

7. Dorchester, etc., Bank v. Milton Bank, 1 Cush. 177; Morse on Banking, 372; Adams v. Otterback, 15 How. (U. S.) 539. Question, whether demand of payment could be postponed to fifth day of grace by usage of two years' standing, changed from former usage, the court said: "To constitute a usage, it must apply to a place rather than to a particular bank. It must be a rule of all the banks of a place, or it cannot consistently be called a usage. If every bank could establish its own usage, the confusion and uncertainty would greatly exceed any local convenience resulting from the arrangement."

8. Leavitt v. Simes, 3 N. H. 14.

9. Mills v. Bank of the United States, 11 Wheat. 431. [This decision is misquoted in Morse on Banking, p. 336.]

10. Mills v. Bank of the United States, *supra*, Story, J.

ute prescribe the mode of making presentment for payment,[11] and it has been held, under the statute, that a mere informal talk asking payment of a note and not accompanied with presentment of it, or intended as a formal presentment and demand, is not sufficient to put a note in dishonor,[12] but the law simply requires substantial compliance in reference to proper presentment, and mere omission to observe the more technical rules will not release an indorser when any omission to comply with the technical rules does not work to the prejudice of the indorser.[13]

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11. See appendix, secs. 70, 72, 73, 74, 82, 84, 134.

12. State of New York Nat. Bank v. Kennedy, 130 N. Y. S. 412, 145 App. Div. 669.

13. Gilpin v. Savage, 112 N. Y. S. 802, 60 Misc. 605, affirmed 118 N. Y. S. 1108, 132 App. Div. 948, wherein the court said that the right of the maker to have insisted on the exhibition of the note, is personal to the maker, and by not demanding its production, he waived it, and held that if, on demand of payment exhibition of commercial paper is not asked, and a party to whom a demand is made declines to pay on other grounds, a mere formal presentation by actual exhibition of the paper will be considered waived; and held further, that where a note was payable at the home of the maker, a demand by telephone, the talk being immediately between the maker and the holder of the note, was sufficient, exhibition of the note not being insisted upon.

CHAPTER XXI

TRANSFER OF BILLS AND NOTES BY INDORSEMENT

§ **663.** A bill or note payable to bearer, or indorsed in blank, may be transferred like currency by mere delivery; [1] other bills and notes, by indorsement of the transferrer's name thereon, and delivery to the individual named, unless they are not expressed to be payable to the order of any person, or to bearer,[2] in which case, unless by statute, they are not negotiable in the United States and in England; [3] but it is otherwise in Scotland.[4] But if the paper be payable to A. B., or order, and A. B. indorse it to C. D., without adding "or order," C. D. may, nevertheless, transfer it by indorsement, and it retains its original negotiable character.[5]

§ **663a. Indorsement of instrument which is payable to bearer.**—While commercial paper payable to bearer, or indorsed in blank, may

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1. South & Lane v. People's Nat. Bank, 4 Ga. App. 92, 60 S. E. 1087.

2. See *post,* § 729, and *ante,* § 10*a*; Wookey v. Poole, 4 B. & Ald. 1; Myers v. Friend, 1 Rand. 13; Rees v. Conecocheague Bank, 5 Rand. 326; Johnson v. Stak. Co., 24 Ill. 75; Jones v. Nellis, 41 Ill. 482; New v. Walker, 108 Ind. 365, citing the text; Everett v. Tidball, 34 Nebr. 804, 52 N. W. 816; Bank v. Sherer, 108 Cal. 513, 41 Pac. 415; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402; Roach v. Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102. Where securities were given for the security of a note payable to payee "or order," the note giving authority to the "holder or holders" to sell the collaterals and apply the proceeds to the payment of the note, and that if there should be any surplus it might be applied to the payment of any other note or claim held by the "holder or holders," the phrase "holder or holders" in the different parts of the note, is broad enough to include any person holding the note under the order of the payee. Richardson v. Winnissimmet Nat. Bank, 189 Mass. 25, 75 N. E. 97.

3. Byles on Bills (Sharswood's ed.) [*142–143], 258; Arnold v. Sprague, 34 Vt. 402; Richards v. Daily, 34 Iowa, 428. In an action on a draft specially indorsed to plaintiff, and not indorsed in blank, so as to make it negotiable by delivery, defenses between the original parties are admissible. Moore & Tabb v. Johnson County Savings Bank (Miss.), 58 So. 646.

4. Thompson on Bills (Wilson's ed.), 173.

5. Muldrow v. Caldwell, 7 Mo. 563; Lea v. Branch Bank, 8 Port. 119; Scull v. Edwards, 8 Eng. (Ark.) 24; Potter v. Tyler, 2 Metc. (Mass.) 58; Blackman v. Green, 24 Vt. 17

be transferred by delivery merely, yet if the payee put his name upon it, and transfers it, he is liable as an indorser, such indorsement being valid between the indorser and subsequent indorsees;[6] and the holder of paper payable to bearer and indorsed, may sue upon it as bearer or indorsee at his election.[7] "The negotiability of a note payable to bearer is certainly not further restrained by an indorsement in full, than would be by the same indorsement, the negotiability of a note payable to order and indorsed in blank by the payee." [8] A note payable to A. D. or bearer is in legal effect the same as if payable simply to bearer, and no indorsement is necessary to pass the legal title; but if indorsement of a note payable to bearer be alleged, it must be proved.[9]

§ 664. Indorsement of instrument payable to a certain person " only."—If a note be nonnegotiable, because payable to a certain person only, should he indorse it, it will be binding upon him; and his liability to his immediate indorsee will be the same as upon the indorsement of a negotiable note; but the principle is not extended to subsequent indorsees.[10] And if indorsed by the payee payable "to

6. Bates v. Butler, 46 Me. 387; Hodge v. Steward, 1 Salk. 125; Hill v. Lewis, 1 Salk. 132; Burmester v. Hogarth, 11 M. & W. 97; Brush v. Reeves, 3 Johns. 439; Gilbert v. Nantucket Bank, 5 Mass. 97; Eccles v. Ballard, 2 McCord, 388; Gwinnell v. Herbert, 5 Ad. & El. 436 (31 Eng. C. L.); Smith v. Rawson, 61 Ga. 208; Young v. Sehon, 53 W. Va. 127, 44 S. E. 136, 62 L. R. A. 499, 97 Am. St. Rep. 970.

7. 3 Kent Com. 44; Story on notes, § 132; Bayley, 466; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873. A negotiable promissory note made payable to order is rendered payable to bearer by an indorsement in blank by the payee. Brown v. Fisher, 35 Ind. App. 549, 74 N. E. 632. Where a payee of an accommodation note indorsed the same on the back, with the indorsement: " For value received I hereby assign all right, interest or title in the within note to I. N. Porter or bearer," this was sufficient to pass title to the note notwithstanding the name I. N. Porter was that of a fictitious person, as the note may be treated as payable to bearer. Keenan v. Blue, 240 Ill. 177, 88 N. E. 553.

8. Johnson v. Mitchell, 50 Tex. 212; *post*, § 696.

9. Wayman v. Bend, 1 Campb. 175; Chitty on Bills (12th Am. ed.) [*198], 227. In Illinois, under statute, a note payable to A. B. or bearer must be in-dorsed to pass the legal title. Garvin v. Wiswell, 83 Ill. 218; Wilder v. De Wolf, 24 Ill. 191; Roosa v. Crist, 17 Ill. 191; Hilborn v. Artus, 3 Scam. 344. So in Alabama a note payable to "A. or bearer" is by statute the same in legal effect as if payable to "A. or order," and is not negotiable save by indorsement. Blackman v. Lehman, 63 Ala. 547.

10. See Story on Notes, §§ 128, 129, 130; Story on Bills, §§ 119, 199, 202. See Carruth v. Walker, 8 Wis. 252; Hackney v. Jones, 3 Humphr. 612; *ante*,

order of" indorsee, it will be negotiable as between the holder and indorsers, though not as to the maker.[11]

§ 664a. When indorsement necessary to transfer legal title.—When the instrument is made payable to "order," the indorsement of the payee is necessary to transfer the legal title; [12] and the transferee without indorsement, takes it as a mere chose in action, and must aver and prove the consideration.[13] And he takes it subject to all equities that attached to it in the hands of his transferrer.[14] The

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§ 105. And a payee of a nonnegotiable paper does not become liable thereon as an indorser merely by writing his name on the back of it, but proof may be made of the actual agreement under which the indorsement was made. See Jossey v. Ruskin, 109 Ga. 319, 34 S. E. 558, 77 Am. St. Rep. 377; Lynch v. Mead, 99 Iowa, 66, 68 N. W. 579; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866; Kendall v. Parker, 103 Cal. 319, 37 Pac. 401, 42 Am. St. Rep. 117; Haber v. Brown, 101 Cal. 445, 35 Pac. 1035. In Michigan it is held that the indorsement of a nonnegotiable instrument operates as an assignment of it. Merchants' Nat. Bank v. Greggs, 107 Mich. 146, 64 N. W. 1052.

11. Carruth v. Walker, 8 Wis. 252.

12. Hopkirk v. Page, 2 Brock. 20; Hestone v. Williamson, 2 Bibb, 83; Russell v. Swan, 16 Mass. 314; Blakely v. Grant, 6 Mass. 386. See § 741 *et seq.;* Quigley v. Mexico So. Bank, 80 Mo. 295, citing the text; Sibley v. American Exchange Bank, 97 Ga. 126, 25 S. E. 470; Haug v. Riley, Admr., 101 Ga. 372, 29 S. E. 44, approving text; Wade v. Elliott (Ga. App.), 75 S. E. 989; Central City Bank v. Rice, 44 Nebr. 594; State v. Stebbins, 132 Mo. 332, 33 S. W. 1147, citing text; Everett v. Tidball, 34 Nebr. 804, 52 N. W. 816. And when the indorsement is denied, the same must be proved. Park v. Exum, 72 S. E. 309, 156 N. C. 228. Where a statute prescribes a mode of transfer of the title to a promissory note, the mode is exclusive, and if the payee of a promissory note signs on the back of the note a receipt for interest, and subsequently sells and delivers the note, the receipts remain as receipts for interest and as originally intended, and it cannot be assumed that he adopts his signature to the interest receipt as made for the purpose of assigning the legal title to the purchaser. Everett v. Sullivan, 102 Ill. App. 133.

13. Van Eman v. Stanchfield, 10 Minn. 255; Faris v. Wells, 68 Ga. 604, citing the text. Under the North Carolina Code, the Supreme Court of that State held that a note transferred by delivery and without indorsement, vests in the transferee the equitable ownership of the note. Jenkins v. Wilkinson, 113 N. C. 532, 18 S. E. 696. Ordinarily, if an indorsee sues upon a note and his title thereto is challenged by a general denial, he must prove his indorsement on said note in writing, and while the writing on the note itself is the best evidence, yet the fact may be proven by parol if done without objection or after and upon proof of the loss or absence of the note. See Moore v. Hubbard, 15 Ind. App. 84, 42 N. E. 967.

14. Hadden v. Rodkey, 17 Kan. 429, Valentine, J.: "If the plaintiff in such a case should desire the benefit that an indorsement would give him, he should plead and prove an indorsement." Benson v. Abbott, 95 Ga. 69, 22 S. E. 127;

negotiability of a note is not affected by the fact that a corporation indorses it through its seal.[15]

Under Negotiable Instrument statute.—Under several provisions of the statute,[16] a note payable to order does not pass with the incidents of negotiability by mere delivery, but when such an instrument is thus transferred, the transferee holds with notice of whatever equities the maker may have had.[17]

§ **665. Delivery by indorser.**—Delivery by the indorser is essential to completion of his contract; and delivery implies its acceptance by the indorsee. If a transferee of a bill or note by indorsement send it back to his indorser as worthless, the indorsement is declined, and

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Massachusetts Loan & Trust Co. v. Twichell, 7 N. Dak. 440, 75 N. W. 786, citing text; Gaylord v. Nebraska Sav., etc., Bank, 54 Nebr. 104, 74 N. W. 415, 69 Am. St. Rep. 705. A guaranty, written upon a note by the payee, is not such an indorsement, though a proper indorsement may include a guaranty. Lowry Nat. Bank v. Maddosc, 4 Ga. App. 329, 61 S. E. 296.

15. Rand v. Dovey, 83 Pa. St. 280.

16. Appendix, secs. 30, 31, 49, 52, 58, 59.

17. Sublette v. Brewington, 139 Mo. App. 410, 122 S. W. 1150; Manufacturers' Commercial Co. v. Blitz, 115 N. Y. S. 402, 131 App. Div. 17; Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879; First Nat. Bank v. McCullough, 50 Oreg. 508, 93 Pac. 17 L. R. A. (N. S.) 1105, 126 Am. St. Rep. 758; O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078. Negotiation is a general term descriptive of all those acts by which a note or bill is put into circulation or passed on in its circulation, and includes delivery in issue, transfer by delivery, or transfer by indorsement. Knapp & Co. v. Tidewater Coal Co., (Conn.) 81 A. 1063. Under section 58 of the statute a negotiable instrument in the hands of any holder other than a holder "in due course" is subject to the same defenses as if it were nonnegotiable. Craig v. Palo Alto Stock Farm, 16 Idaho, 701, 102 Pac. 393. Where notes are in the hands of a bank as collateral for money advanced, and are held without indorsement, they are subject to defenses and equities available against the payee. Keel v. Construction Co., 143 N. C. 429, 55 S. E. 826. An allegation in an answer with reference to a note which was payable to order, that the defendant "denies that said note was ever duly negotiated," is equivalent to a denial that the note was ever duly indorsed and delivered for value. Rogers v. Morton, 95 N. Y. S. 49, 46 Misc. 494. Where a note was given in consideration of money to be advanced later, a transfer of the note without indorsement was not in due course, but the transferee took the note free from the defense of want of consideration, notwithstanding the statute, under the principle of estoppel. Marling v. Fitzgerald, 138 Wis. 93, 120 N. W. 388, the court saying that the rule that a negotiable instrument in the hands of an assignee for value (that is, by transfer without indorsement) and without notice of defenses, as between the original parties is subject, nevertheless, to such defenses, has relation to such equities or defenses as existed at the time of the transfer, not to latent defenses or equities which possibly may at some future time exist.

becomes invalid; and he acquires no new title by merely getting possession, without a new transfer; but there need not be a new indorsement because the former indorsement is capable of becoming again valid by ratification or confirmation.[18] An offer to indorse for another must be accepted in a reasonable time.[19] If the proposed indorsee wrongfully retain the note after refusing its acceptance, he cannot upon payment of a judgment for the wrongful conversion hold the indorser liable; such payment will invest him with title to the converted property as of the date of the conversion, which is merely the obligation of the makers of the note, the contract of indorsement having never been consummated.[20]

Under Negotiable Instrument statute.—The sections of the statute defining the word indorsement,[21] as to the negotiation of an instrument payable to order being an indorsement completed by delivery, are simply declaratory of pre-existing law.[22] Under sections 30 and 49, although a holder of an instrument payable to his order may transfer such title as the transferrer had therein, such transferee is not a holder in due course so as to cut defenses.[23]

SECTION I

NATURE OF THE CONTRACT, AND LIABILITIES OF INDORSER

§ 666. As to the meaning of the term.—Indorsement, in its

18. Cartwright v. Williams, 2 Stark. 340. See § 667; Spencer v. Carstardien (Colo.), 24 Atl. 882, citing the text. A note will not convey title to an indorsee if not delivered during the lifetime of the indorser. Lowrey v. Danforth, 95 Mo. App. 441, 69 S. W. 39.

19. Claflin v. Briant, 58 Ga. 414.

20. Haas v. Sackett, 40 Minn. 53.

21. Appendix, secs. 30, 191.

22. Louisville Coal Min. Co. v. International Trust Co., 18 Colo. App. 345, 71 Pac. 898, holding that in an action on a note by a transferee, an allegation that the payee "indorsed and transferred" the note, is sufficient, as a simple allegation that the payee indorsed the note would have sufficed. The "holder," under section 30 of the statute, is the payee, and not a person who claimed to have possession of the notes as agent of the payee, and attempted to transfer them by an indorsement as agent of and attorney in fact for the payee, and not by his personal indorsement. Scotland County Nat. Bank v. Hohn (Mo. App)., 125 S. W. 539.

23. Foster's Admr. v. Metcalfe, 138 S. W. 314, 144 Ky. 385. See also Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, holding that section 59 declaring that "every holder is deemed *prima facie* a holder in due course," etc., does not affect the rule at common law and under the statute that to constitute a holder in due course of an instrument payable to order, the same should be indorsed.

technical sense, is applicable only to negotiable paper;[24] and it is important to bear this in mind, as the effect of indorsing a negotiable instrument, and assigning or becoming the surety or guarantor of one nonnegotiable is very different. In common parlance, the word is indifferently applied to bonds, bills, and promissory notes, whether negotiable or otherwise, and confusion of ideas will only be avoided by holding in view its definite legal signification.

Indorsing an instrument, in its literal sense, means writing one's name on the back thereof;[25] and, in its technical sense, it means writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser.[26]

The liability of the indorser applies to interest on the paper falling due before maturity, but must be fixed as to such interest by demand and notice.[27]

§ 667. The term "indorsed" includes "delivered."—When we speak of a negotiable instrument being indorsed to a party, the

24. Orrick v. Colston, 7 Gratt. 195; Bank of Marietta v. Pindall, 2 Rand. 475.

25. Hartwell v. Hemenway, 7 Pick. 116; Commonwealth v. Spilman, 124 Mass. 327; Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606.

26. See § 688, as to form. Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537. The words "indorse" and "indorser" have a popular as well as a technical meaning, and their use in connection with the act of one, not a party to a note, in putting his name on the back of the note for the purpose of increasing its commercial value, is not inconsistent with his having signed as surety. Redden v. Lambert, 112 La. 740, 36 So. 668. Where a draft was given for the price of goods and was attached to a bill of sale, a memorandum on the bank, signed by the payee: "Have this day delivered to C. W. Neel, for Gray Tie & Lumber Co. (the drawee), the ties named in this draft, and said ties are free from all liens and incumbrances of any character; and I hereby agree to pay all landing or yard rent, bankage or wharfage on the ties named in this draft until said ties are removed. J. H. Flora," and immediately beneath the signature the following printed statement: "Draft not good unless above bill of sale is signed, and drafts also properly indorsed," is not an "indorsement" within the meaning of the law. Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537. The mere fact that an attorney for the indorsee of a note may have either willfully or innocently mistated to the indorser that the indorser would not be responsible by reason of the indorsement, would not preclude the indorsee from recovering thereon, as it was not the misstatement of a fact, but only the expression of an opinion as to the legal effect of the indorsement. Wizig v. Beisert (Tex. Civ. App.), 120 S. W. 954.

27. Daily v. Bartholomew, 5 Kan. App. 148, 48 Pac. 923, quoting text; True v. Bullard, 45 Nebr. 409, 63 N. W. 824.

idea of its being transferred and delivered to him for consideration is included—the term "indorsement" including delivery for value to the indorsee; [28] but it is otherwise as to an instrument not negotiable.[29]

§ 667a. Neither indorsement nor acceptance are complete before delivery.[30]—Accordingly, where A. specially indorsed certain bills to B., sealed them up in a parcel, and left them in charge with his own servant to be given to the postman, it was held that the special indorsement did not transfer the property in the bills till delivery, and that delivery to the servant was not sufficient, though it would have been otherwise had the delivery been made to the postman.[31] But where A. and B., being partners, and indebted to C., A., who

28. Freeman's Bank of Ruckman, 16 Gratt. 129; Bank of Marietta v. Pindall, 2 Rand. 475; Thomas v. Watkins, 16 Wis. 478; Dann v. Norris, 24 Conn. 333; Adams v. Jones, 12 Ad. & El. 455 (40 Eng. C. L.); Lloyd v. Howard, 20 L. J. Q. B. 1, 14 Q. B. 995 (69 Eng. C. L.); Marston v. Allen, 8 M. & W. 493; Green v. Steer, 1 Q. B. 707 (41 Eng. C. L.); Hayes v. Caulfield, 5 Q. B. 81 (48 Eng. C. L.); Frederick v. Winans, 51 Wis. 472; Higgins v. Bullock, 66 Ill. 37; Mt. Mansfield Hotel Co. v. Bailey, 64 Vt. 156, 24 Atl. 136. See Codman v. Vermont & Canada R. Co., 16 Blatchf. 165; Verder v. Verder, 63 Vt. 38, 21 Atl. 611.

29. In Bank of Marietta v. Pindall, 2 Rand. 475, Cabell, J., said: "The term 'indorse,' when applied to bills of exchange, negotiable by the custom of merchants, or to papers made negotiable by our statutes, may *ex vi termini* import a legal transfer of the title. But as to bonds and notes not negotiable, the legal title to them passes by assignment only, and as to them indorsement is not equivalent to assignment. As to them assignment means more than indorsement; it means by one party, with intent to assign, and an acceptance of that assignment by the other party. The notes in question are not negotiable according to our laws, but assignable only. They might well be indorsed in Virginia and assigned in Ohio. The pleas, therefore, that they were indorsed in Virginia, tendered immaterial issues, and were properly demurred to." But "indorsed and delivered" would be sufficient allegation of assignment as to nonnegotiable paper. Freeman's Bank v. Ruckman, 16 Gratt. 129. In Commonwealth v. Powell, 11 Gratt. 830, there was an indictment against Powell for forging the name of a party before the payee's on the back of a negotiable note, Lee, J., said: "There is no reason for restricting the term 'indorsement' to the technical sense applied to it in the *lex mercatoria*. The primitive and popular sense of something written on the outside or back of a paper, on the opposite side of which something else had been written, should be given to the word whenever the context shows it to be proper, or it is necessary to give effect to the pleading or other instrument in which it may occur. And such is the sense in which it should be understood in this indictment."

30. Rex v. Lambton, 5 Price, 528; Lysaght v. Bryant, 9 C. B. 46 (67 Eng. C. L.). See *ante*, § 665.

31. Rex v. Lambton, 5 Price, 428; Bayley on Bills, 137; Byles on Bills (Sharswood's ed.) [*146], 265; Wulschner v. Sells, 87 Ind. 74.

acted as C.'s agent, with B.'s concurrence, indorsed a bill in the name of the firm, and placed it among the securities which he held for C., but no communication of the fact was made to C. personally, it was held a good indorsement of the firm to C.[32]

§ **668. An indorsement cannot be partial.**—A bill or note cannot be indorsed for part of the amount due the holder, as the law will not permit one cause of action to be cut up into several, and such an indorsement is utterly void as such;[33] but when it has been paid in part, it may be indorsed as to the residue.[34] And an indorsement of part of the amount due would give the intended indorsee a lien on the instrument.[35] If the indorsement on its face is of the whole instrument, without any apparent limitation, so that the holder could enforce it against the parties liable thereon, it would be immaterial that, as between the indorser and his immediate indorsee, a part of the amount only was to be received for the latter's benefit, and the residue as trustee for his indorser.[36]

Where it was indorsed upon a negotiable note by the payee, "Pay one-half of the within note to S. F., and the other half to E. B.," and the note was at the time delivered to one of the indorsees for the benefit of both, it was held that a valid title was vested in both, although the other did not accept the transfer until afterward, and that it was proper for them as joint indorsees to bring a joint action against the maker.[37] And where distinct shares in a note are sold to

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32. Lysaght v. Bryant, 9 C. B. 46 (67 Eng. C. L.).

33. Lindsay v. Price, 33 Tex. 282; Frank v. Kuigler, 36 Tex. 305; Planters' Bank v. Evans, 35 Tex. 592. In this case, on a note for $500, the payee indorsed "Pay to L. four hundred dollars out of this note." Suit being brought by a subsequent indorsee in his own name, alleging that he was the legal and equitable owner, but exhibiting the note and indorsements as part of his petition, the maker and defendant demurred. Held, that the demurrer was properly sustained. Goldman v. Blum, 58 Tex. 636; Hawkins v. Cardy, 1 Ld. Raym. 160; Bayley on Bills (Am. ed.), 92; Thompson on Bills (Wilson's ed.), 184; Hughes v. Kiddell, 2 Bay, 324, in which it was held that where two indorsements for parts of the amount were made, they were invalid, though together they purported to transfer the whole.

34. Ibid.

35. Byles on Bills (Sharswood's ed.), 291.

36. Reid v. Furnival, 1 Car. & M. 538, 5 Car. & P. 499 (24 Eng. C. L.).

37. Flint v. Flint, 6 Allen, 36, Dewey, J., saying: "This action was properly instituted in the names of the present plaintiffs, the indorsement of the entire note being made to the two indorsees, and the claim, as respects the maker, not being divisible into two separate causes of action. The delivery to one of the

different persons, they are co-owners, and one co-owner may maintain trover against the other for conversion.[38]

It has been held in Indiana that an assignment of a half interest in a note by one of the joint payees passed his interest in equity; and under the peculiar statute of Indiana, that the assignee might join in a suit with the other joint payee against the maker; [39] and where part interest in a note is assigned for valuable consideration it may be enforced by bill in equity; [40] and where a note is payable to "A. and B.," an indorsement by one as "A. and B.," is good if the other consents thereto.[41] Joint indorsements are hereafter considered.[42]

§ 669. Nature of the contract of indorsement; it is a separate and independent contract.—The indorsement of a bill or note is not merely a transfer thereof, but it is a fresh and substantive contract, embodying all the terms of the instrument indorsed in itself.[43] The

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indorsees, and a suit instituted and carried on for the benefit of both, with their concurrence, show a sufficient acceptance of the transfer to them."

38. Conover v. Earl, 26 Iowa, 167.

39. Groves v. Ruby, 24 Ind. 418; Fordyce v. Nelson, 91 Ind. 448; Earnest v. Barrett, 6 Ind. App. 371, 33 N. E. 635.

40. Hutchinson v. Simon, 57 Miss. 628.

41. Cooper v. Bailey, 52 Me. 230.

42. See § 701*a*.

43. Brown v. Hull, 33 Gratt. 27, 29, Staples, J.: "As a new and independent contract it only takes effect from the time it is made, and must be determined by the laws then in force, and the circumstances then existing." Smith v. Caro, 9 Oreg. 278; Bank of British North America v. Ellis, 6 Sawy. 98, citing the text; Benn v. Kutzchan, 24 Oreg. 28, 32 Pac. 763, quoting and approving text; Kiel v. Choate, 92 Wis. 417, 67 N. W. 431, 53 Am. St. Rep. 936, citing text; Alabama Nat. Bank v. Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95; Smith v. Pickham, 8 Tex. Civ. App. 326, 28 S. W. 505, citing text; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, text cited; The Johnson, etc., Bank v. Lowe, 47 Mo. App. 151, citing text; Wolford v. Rusk, 145 Ill. App. 405; Horowitz v. Wollowitz, 110 N. Y. S. 972, 59 Misc. Rep. 520. The indorsement of an indorser, using that word in its technical sense, imports a guarantee of previous signatures, because it is a transfer and sale; but an indorsement, which is not made for the purpose of transfer, but for payment, is not an indorsement within the law merchant, and does not carry with it a guarantee of previous indorsements. First Nat. Bank v. City Nat. Bank, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637. The words "The Mayes Merc. Co., Transferred to W. H. Handley," The Mayes Mercantile Co. being the payee of the note which was negotiable, were a commercial indorsement and fixed the liability of the payee as an indorser; the payee did not become a mere assignor of the note. Mayes Mercantile Co. v. Handley (Ind. Ter.), 98 S. W. 125, 103 S. W. 599 (1906). A contract attached to a promissory note, and signed by the payee thereof, in which he undertakes to trans-

indorsement of a bill is equivalent to the drawing of a new bill by the drawer upon the drawee (or acceptor, if it be accepted) in favor of the indorsee; and the indorsement of a note is equivalent to the drawing of a bill upon the maker, who stands in the relation of acceptor, as it were, in favor of the indorsee.[44] So entirely distinct and independent is the contract of the indorser of a note from that of the maker that at common law a separate action against each was indispensable.[45]

There is no doubt that the indorser of a bill or note is a surety and that any change in the contract by indulgence as to time or otherwise, without his consent, will discharge him.[46]

§ **669a. Liabilities assumed by indorser.**—The indorser engages (1) that the bill or note will be accepted or paid, as the case may be, according to its purport; but this engagement is conditioned upon due presentment or demand, and notice; [47] he also engages (2) that it is in every respect genuine; (3) that it is the valid instrument it purports to be; (4) that the ostensible parties are competent; and (5) that he has lawful title to it and the right to indorse it. And if it turns out that any of these engagements but that first named are not fulfilled, the indorser may be sued for recovery of the original consideration

fer the note, "and guaranty it as free from any defense that could be made under section 2785 of the Code of Georgia and also guaranty payment in full on the day it is due," is, in this State, a contract of indorsement. Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 762, 42 S. E. 1002, the court saying that it was made, according to the alterations of the petition, for the purpose of transferring the note to the plaintiff in satisfaction of a claim held by it against the defendant, and the mere use of the word "guaranty" will not make the contract one of guaranty.

44. Ingalls v. Lee, 9 Barb. 947; Cundy v. Marriott, 1 B. & Ald. 696; Billgerry v. Branch, 19 Gratt. 418; Brown v. Hull, 33 Gratt. 29; Evans v. Gee, 11 Pet. 80; Hill v. Lewis, 1 Salk. 132; Suse v. Pompe, 98 Eng. C. L. 538; Edward on Bills, 289; Chitty on Bills (13th Am. ed.) [*82], 98; Bunker v. Langs, 76 Hun, 543, 28 N. Y. Supp. 210. Where a creditor has adjusted his indebtedness by taking a note from the debtor and indorsed the note, and has afterwards been required as indorser to pay the note, his action against the maker is one upon the note and not upon the indebtedness, differing in this respect from the remedy of a surety. Keys v. Keys' Estate, 217 Mo. 48, 116 S. W. 537.

45. Brown v. Hull, 33 Gratt. 29; Patterson v. Todd, 18 Pa. St. 426.

46. State Sav. Bank v. Baker, 93 Va. 514, 25 S. E. 550; Dey v. Martin, 87 Va. 1. See § 1303 on subject of Principal and Surety.

47. Callahan v. Bank of Kentucky, 82 Ky. 235; Ankeny v. Henry, 1 Ida. Terr. 231; True v. Bullard, 45 Nebr. 409, 63 N. W. 824; Huttig Sash & Door Co. v. Gitchell, 69 Mo. App. 115; Hawkins v. Shields (Miss.), 57 So. 4.

which has failed,[48] or be held liable as a party,[49] without proof of demand and notice.[50]

§ **669b.** The doctrine of the text that in such cases the indorser is bound without demand or notice undoubtedly applies when he indorses with knowledge of the infirmity that renders the instrument void; [51] and such knowledge is necessary to make him so liable, according to some authorities.[52] But the better opinion is, we think, that he is, at least, bound to refund the consideration paid him upon the transfer if the instrument is void, for it is not then the thing which it purported to be, and which he impliedly represented it to be.[53] If he be a mere accommodation indorser, receiving no part of the consideration, it has been cogently argued, and has been held, that he is not responsible for any alteration which may have avoided the instrument unless there were due demand and notice.[54] But the

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48. Chitty on Bills [*95], 116. Following the doctrine of the text, in New York it has been held, that an indorser cannot defend against a *bona fide* holder for value, that the note was never made or delivered by the maker. Lennon v. Grauer, 2 App. Div. 513, 38 N. Y. Supp. 22; Earnest v. Barrett, 6 Ind. App. 371, 33 N. E. 635; Spencer v. Halpern, 62 Ark. 595, 37 S. W. 711, quoting with approval, the text; Andrews v. Kramer *et al.*, 77 Miss. 151, 25 So. 156; First Nat. Bank v. Farmers & Merchants Bank, 56 Nebr. 149, 76 N. W. 430; Huttig Sash & Door Co. v. Gitchell, 69 Mo. App. 115; Willis v. French, 84 Me. 593, 24 Atl. 1010, 30 Am. St. Rep. 416; Furgerson v. Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 70.

49. Story on Bills, § 108; Edwards, 287; Chitty (13th Am. ed.) [*243], 277; Lake v. Haynes, 1 Atk. 281 (1736); Heylin v. Adamson, 2 Burr. 669 (1758); Ballingalls v. Gloster, 3 East, 483 (1820).

50. Copp v. M'Dugall, 9 Mass. 1; Chitty (13th Am. ed.) [*82], 69. See chapter XXXIII, section I, vol. II. The doctrine of the text is approved in Cochran v. Atchison, 27 Kan. 728.

51. Benjamin's Chalmers' Digest, 197. See §§ 669, 732, 733, 734, 736. See on this subject, vol. II, § 1113; Rossi v. National Bank, 71 Mo. App. 150, citing text.

52. See §§ 733, 733*a*.

53. See § 733*a;* Ames on Bills and Notes, vol. I, p. 476; 1 Parsons on Notes and Bills, 444.

54. Susquehanna Valley Bank v. Loomis, 85 N. Y. 207. In this case it appeared that an altered draft was indorsed by defendant to accommodate a stranger and enable him to get the money at a bank, the indorser receiving no part of the consideration. Held, that the accommodation indorser was not bound without demand and notice. Danforth, J., considered that exceptions to the rule requiring notice should not be multiplied, that "the indorser does not warrant the genuineness of the body of the check as to payee or amount," and that as not charged by the law merchant in the case adjudicated he was not bound. We submit that the cases cited by the court do not sustain its judgment. Money paid under a

consideration paid the party accommodated is, in such case, attributable to him, and he would seem to us to stand as a surety, bound to refund it. And the rule exacting notice to hold an indorser liable seems to us to apply to cases in which he warrants payment at maturity, and not to those cases in which he passes an instrument affected by some vice which renders it, in fact, not the bill or note it purports to be.

§ 670. Liability of indorser "without recourse."—When the indorsement is "without recourse" the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is nevertheless liable if he draws upon a fictitious party, or one without funds. And, therefore, the holder may recover against the indorser "without recourse," (1) if any of the prior signatures were not genuine; [55] or (2) if the note was invalid between the original parties, because of the want, or illegality of, the consideration; [56] or if (3) any prior party was incompetent, or (4) the indorser was without title.[57] In a Virginia case, where a party agreed to have a bond assigned "without recourse" to another, those words were held not to exempt the contractor from liability when it afterward appeared that it had been previously paid, Carr, J., saying: "The very possession of the bond, the claiming it as property, as something binding the obligors, precluded the idea that it was at that moment discharged or satisfied; for then it was no bond: it bound nobody, it was not the representative of money. The bond, too, was payable at a future date; who

mistake of fact (as in Marine Nat. Bank v. National City Bank, 59 N. Y. 67) may be recovered back because the consideration is not received; but an indorser induces payment or purchase by another. He does not suffer by, but himself unites in the representation; and for that reason should make good what others relying on his name have contracted to receive.

55. Dumont v. Williamson, 18 Ohio (N. S.) 515.

56. Blething v. Lovering, 58 Me. 437; Hannum v. Richardson, 48 Vt. 508; Challiss v. McCrum, 22 Kan. 157; Seeley v. Reed, 28 Fed. 167, citing the text; Drennan v. Bunn, 124 Ill. 184, citing the text. See *post*, § 700. *Contra*, Rayne v. Dillo, 27 La. Ann. 622.

57. Scarbrough v. City Nat. Bank, 157 Ala. 577, 48 So. 62, 131 Am. St. Rep. 71; Challiss v. McCrum, 22 Kan. 127, approving the text; Geneser v. Wissner, 69 Iowa, 120, citing the text. But "the contract of indorsement expressed by the words 'without recourse' is available only to the payee whose individual contract it was." Doom *et al.* v. Sherwyn, 20 Colo. 234, 38 Pac. 56.

could have dreamed that it was already mere wax and paper—not a cent due on it?" [58] In another case, where a party transferred a negotiable note, after maturity, pending suit, and "without recourse," it was contended, on the authority of the case just quoted, that it appearing that the indorser was already discharged by failure in respect to notice, and the maker proving insolvent, the transferrer was bound for the amount of the note. But the court held otherwise, laying some stress, however, on the peculiar circumstances of the case.[59] In Maine, where an overdue note was transferred with the indorsement, "Indorser not holden," it was held that the indorser was nevertheless liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it of which the note gave no indication and the vendor no information.[60]

Under Negotiable Instrument statute.—Under the warranty on negotiating an instrument by a qualified indorsement,[61] it has been held that upon an indorsement, "By agreement with recourse after all security has been exhausted, waiving protest," until such security is exhausted, no cause of action accrues against the indorser, and he cannot therefore be joined with the mortgagor as a defendant in an action to foreclose such mortgage,[62] and that an indorsement "without recourse" does not obviate the liability involved in the warranty of genuineness and of title.[63]

§ 671. In the first place, as to acceptance and payment.—The indorser of a bill contracts to pay it at maturity, if, on presentment for acceptance, it is not accepted according to its purport, and he is duly notified of the dishonor.[64] And the indorser of an accepted bill, or of a note, likewise contracts to pay it, if it be not duly paid by the acceptor or maker.[65] It matters not what may be the cause of the

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58. Mays v. Callison, 6 Leigh, 230.

59. Ober v. Goodridge, 27 Gratt. 878.

60. Ticonic Bank v. Smiley, 27 Me. 225. See also Challiss v. McCrum, 22 Kan. 157.

61. Appendix, sec. 65.

62. Smith v. Bradley, 16 N. D. 306, 112 N. W. 1062.

63. State v. Corning State Savings Bank, 139 Iowa, 338, 115 N. W. 937.

64. Ballingalls v. Gloster, 3 East, 481, 4 Esp. 268. Lord Ellenborough, C. J., said: "There is no distinguishing the case of an indorser from that of the drawer." Smith v. Johnson, 27 L. J. Exch. 363, 3 H. & N. 222; Brown v. People's Bank, 59 Fla. 163, 52 So. 719 (as to a check); Chitty on Bills [*241], 576.

65. Ogden v. Sanders, 12 Wheat. 313; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554, affirming 79 N. J. L. 40, 74 Atl. 708; Story on Notes, § 135; Chitty on

drawer's or maker's refusal. The indorser contracts to pay on being duly notified that he refuses to pay. He, therefore, warrants the solvency of the parties—or, in short, warrants that it will be paid, either by them or by himself, on receiving notice of their failure.

§ 672. **In the second place, as to genuineness.**—The indorser contracts that the bill or note is in every respect genuine, and neither forged, fictitious, or altered. Undoubtedly, and by universal admission, this principle applies to the signatures of the drawer, acceptor, and maker of the bill or note, who are the original parties, and it is often expressed in language to the effect that the indorser warrants that it is a genuine instrument.[66] This rule, however, would not apply where the holder procured the indorsement of a forged note with knowledge of the forgery, and represented to the indorser that it was genuine, or where the holder has received the paper after maturity and without consideration.[67] Whether or not the indorser's engagement extends to the genuineness of prior indorsements is not so well settled. Undoubtedly the indorser admits their genuineness, as he

Bills (13th Am. ed.) [*241], 276. In the case of Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 509, the question is raised, but not decided, whether the ordinary contract of indorsement credits a debt when entered into, without regard to the subsequent maturity of the note, demand and due protest; the court citing the case of Barclay v. Weaver, 19 Pa. St. 396, 57 Am. Dec. 661, note, to the effect that demand and notice are no part of the contract, but only steps in the legal remedy upon it.

66. Edwards on Bills, 188, 289; Story on Bills, § 111; Coggill v. American Exchange Bank, 1 N. Y. 113; Murray v. Judah, 16 Cow. 484; McIntosh v. Haydon, R. & M. 362; Howe v. Merrill, 5 Cush. 83; Bell v. Dagg, 60 N. Y. 528; Hannum v. Richardson, 48 Vt. 508; Condon v. Pearce, 43 Md. 83; Chapman v. Rose, 56 N. Y. 137; Misher v. Carpenter, 13 Hun, 604; Cochran v. Atkinson, 27 Kan. 732, citing the text; Austin, Tomlinson & Webster Mfg. Co. v. Heiser *et al.*, 6 S. Dak. 429, 61 N. W. 445; Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. Supp. 1070. But, if the indorsement be, "for collection," by one other than the payee, such indorser does not guarantee that the name of the drawer is genuine, but he does guarantee that the indorsements then on the paper are genuine. First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 65 Am. St. Rep. 748; Willis v. French, 84 Me. 583, 24 Atl. 1010, 30 Am. St. Rep. 416; Furgerson v. Staples, 82 Me. 159, 19 Atl. 158, 17 Am. St. Rep. 470; Palmer v. Courtney, 32 Nebr. 773, 49 N. W. 754, quoting text; Beattie v. The National Bank, 174 Ill. 571, 51 N. E. 602, 66 Am. St. Rep. 318, quoting text; Meyer v. Foster, 147 Cal. 166, 81 Pac. 402; Seaboard Nat. Bank v. Bank of America, 100 N. Y. S. 740, 51 Misc. Rep. 103, affirmed 103 N. Y. S. 1141, 118 App. Div. 607; Fretwell v. Carter, 78 S. C. 531, 59 S. E. 639.

67. Turner v. Keller, 66 N. Y. 66; Misher v. Carpenter, 13 Hun, 604; First Nat. Bank v. Farmers' & Merchants' Bank, 56 Nebr. 149, 76 N. W. 430.

is estopped to deny his title, which would otherwise be invalid,[68] and notwithstanding the doubts and dissents which have been expressed, it is clear upon principle that the indorser warrants the instrument throughout. If there be any forged indorsement the indorser cannot recover against any party prior to it; [69] and the subsequent indorser has transferred a thing to which he himself had no right or title. He should plainly be regarded as representing, by the act of ownership, a right of ownership,[70] and be held bound accordingly. In Bayley on Bills it is said, "An indorsement is no warranty that prior indorsements are genuine;" [71] but the case cited does not satisfactorily sustain that view, and the authorities greatly preponderate against it.[72]

It has been held that the indorsement of one of two joint payees

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68. Ogden v. Sanders, 12 Wheat. 313; Chitty on Bills [*242], 277; Story on Bills, §§ 110, 111. Oriental Bank v. Gallo, 98 N. Y. S. 561, 112 App. Div. 360, affirmed 188 N. Y. 610, 81 N. E. 1170; First Nat. Bank of Mt. Vernon v. First Nat. Bank of Lincoln, 68 Ohio St. 43, 67 N. E. 91. When an indorsement upon a genuine bank check is forged, or the name of the payee is placed thereon without authority, and the check is transferred and paid by a bank not the drawee, which bank in turn indorses it and collects it from the drawee bank, the drawee is under no obligation to inquire as to the genuineness of the first indorsement, but the latter indorser guarantees the genuineness of the prior indorsement. Wellington Nat. Bank v. Robbins, 71 Kan. 748, 81 Pac. 487, 114 Am. St. Rep. 523. See also Lieber v. Fourth Nat. Bank, 137 Mo. App. 158, 117 S. W. 672.

69. Chitty on Bills [*260, 261], 297.

70. State Bank v. Fearing, 15 Pick. 533; Harris v. Bradley, 7 Yerg. 310; Oliver v. Andry, 7 La. 496; Bruce v. Bruce, 1 Marsh. 165, 5 Taunt. 485; Redington v. Wood, 45 Cal. 406; Cal. Law Times, January, 1873, p. 12; 1 Parsons on Notes and Bills, 25; 2 Parsons on Notes and Bills, 588; Story on Bills, § 111; Story on Notes, §§ 135, 380; Benjamin's Chalmers' Digest, 217, 218; Dalrymple v. Hillenbrand, 2 Hun, 488, affd. 60 N. Y. 5; White v. Continental Nat. Bank, 64 N. Y. 320. In an action brought by an indorsee upon the implied undertaking of an indorser that the signatures of all prior indorsers are genuine, to recover an amount which such indorsee has been adjudged to pay in consequence of the forgery of the signature of a prior indorser, the plaintiff having given to the defendant timely notice of the pendency of the suit in which such judgment was recovered, and an opportunity to defend, such former judgment is conclusive with respect to the forgery. First Nat. Bank of Mt. Vernon v. First Nat. Bank of Lincoln, 68 Ohio St. 43, 67 N. E. 91.

71. Bayley, chap. 5, p. 170 (5th ed., 1833), citing East India Co. v. Tritton, 3 B. & C. 280.

72. Williams v. Tishomingo Sav. Inst., 57 Miss. 633 (1880), George, C. J., saying: "The rule is well settled that an indorser warrants the genuineness of the prior indorsements on the bill as well as his title to the paper." Fish v. First Nat. Bank, 42 Mich. 204; Cochran v. Atchison, 27 Kan. 728; First Nat. Bank v. Farmers' & Mechanics' Bank, 56 Nebr. 149, 26 N. W. 430.

does not warrant the genuineness of the first, as in case of several indorsements.[73]

Under Negotiable Instrument statute.—Under the statute, an indorser warrants the genuineness of the paper.[74] The warranty is applicable to the condition of the instrument on leaving the hands of the indorser, and has no reference to alterations which may be made subsequently,[75] and the fact that the transferee of a forged note extended payment of the note for a year and received interest on the same when he was still ignorant of the forgery, does not stop him from receiving judgment against the transferrer on his warranty.[76] It is to be noticed that the warranty declared by the statute extends only to the subsequent holders in due course, and an indorser of a check does not warrant to the drawee the genuineness of the signature of the maker.[77]

§ 673. In the third place, as to validity.—The indorser engages that the bill or note is a valid and subsisting obligation, binding all prior parties according to their ostensible relations; and he may be held liable, although the instrument be entirely null and void as between prior parties themselves; and also as between prior parties and even *bona fide* holders without notice.[78] In an early English case,

73. Foster v. Collner, 107 Pa. St. 310.

74. Appendix, secs. 65, 66. Willard v. Crook, 21 App. D. C. 237. Where a note was made to the order of a certain named person, and the maker forged the indorsement of such person, one who subsequently indorsed the note for the maker guaranteed the genuineness of the signature of the previous indorsement, and that the note was a "valid and subsisting" obligation. Packard v. Windholz, 84 N. Y. S. 666, 88 App. Div. 365, affirmed 180 N. Y. 549, 73 N. E. 1129. In an action to recover the amount paid upon an altered check under a mistake of fact, it was held that an indorsement signed "Received payment through New York Clearing House, December 3, 1906. Indorsement guaranteed," was equivalent to a guaranty of the genuineness of the whole of the instrument, including the indorsements excepting only the signature of the drawer, and, in case of forgery, rendered the defendant liable *prima facie* to refund to plaintiff the amount received on the check, on the ground that the payment had been made under a mistake of fact. New York Produce Exch. Bank v. Twelfth Ward Bank, 119 N. Y. S. 988, 134 App. Div. 953.

75. First Nat. Bank v. Gridley, 98 N. Y. S. 445, 112 App. Div. 398. See also Appendix, sec. 124.

76. Chuseau v. Wagner (La.), 52 So. 547.

77. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939, 112 Am. Rep. 817, the court saying that the drawee is not a holder in due course as defined in section 52, or a holder as defined in section 191, and that the drawee, when he accepts the check, makes himself the guarantor thereof.

78. Chitty on Bills (13th Am. ed.) [*82, 90, 95], 98, 111, 116; Roscoe on Bills,

where the suit was by the indorsee against the maker of a note void for gaming, Lee, C. J., said: "The plaintiff is not without remedy, for he may sue Church (the indorser) upon his indorsement." [79] And where an indorsee of a note, with notice of the failure of consideration for the note, transferred the same to an innocent purchaser for value, and the maker was compelled to pay such innocent purchaser, the maker may recover the amount paid from the indorsee who assigned the note with notice of its invalidity.[80]

Under Negotiable Instrument statute.—The warranty by indorsement, declared by the statute, is that at the time of the indorsement the instrument is valid and subsisting.[81] The warranty runs, by the terms of the statute, to holders in due course,[82] and the payee of a note who knew its illegal consideration is not a holder in due course, and cannot hold an indorser before delivery to the payee upon a warranty.[83]

§ **674.** In another English case, in an action against the drawer of a bill, it was held no defense that it was drawn and accepted for a gaming debt, it having been indorsed over by the drawer for a valuable consideration to a third person, by whom the suit was brought; [84]

123; Bayley on Bills, chap. 12, p. 369; Byles (Sharswood's ed.) [*135], 250; Johnson on Bills, 32; Thompson on Bills, 82; 1 Parsons on Notes and Bills, 218; Edwards on Bills, 289, 350; Story on Notes, § 193; Story on Bills, § 190; Benjamin's Chalmers' Digest, 217, 218. See Railroad Co. v. Schutte, 103 U. S. (13 Otto) 145; Fish v. First Nat. Bank, 42 Mich. 404. Not as to seller of Municipal bonds. See Ruohs v. Bank, 94 Tenn. 57, 28 S. W. 303. If party receives paper with void indorsement of corporation thereon, and he, knowing the void character of such indorsement, transfers the instrument to another, such transferrer would be liable thereon to the indorsee. Nashville Lumber Co. v. Fourth Nat. Bank, 94 Tenn. 374, 29 S. W. 367, 45 Am. St. Rep. 727; Shaw v. Outwater, 77 Hun, 87, 28 N. Y. Supp. 312.

79. Bowyer v. Bampton, 2 Stra. 1155 (1741).

80. Falke v. Brule, 17 Colo. App. 499, 68 Pac. 1054. If, when sued by the indorsee, the maker has attempted without success, but in good faith, and with reasonable grounds, to show that the plaintiff was not in fact an innocent holder, so that he might make his defense upon the merits, his recovery should include the costs and his attorney's fee in that action. Bourke v. Spaight, 80 Kan. 387, 102 Pac. 253.

81. Appendix, secs. 65, 66. Leonard v. Draper, 187 Mass. 536, 73 N. E. 644; Horowitz v. Wollowitz, 110 N. Y. S. 972, 59 Misc. Rep. 520 (as that a note is not void for usury).

82. Bruck v. Lambeck, 118 N. Y. S. 494, 63 Misc. Rep. 117.

83. Burk v. Smith (Md.), 75 Atl. 114.

84. Edwards v. Dick, 4 B. & Ald. 212 (6 Eng. C. L.).

and, in Pennsylvania, that the indorsee of a note given on such a consideration may sue the indorser.[85] And, in Virginia, in an action against the maker and four indorsers of a note, it was held that the holder could recover against the fourth indorser, of whom he was the indorsee for value, although it was indorsed for accommodation of the maker by the first three indorsers, and had been purchased by the fourth at a usurious rate of interest.[86]

Upon these principles it has been decided in Georgia, where the Supreme Court has held valid the article of the State Constitution which provides that "No court of this State shall try or give judgment, or enforce any debt, the consideration of which was a slave;" that the courts should enforce payment by the indorser of a note given for a slave, Brown, C. J., saying: "The payee of a promissory note given for a slave, who, for a valuable consideration, which was in no way connected with the slave, indorsed and delivered the note to the plaintiff, is liable. The indorsement is a new contract, and the court has jurisdiction to enforce the judgment against him on that contract." [87]

In such cases the indorsee may not only sue the indorser upon the paper itself, but also upon a count for money had and received.[88]

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85. Unger v. Boas, 1 Harris, 601 (1850).

86. Moffett v. Bickel, 21 Gratt. 283, Moncure, J., saying: "If there were any doubt upon this question, I think it would be removed by the case referred to by the learned counsel of the plaintiff in error, of Edwards v. Dick, decided by the Court of King's Bench in 1822, and reported in 4 B. & Ald. 212, 6 Eng. C. L. 405. Abbott, C. J., and Bayley, Holroyd, and Best, JJ., composed the court, and were unanimous. Such a decision of such a court is entitled to our highest respect. But the reasons assigned by the learned judges command more of our respect in weighing its authority than does their high judicial character. * * * That, it is true, was a case in which the question arose as to the Statute of Gaming; while here the question arises in regard to the Statute of Usury. But the Statute of Gaming is very broad and sweeping in its terms, just as much so as the Statute of Usury. And, indeed, Abbott, C. J., in his opinion, places the case upon the same ground as that of usury, and says: 'There is no case upon the Statute of Usury where a drawer, having parted with a bill for a good consideration, can afterward set up as a defense an antecedent usurious contract between himself and the acceptor. For, if so, a court of justice would enable him to commit gross fraud upon an innocent party.'" To same effect, see Morford v. Davis, 28 N. Y. 484; Brown v. Wilcox, 7 Iowa, 414; Frank v. Longstreet, 44 Ga. 185; Burrill v. Smith, 7 Pick. 291.

87. Graham v. Maguire, 39 Ga. 531. To same effect, see Succession of Weil, 24 La. Ann. 193.

88. Ingalls v. Lee, 9 Barb. 947; Edwards on Bills, 289; Cundy v. Marriott, 1 B. & Ald. 696 (1831).

But if the holder have any privity in the illegal consideration, he cannot hold the indorser.[89] It seems that where a corporation is prohibited from availing itself of the defense of usury, an indorser or other surety upon its paper cannot avoid liability thereon, upon the ground of usury; the prohibition reaching in legal effect to include individuals who become its guarantors, sureties, or indorsers.[90]

So holds the Supreme Court of the United States.[91]

§ 675. In the fourth place, as to competency of original parties.— The indorser contracts that the original parties to the bill or note were competent to bind themselves, whether as drawer, acceptor, or maker; for otherwise, although ostensible, they would not be real parties to it. Therefore, if the drawer, acceptor, or maker became a party under duress,[92] or were an infant, lunatic, or married woman, the indorser's contract is broken,[93] and he may be sued for recovery of the original consideration which has failed, or upon the instrument itself, without proof of demand and notice.[94] So, if the instrument purported to be signed by procuration, he engages that there is competent authority in the agent.[95] Thus, in Massachusetts, where the note was executed by the agent, who, as also the payee, was ignorant that his principal was dead, and the latter indorsed it, he was held, Parker, C. J., saying:[96] "The indorser always warrants the existence and legality of the contract which he undertakes to assign. The indorsee takes it on the credit chiefly of the indorser. Thus, if a note,

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89. Ackland v. Pearce, 2 Campb. 599; Edwards v. Dick. 4 B. & Ald. 21; Union Nat. Bank v. Wheeler, 60 N. Y. 612.

90. National Bank of Pittsburg v. Wheeler, 60 N. Y. 612; Rosa v. Butterfield, 33 N. Y. 664; Stewart v. Bramhall, 74 N. Y. 85.

91. Hubbard v. Tod, 171 U. S. 501, 19 Sup. Ct. Rep. 14; Wheeler v. National Bank, 96 U. S. 268.

92. Bowman v. Hiller, 130 Mass. 153; Edmunds v. Rose, 51 N. J. L. 548, 18 Atl. 748, 14 Am. St. Rep. 704.

93. Haly v. Lane, 2 Atk. 181. The Lord Chancellor said: "Though a note given by a wife to her husband, is void, yet if it is indorsed over by the husband, as between him and the indorsee, it is certainly good." To same effect, see Robertson v. Allen, 59 Tenn. 233; Archer v. Shea, 14 Hun, 493; Kenworthy v. Sawyer, 125 Mass. 28. In Erwin v. Downs, 15 N. Y. 575, a note was made by two married women, and indorsed by the defendant for their accommodation. He was held bound to a *bona fide* indorsee, although the latter knew that the makers were married women when he took it. Prescott Bank v. Caverly, 7 Gray, 217.

94. See *ante*, § 669.

95. Edwards on Bills, 289; Story on Bills, § 110.

96. Burrill v. Smith, 7 Pick. 291.

void between promisor and payee, on account of usury or other illegal consideration, is indorsed *bona fide* for valuable consideration, the indorser must make it good. So, if the indorsement is of a note made by a minor or of a *feme covert*, and even if the name of the promisor is forged, the indorser is held upon his contract to pay the indorsee."

§ 676. Whether or not the indorser's engagement is that all of the antecedent parties are competent to contract?—This is questioned. It is thought by some that prior indorsements are warranted to be by competent parties, as well as to be genuine; [97] while others entertain the contrary view.[98] The considerations which conduce to the opinion that he warrants genuineness of prior indorsements, apply also to their competency, and lead us to the same conclusion that it is warranted. In New York the doctrine of this text has been established by recent decisions. There it has been held that one who indorses a note purporting to be executed by a copartnership, impliedly warrants that it was made by the firm, and cannot in a suit against him dispute it.[99]

Under Negotiable Instrument statute.—The statute also declares that an indorser warrants that all prior parties had capacity to contract.[1] Where the note was executed in the name of a corporation by its treasurer, an indorser warrants the authority of the treasurer, to sign the note for the corporation,[2] and where several persons have indorsed a note, an indorsement by one is a warranty of the capacity of all the preceding parties to the contract.[3]

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97. 1 Parsons on Notes and Bills, 25; Story on Bills, § 110; Story on Notes, § 380, and note. See also Harris v. Bradley, 7 Yerg. 310.

98. Chitty on Bills (13th Am. ed.) [*243] 277. But the only authorities cited are East India Co. v. Tritton, 3 B. & C. 280, and dissenting opinion of Chambre, J., in Smith v. Mercer, 6 Taunt. 83. The latter citation is no authority; and the former was decided on the ground that the party accepted the bill with knowledge of the circumstances respecting the agent's authority. See Story on Bills, § 110, note 1; 2 Parsons on Notes and Bills, 588 (where Chitty's view is criticised); Bayley (5th ed.), chap. 5, p. 170.

99. Dalrymple v. Hillenbrand, 2 Hun, 488; affd. in 61 N. Y. 5; Turner v. Keller, 66 N. Y. 66, but held in this case not to apply where the holder had procured a subsequent indorsement with knowledge of the antecedent forgery. Glidden v. Chamberlin, 167 Mass. 486, 46 N. E. 103, 57 Am. St. Rep. 479, citing and approving text.

1. Appendix, secs. 65, 66, 67.

2. Leonard v. Draper, 187 Mass. 536, 73 N. E. 644.

3. Willard v. Crook, 21 App. D. C. 237.

§ 677. In the fifth place, as to title.—The indorser contracts that he has a lawful title to the bill or note, and a right to transfer it.[4] If he has stolen or found the instrument, or otherwise acquired possession without title, and it be payable to bearer or indorser in blank, he might, before its maturity, invest a *bona fide* indorsee without notice with a perfect title, although not himself possessing it; and even after maturity, the *bona fide* indorsee might get from him some superior rights to his own. But the indorsee might be involved in controversy, or be placed in the distasteful attitude of compelling payment by those who did not owe; and the indorser should not be protected while he brings mischief upon others. A forged instrument carries no title to the indorsee; and where the thief or finder of negotiable paper payable to order which has been indorsed, and put in circulation by the payee, erases the indorsement and, subsequently, personating the payee, forges his signature, and transfers the paper to a *bona fide* purchaser for value, no title passes as against the true owner.[5]

§ 678. Law of place applicable to indorsement.—An indorsement falls under the general rule that the obligations of a personal contract are to be determined by the law of the place of its execution, and, therefore, an indorser may become responsible for a much higher rate of damages and of interest, upon the dishonor of a note, than he can recover from the drawer;[6] and the jurisdiction of the Federal courts of the United States attaches upon an indorsement as a distinct contract, independently of the residence of the original and remote parties to the instrument.[7]

§ 678a. Invalidity as between indorser and indorsee.—The indorsement or assignment of a bill or note being an independent con-

4. Williams v. Tishomingo Sav. Inst., 57 Miss. 633; Redington v. Wood, Cal. Law Times, January, 1873, p. 12; Edwards on Bills, 289; Story on Bills, § 111; Story on Notes, §§ 135, 380; Cochran v. Atchison, 27 Kan. 728; Andrews v. Kramer *et al.*, 77 Miss. 151, 25 So. 156.

5. Colson v. Arnot, 57 N. Y. 253; Graves v. American Exchange Bank, 17 N. Y. 205; § 903, *et seq.;* Third Nat. Bank v. Merchants' Nat. Bank, 76 Hun, 475, 27 N. Y. Supp. 1070; Kernochan v. Mauss, 53 Ohio St. 118, 41 N. E. 258; Roach v. Woodall, 91 Tenn. 206, 18 S. W. 407, 30 Am. St. Rep. 883, citing and approving text.

6. Slocum v. Pomeroy, 6 Cranch, 221; Powers v. Lynch, 3 Mass. 77; Krieg v. Palmer Nat. Bank (Ind. App.), 95 N. E. 613. See *post*, §§ 899, 904.

7. Coffee v. Planters' Bank, 13 How. 183.

tract, the circumstances which would invalidate any other contract apply to it with like effect. Thus, a war between the countries of which the indorsee and indorser are citizens, rendering them alien enemies, any commercial transaction between them, such as drawing a bill upon, or making or indorsing or assigning a note to, the other, is void.[8]

In a Virginia case it appeared that checks were drawn by a bank of Richmond, Va., upon a bank in New Orleans, and were indorsed in Petersburg, Va., in February, 1863, while the late war between the United States and Confederate States was in progress, to a resident of Vicksburg, Miss. Petersburg, Richmond, and Vicksburg were then in the Confederate lines, whilst New Orleans was in the permanent possession of the Federal forces. It was held that the indorsement was illegal and void, and that the indorsee could not recover against the indorser, in an action brought after the war.[9]

§ 679. Consideration between indorser and indorsee.—There must be a consideration for an indorsement as between the immediate parties, and while it is *prima facie* evidence in itself of a consideration, the presumption as between immediate parties may be rebutted.[10]

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8. Billgerry v. Branch, 19 Gratt. 417, 437; Griswold v. Waddington, 16 Johns. 438; Willison v. Pattison, 8 Taunt. 439 (2 Eng. C. L.), 1 J. B. Moore, 133; McCaughy v. Berg, 4 Heisk. 695. See *ante*, § 218.

9. Billgerry v. Branch, 19 Gratt. 417, 437.

10. See *ante*, § 174; First Nat. Bank v. Anderson, 141 Fed. 926, reversing 5 Ind. Ter. 115, 82 S. W. 692. The title of an indorsee of a negotiable note is defective when the consideration for the indorsement is unlawful, or where the indorsement is procured by unlawful means. Drinkall v. Movins State Bank, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693. Extension of time for the payment of a note furnishes ample consideration for an indorsement. Lyndon Savings Bank v. International Co., 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900. See also Utica City Nat. Bank v. Tallman, 71 N. Y. S. 861, 63 App. Div. 480, affirmed 172 N. Y. 642, 65 N. E. 1123, holding that where a widow was the devisee of her husband in property, which a note made by the husband was given in payment of, indorsed renewals of extensions of the note for the purpose of preventing a forced sale of securities and other property, her interest in the property formed a good consideration for her indorsement of the renewals. When a renewal of a note was accepted by the payee on the indorser of the old note indorsing the new one, a contention that the new indorsement was without consideration cannot be sustained, though the indorser was not then liable on the old note. Nashua Sav. Bank v. Sayles, 184 Mass. 520, 69 N. E. 309, 100 Am. St. Rep. 573. The consideration must have some value and reality, and the assumption of a supposed danger or liability which has no foundation in law or in fact is not a valuable or sufficient consideration. Funk v. Hossack, 129 Ill. App. 421, hold-

Where the indorser makes the indorsement after the instrument is delivered, as a perfected obligation, it would be void for want of consideration.[11]

SECTION II

BY WHOM AND TO WHOM INDORSEMENT OR ASSIGNMENT MAY BE MADE

§ 680. In the first place, as to who may indorse or transfer negotiable paper.—Any person legally competent to enter into a contract may be the indorser, or transferrer by delivery of negotiable paper.[12] If payable to the order of the payee, he or his legal rep-

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ing that a promise to refrain from putting the maker of a note into bankruptcy the maker being a farmer, is not a sufficient consideration as against an indorser signing the note some time after it was made and delivered, as a farmer could not be forced into involuntary bankruptcy. Where the guarantor of a note which the principal had failed to pay, by an agreement with the payee, executed to the payee his note for amount of the note the payee held against the guarantor and his principal, and the payee surrendered to the guarantor the old note and indorsed the same to him, such an indorsement was wholly without consideration. Peabody v. Munson, 211 Ill. 324, 71 N. E. 1006.

11. Collier v. Mahan, 21 Ind. 110.

12. 2 Parsons on Notes and Bills, 3; Story on Bills, § 195. In accepting the indorsement of a stranger to the paper, it is the acceptor's duty to know that the indorsement was authorized. Wickersham Banking Co. v. Nicholas, 2 Cal. App. 18, 82 Pac. 1124. Under a statute authorizing school trustees to take notes, bonds and other negotiable securities, when a note is once in their ownership it retains its negotiable qualities, and the school trustees in their corporate capacity have power to sell and transfer the same, and invest the purchaser with the legal title thereto. Scott v. Goode, 128 Ill. App. 26, holding further that such instruments can be transferred by the trustees only by their corporate action, and not by their agents and attorneys. Where a note was made by a corporation under the name of "Silberstein & Silver," of which Silberstein and Silver were members, the mere appearance of an indorsement "Silberstein—Silver" on the back of the note, together with a statement in a letter written by a bookkeeper to the payee that "Note is indorsed by Silberstein and Silver personally," were held not to be sufficient to establish a claim of personal indorsement by a fair preponderance of proof, when Silberstein testified that the bookkeeper was not authorized to write the letter in that form. Reedy v. Elevator Co., 114 N. Y. S. 785. Where notes, issued by a municipal corporation, were made payable "to the order of J. V. Felker, City Treas.," and the same, when negotiated, were indorsed in blank, "J. V. Felker, City Treas.," such signature does not make Felker liable on the notes, but his name was used only to give the notes currency. Citizens' Savings Bank v. City of Newburyport, 169 Fed. Rep. 766.

resentative must be the transferrer. In case of the bankruptcy of the payee of a bill or note, all his rights become vested in the assignee, who may transfer it in his own name; [13] and the bankrupt cannot; [14] and in the case of the death of the payee the like right devolves upon his executors or administrators.[15] But if payable to several persons "as executors," all must concur.[16] In Louisiana, where suit was brought against the executors of Mary C. Moore and John Moore, who were in their lifetime tutrix and cotutor of D. Magill, to recover judgment on two drafts which said tutrix and cotutor drew payable to their own order, it was held that they were not personally bound by their indorsement, although they omitted therein to state their fiduciary capacity.[17] When an assignment of notes by a guardian without an order of court is forbidden by statute, no title passes to the assignee by such an attempted assignment.[18]

§ 681. **In the case of the marriage of a woman who is payee** or indorsee of a bill or note, the property thereof, vests in her husband, and he alone can indorse or transfer it; and in like manner, if the paper be made payable to her after marriage, her husband alone can indorse or transfer it.[19] But this principle is subject to the

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13. Chitty, 227; Story on Notes, § 123; *Ex parte* Brown, 1 Glyn & J. 407.

14. Ashurst v. Bank of Australia, 37 Eng. L. & Eq. 149.

15. Watkins v. Maule, 2 Jac. & Walk. 237; Rawlinson v. Stone, 3 Wils. 1; Rand v. Hubbard, 4 Metc. (Mass.) 252; Malbon v. Southard, 36 Me. 147; Dwight v. Newell, 15 Ill. 333; Nelson v. Stollenwerck, 60 Ala. 140; Shelton v. Carpenter, 60 Ala. 211; Crumrine v. Estate of Crumrine, 14 Ind. App. 641, 43 N. E. 322. Where a widow became by right of survivorship the owner of a certificate of deposit taken in the names of her husband and herself, and delivered it indorsed to the administrator of her husband's estate because he represented to her that it belonged to that estate, but did not indorse it for the purpose of transferring to him any interest she had, she is entitled to the certificate. Brewer v. Bowersox, 92 Md. 567, 48 Atl. 1060.

16. Johnson v. Mangum, 65 N. C. 146.

17. Lapeyre v. Weeks, 28 La. 665. The court said: "We do not regard Mary C. Moore and John Moore as indorsers of the drafts. In indorsing the drafts they omitted adding their capacity as tutrix and cotutor. In their fiduciary capacity the drafts were not indorsed and completed by the drawers, unless we regard the signatures of Mary C. Moore and John Moore as made in that capacity. Bills drawn by a fiduciary to his own order are not completed unless indorsed in the same capacity as drawn. We regard these drafts as completed, and must, therefore, consider that Mary C. Moore and John Moore indorsed them in the same capacity in which they drew them."

18. Browne v. Fidelity & Deposit Co., 98 Tex. 55, 80 S. W. 593.

19. See *ante*, § 254; Mason v. Morgan, 2 Ad. & El. 30 (29 Eng. C. L.); Chitty,

limitation that the wife may, with the consent of the husband, indorse a bill or note made payable to her, and pass a good title to the indorsee.[20]

The law being based upon the distinction that coverture of the wife creates a disability on her part to enter into a contract which the assent of the husband may remove.[21] The indorsement of the wife, under such circumstances, is equivalent to that of her husband. Her act becomes in law his act, and the indorsee must claim through the husband by a title derived from him.[22] If a woman who is the payee of a note payable to her order assigns it by delivery and afterward marries the maker, her indorsement after marriage transfers the legal title.[23]

§ **682. Infant as indorser.**—An infant is not bound upon his indorsement of a bill or note, being incapable of making a contract; but he may, by his indorsement (which is voidable—not absolutely void), transfer the paper to any subsequent holder, against all the parties thereto, except himself.[24]

§ **683. When a bill or note is payable or indorsed to a copartnership,** any member of the firm may transfer it during the continu-

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26; Story on Notes, § 124; Barlow v. Bishop, 1 East, 433; Conner v. Martin, 1 Stra. 516; Miles v. Williams, 10 Mod. 243; Savage v. King, 5 Shep. 301; Miller v. Delamater, 12 Wend. 433. *Contra* in Texas, where the common law is changed by statute. Kempner v. Comer, 73 Tex. 200.

20. See *ante*, §§ 252, 253.

21. Chitty on Bills, 21, 200; Stevens v. Beals, 10 Cush. 291; Miller v. Delamater, 12 Wend. 433; Hancock Bank v. Joy, 41 Me. 568; Reakert v. Sanford, 5 Watts & S. 164; Leeds v. Vail, 15 Pa. St. 185; Fredd v. Eves, 4 Harr. (Del.) 385; Cotes v. Davis, 1 Campb. 485; Prestwick v. Marshall, 7 Bing. 565, 4 Car. & P. 594; Prince v. Brunatte, 7 Bing. N. C. 435; 2 Bright on Husband and Wife, 42; Lindus v. Bradwell, 5 C. B. 583; Lord v. Hall, 8 C. B. 627. See *ante*, §§ 252, 253.

22. Stevens v. Beals, 12 Cush. 291, and cases in note, *ante*. See also *ante*, §§ 252, 253.

23. Guptill v. Horne, 63 Me. 405. Appleton, C. J.; "As the wife would have been compelled by a court of equity to indorse, her voluntary act is as effectual to transfer to the indorsee the right to sue as if it had been the result of legal compulsion."

24. Story on Bills, § 196; Story on Notes, § 124; Bayley on Bills, 44; Chitty, 21; 2 Parsons on Notes and Bills, 3; Nightingale v. Withington, 15 Mass. 272; Burke v. Allen, 29 N. H. 106 (*semble*); Frasier v. Massey, 14 Ind. 382; Hardy v. Waters, 38 Me. 450; Taylor v. Croker, 4 Esp. 187; Jeune v. Ward, 2 Stark. 326; Grey v. Cooper, 3 Doug. 65. See *ante*, § 227 *et seq.*

ance of the firm, and indorse it in the firm name; [25] and upon the death of a member of the firm, the survivor may indorse it in his own name.[26] But the indorsement by a partner to his copartner, or to another person, of a bill or note payable to the firm, in his individual name, will not pass the title to the paper, nor enable the indorsee to bring a suit on it in his own name.[27] It has been held, however, that such an indorsement would pass the equitable title.[28] And where partners individually indorse a note given by the firm, they are indorsers, and none the less so and liable as such because they are also liable as members of the firm which made the note.[29]

If there be a dissolution of the copartnership (otherwise than by the death of a partner), the survivor cannot indorse in the firm name a bill or note payable to the firm; [30] even though the surviving partner had power to settle the partnership affairs; [31] but the contrary had been held if the dissolution were unknown to the indorsee,[32] and the rule does not apply where the bill or note of the firm was made payable to the partner who, after dissolution, indorsed it.[33]

§ 684. **If several persons, not partners, are payees or** indorsees of a bill or note, it should be indorsed by all of them,[34] unless it be

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25. Story on Notes, § 125; Bayley on Bills, 53; Barrett v. Russell, 45 Vt. 43. It is within the authority of the managing partner to indorse a renewal note before delivery and thus bind the firm as joint makers, when they were liable on the renewal note as indorsers. Citizens' Commerical & Savings Bank v. Platt, 135 Mich. 267, 97 N. W. 694.

26. Jones v. Thorne, 14 Mart. 463.

27. Estabrook v. Smith, 6 Gray, 570; Robb v. Bailey, 13 La. Ann. 446; Fletcher v. Dana, 4 Blackf. 377; Desha v. Stewart, 6 Ala. 852; Moore v. Denslow, 14 Conn. 235; Absolem v. Marks, 11 Q. B. 19; Russell v. Swan, 16 Mass. 314; Hooker v. Gallagher, 6 Fla. 351.

28. Alabama Co. v. Brainard, 35 Ala. 476.

29. Faneuil Hall Nat. Bank v. Meloon, 183 Mass. 66, 66 N. E. 410, 97 Am. St. Rep. 416.

30. Sanford v. Mickles, 4 Johns. 224. See *ante*, § 370.

31. Abel v. Sutton, 3 Esp. 108; Humphries v. Chastain, 5 Ga. 166; Foltz v. Pouree, 2 Desaus, Eq. 40; Parker v. Macomber, 18 Pick. 505. See *ante*, § 372.

32. Cony v. Whellock, 33 Me. 366; Lewis v. Reilly, 1 Q. B. 349. See *ante*, § 373.

33. Semple v. Seaver, 11 Cush. 314.

34. Brown v. Dickinson, 27 Gratt. 693; Smith v. Whiting, 9 Mass. 334; Sneed v. Mitchell, 1 Hayw. 289; Carvick v. Vickery, 2 Doug. 653. See Sayre v. Frick, 7 Watts & S. 383; Culver v. Leavy, 19 La. Ann. 202, and *post*, §§ 701*a*, 704; Ryhiner v. Feickert, 92 Ill. 311; Allen v. Corn Exch. Bank, 84 N. Y. S. 1001, 87 App. Div. 335, quoting text. Where a negotiable paper, payable on its face to

expressed to be payable to the order of either of them, or to the order of certain ones of them, in which cases their indorsement would suffice.[35] Either one of the joint payees may authorize the other to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority.[36] But there is no presumption of law that one may indorse for the other.[37]

Under Negotiable Instrument statute.—The statute provides that where an instrument is payable to the order of two or more payees or indorsers who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.[38] Where one of two payees of a note indorsed it in his own name and in the name of the other without authority, this was a conversion of the note as between the other payee and the indorsee.[39]

§ 685. A note payable an to executor may be transferred for a debt of the estate.[40]—If the instrument be payable to two or more persons as executors or administrators, all must indorse;[41] but it seems that in other cases one of the personal representatives might

two persons jointly, represented money due to one individually and the other indorsed the paper individually, and also in the name of the one to whom the money was due, this forgery was a conversion of the paper as to both the indorsee and indorser as against the payee whose name had been forged. Kaufman v. State Savings Bank, 151 Mich. 65, 114 N. W. 863, 18 L. R. A. (N. S.) 630, 123 Am. St. Rep. 259.

35. Watson v. Evans, 1 Hurl. & Colt. 662 (1863); Benjamin's Chalmers' Digest, 7, 134.

36. Russell v. Swan, 16 Mass. 314; Goddard v. Lyman, 14 Pick. 268. See also Citizens' Nat. Bank v. Walton, 96 Va. 439, 31 S. E. 840. See *post*, § 701*a*.

37. 2 Parsons on Notes and Bills, 5. The text is approved in Ryhiner v. Feickert, 92 Ill. 305, Scholfield, J., saying: "If a note be made payable to several persons not partners, the transfer can only be by a joint indorsement of all. * * * Neither party being the agent in legal contemplation of the other, he can no more bind the other by a sale of the note without indorsement than he can by a sale of the note with an indorsement. He has no power whatever to dispose of the interest of his copayee, legal or equitable, in the note, without the consent of his copayee." Haydon v. Nicoletti, 18 Nev. 290, citing the text.

38. Appendix, sec. 41. First Nat. Bank v. Gridley, 98 N. Y. S. 445, 112 App. Div. 398.

39. Kaufman v. State Savings Bank, 151 Mich. 65, 114 N. W. 863, 18 L. R. A. (N. S.) 630, 123 Am. St. Rep. 259, the court saying that either one of the joint payees may authorize the other to indorse for him, and an assignment of his interest in the paper from one to the other carries with it such authority; but there is no presumption of law that one may indorse for the other.

40. Moses v. Clark, 46 Ala. 226.

41. Smith v. Whiting, 9 Mass. 334.

indorse.[42] An executor or administrator will be personally bound by his indorsement, although he add "executor" or "administrator" to his name, unless he expressly specify that recourse is to be had only against the estate of the deceased.[43] A negotiable note transferred by the payee, by delivery only, may be indorsed by his personal representative with the same effect as if done by the payee in his lifetime.[44]

When a bill or note is payable at a bank, an indorsement by "A. B., Pres't," binds the bank.[45] And so an indorsement by "A. B., Cashier." [46] If payable to A. or order for the use of B., it can be indorsed by A. only, as the legal interest is in him, not in B.[47]

§ 686. In the second place, as to whom transfer may be made.— The transfer of a bill or note may be made, of course, to any party who may legally contract with the transferrer. It may also be made to an infant, or to a married woman; but in the latter case the interest will vest in her husband, who may treat it as payable to himself, or to himself and wife.[48] In the latter case, should she survive him, she may sue in her own name. It may also be made to a trustee, or personal representative, in which case it will operate as a transfer to them personally, although the trust may attach to the proceeds in their hands.[49] The transfer cannot be made by the husband to his wife,[50] except to act as his agent and convey title to another.[51]

If the transfer be to an executor or trustee, it will operate as a transfer to him personally, although the trust may attach to the proceeds in his hands.[52] If a principal make an indorsement in blank to his agent, the latter may fill it up to himself individually, and it will be regarded as between him and all other parties, except his principal,

42. Wheeler v. Wheeler, 9 Cow. 34. See 2 Parsons on Notes and Bills, 6.

43. See Beals v. See, 10 Barr, 56; Seaver v. Phelps, 11 Pick. 304; Serle v. Waterworth, 4 M. & W. 487.

44. Molbin v. Southard, 36 Me. 149; Hersey v. Elliott, 67 Me. 527. See Watkins v. Maule, 2 Jacob & Walker, 148.

45. Aiken v. Marine Bank, 16 Wis. 679. See Leavitt v. Connecticut Peat Co., 6 Blatchf. 139, and *ante*, § 394.

46. See *ante*, §§ 392, 417.

47. Evans v. Cramlington, 2 Show. 509, 1 Show. 4.

48. Story on Notes, § 126; Richards v. Richards, 2 B. & Ad. 477; Burrough v. Moss, 10 B. & C. 558; Philliskirk v. Pluckwell, 2 Maule & S. 393.

49. Ibid.; Crumrine v. The Estate of Crumrine, 14 Ind. App. 641, 43 N. E. 322.

50. Gay v. Kingsley, 11 Allen, 345.

51. Slawson v. Loring, 5 Allen, 340. See *ante*, § 241.

52. Richards v. Richards, 2 B. & Ad. 447.

as his own; or he may fill it for his principal, and act in his name.[53] The indorsee must, of course, be living at the time of the indorsement; and if he be dead, and the indorsement be with intention to invest his personal representative with the legal property in the instrument, it is null and void.[54]

A promissory note payable to "J. C., Sh'ff" (sheriff), and indorsed "J. C., Sh'ff," does not of itself impart notice to the indorsee that the money was payable to J. C. in his official capacity as sheriff, or as trustee for other parties.[55] So a note to A. B., receiver, indorsed by him "as receiver," is *prima facie* his individually, and he may sue upon it in his own name.[56]

§ 687. Cashier as payee and indorser.—If a bill or note be made payable to a party as "cashier," it will be regarded *prima facie* as payable to his bank; and if so indorsed, as indorsed by his bank.[57] An indorsement by the cashier of a bank to himself would be voidable merely at the instance of the bank, and until avoided by the bank would pass legal title to the cashier.[58] In cases of indorsement to a cashier of a bank as cashier, for example, "to A. B., Cashier," the bank may sue on it, or the cashier may do so for the use of the bank, or in his own name.[59] And if the indorsement be to the treasurer of the United States, in his official capacity, it will be regarded as to the United States in point of fact, and they may sue upon it in their name.[60] And the same principle applies to other governmental officers.[61]

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53. Clark v. Pigot, 1 Salk. 126; Story on Bills, § 207.
54. Valentine v. Holloman, 63 N. C. 475.
55. Fletcher v. Schaumberg, 41 Mo. 501.
56. Davis v. Peck, 54 Barb. 425.
57. Bank of the State v. Muskingum Branch Bank, 29 N. Y. 619; Collins v. Johnson, 16 Ga. 458; Bank of Manchester v. Slasen, 13 Vt. 334; Folger v. Chase, 18 Pick. 63; Fleckner v. Bank of the United States, 8 Wheat. 360; Minor v. Mechanics' Bank, 1 Pet. 46; Wild v. Passamaquoddy Bank, 3 Mason, 505; Blair v. Bank of Mansfield, 2 Flip. 111. See *ante*, § 417.
58. Dyer v. Sebrell, 135 Cal. 597, 67 Pac. 1036.
59. McHenry v. Ridgely, 3 Scam. 309; Porter v. Neckervis, 4 Rand. 359; Fairfield v. Adams, 16 Pick. 381. See *ante*, § 417, and *post*, chapter XXXVII, section II, vol. II.
60. Dugan v. United States, 3 Wheat. 172.
61. See *ante*, § 433.

SECTION III

FORM AND VARIETIES OF INDORSEMENT

§ **688. As to the place of the indorsement.**—The indorsement, as its derivation and meaning would indicate, is generally made by writing the transferrer's name on the back of the paper, but it may be written—although unusual and irregular—on any other portion of it, even on the face and under the maker's name.[62] As said by Lord Campbell, C. J.: "It is quite immaterial whether the indorsement be written on the back of the instrument or on the face." [63] Where the payee's name was indorsed in the usual place on the back of the note, and another indorsed it, writing his name at the other end with his signature reversed, it was considered irregular, but valid and in the usual course of business.[64]

§ **688a. Formal signature of indorser.**—Writing and signature are necessary to the formal indorsement of a negotiable instrument; but no particular form of signature is necessary, any form adopted as such being sufficient.[65] The full name should be written, but the

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62. Bigelow on Bills and Notes, 135; 2 Parsons on Notes on Bills, 18, *dubit ante*; Benjamin's Chalmers' Digest, 122; Ames on Bills and notes, vol. I, p. 228; Thompson on Bills, 181; First Nat. Bank of Etowah, Tenn. v. Messer, 136 Ga. 226, 71 S. E. 148; Perry v. Bray, 68 Ga. 293; Quin v. Sterne, 26 Ga. 223; Herring v. Woodhull, 29 Ill. 92; Gibson v. Powell, 6 How. (Miss.) 60; Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466; Haines v. Dubois, 30 N. J. L. (1 Vroom) 259; Patridge v. Davis, 20 Vt. 449; Rex v. Begg, 3 p. Wms. 419, 1 Stra. 18. Young v. Glover, C. B., 3 Jurist (N. S.), 637; Armsfield v. Allport, 27 L. J. Exch. 42; But see Marion Gravel Road Co. v. Kessinger, 66 Ind. 553. The fact that the payee signed his name at the foot of the note, along with the other makers, does not render it invalid as an obligation of the others, the note being both joint and several. Fisher v. Diehl, 94 Md. 112, 50 Atl. 432, the court saying: "If the note had simply been a joint one, there is authority for the proposition that the appellee could not have maintained an action on it against any of its makers." But the note being both joint and several it contained the individual promise of the appellant to the appellee to pay the amount of the note as well as the joint promise of all the makers.

63. Young v. Glover, 3 Jurist (N. S.), 637; Shain v. Sullivan, 106 Cal. 208, 39 Pac. 606.

64. Arnot v. Symonds, 85 Pa. St. 99. See § 689*a*.

65. Sheffield v. Johnson County Savings Bank, 2 Ga. App. 221, 58 S. E. 386, holding further that a seal is unnecessary to its sufficiency, whether it be that of a private person or of a corporation.

initials will suffice,[66] as will also any mark, instead of the name, made to represent it.[67]

Writing on the paper, "Pay the contents to A.," is a transfer, so far as it authorizes payment to be made to A., but it does not render the writer liable as an indorser.[68]

It has been held that the figures "1, 2, 8," written in pencil, was a sufficient indorsement connected with evidence tending to show that the party who placed them on the paper intended to bind himself as an indorser.[69] This decision is questioned by Prof. Parsons (vol. II, N. & B., 17); but with the utmost respect for that eminent jurist, it seems to us sound, on the ground that it was intended as a mark to represent the indorser's name.[70] And it is well settled that any mark which is shown to have been intended as the maker's name, is as valid to bind him as the name itself. "A very small matter," says Cunningham, in his Law of Exchange, p. 26, "will amount to an acceptance;" and he gives as an example the mere memorandum of the date of presentment. The same may be said of an indorsement. It is the intention which gives significance to the mark.

It is settled that the writing may be done in any legible way, by pen or pencil.[71]

§ 688b. Whether party who writes sale or assignment over his signature is indorser or mere assignor of the instrument; peculiar expressions used in transfers.—The usual and regular indorsement is made by simply writing the indorser's name, or by writing

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66. Merchants' Bank v. Spicer, 6 Wend. 443; Palmer v. Stephens, 1 Den. 471; Bank v. Flanders, 6 N. H. 239; Rogers v. Colt, 6 Hill, 322; Williamson v. Johnson, 1 B. & C. 146; Corgan v. Frew, 39 Ill. 31.

67. George v. Surrey, 1 Moody & M. 516; Baker v. Denning, 8 Ad. & El. 94; Addy v. Grix, 8 Ves. 504: Flint v. Flint, 6 Allen. 34; Brown v. Butchers, etc., Bank, 6 Hill, 443. An indorsement "for deposit * * * to credit of E. J. Neher," is sufficient although the name signed makes part of a sentence. Haskell v. Avery, 181 Mass. 106, 63 N. E. 15, 92 Am. St. Rep. 401. Where the name of the drawee of a draft has been stamped on the back with a rubber stamp by one having authority to do it and with intent to indorse the instrument, this is a valid indorsement. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879, holding further that such indorsement does not prove itself, but must be established by proper testimony.

68. Vincent v. Horlock, 1 Campb. 442.

69. Brown v. Butchers', etc., Bank, 6 Hill, 443.

70. Redfield & Bigelow's Lead. Cas. 110, 111.

71. Geary v. Physic, 5 B. & C. 234; Brown v. Butchers, etc., Bank, 6 Hill, 443; Closson v. Stearns, 4 Vt. 11.

also over it the direction to pay to the indorsee named or order, or to him or bearer. But sometimes additional expressions are used which give rise to the contention that the transfer is merely by way of sale or assignment. In an English case the holder wrote on the back of the instrument: "I hereby assign this draft and all benefit of the money secured thereby to John Grainger, of Bessilsleigh, in the County of Berks, labourer; and order the within named Thomas Fox Hitchcock to pay him the amount and all interest in respect thereof"—Hitchcock being the maker of the instrument, which was a note. Gurney, B., said: "It amounts to nothing more than an ordinary indorsement of the note, but it is in a very elaborate form." [72] Where a payee of a note signed the following indorsement on the back of the note: "I hereby acknowledge myself a principal maker of this note," it may be stricken out as surplusage, and without legal meaning or effect, and the signature of the payee makes him an indorser.[73] In the case of a note payable to the order of the maker, which is not negotiable unless indorsed by the maker,[74] it has been held that the addition of a statement of the value of the maker's real and personal property above his signature on the back of the note is not an indorsement of such a note,[75] though the contrary has been maintained.[76]

§ 688c. American decisions in similar cases.—A written agreement to pay a note "as if by me indorsed" has been considered in the United States an indorsement in the legal and mercantile sense of the term.[77] And the like effect has been given to writings on the back of the paper over the transferrer's signature where the expressions were used: "I hereby assign all my right and title to L. M.;" [78] "I assign the within note to S. C.;" [79] "For value received we assign

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72. Richards v. Frankum, 9 Car. & P. 221 (38 Eng. C. L.) (1840). See § 700*a*; Hall v. Toby, 110 Pa. St. 318; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, note; Jacobs v. Gibson, 77 Mo. App. 244, text cited.

73. Kistnor v. Peters, 223 Ill. 607, 79 N. E. 311, 7 L. R. A. (N. S.) 400, 114 Am. St. Rep. 362.

74. See *ante*, § 130.

75. Pickering v. Cording, 92 Ind. 306.

76. Dunning v. Heller, 103 Pa. St. 271.

77. Pinnes v. Ely, 4 McLean, 173.

78. Sears v. Lantz, 47 Iowa, 658; Jacobs v. Gibson, 77 Mo. App. 244, text cited.

79. Sands v. Wood, 21 Iowa, 263, cited in Sears v. Lantz, 47 Iowa, 658; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601. Under a statute making promissory notes payable "to any person or order," or "to any person or assigns," an indorse-

the within note to A. B., waiving demand and notice;"[80] and "I hereby sell and assign all my interest in the within note to A. B."[81] Also, "I sign this note to N. H. G. without recourse."[82] But in Michigan, where the payee wrote on the back of a note, "I hereby transfer my right, title, and interest of the within note to S. C. Y.," the view has been strongly presented that such transfer was not an indorsement in the sense of the law merchant, but merely passed title, not rendering the assignor liable as an indorser in the event of due dishonor and notice.[83] And in Kansas, a writing on the back of a

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ment by a payee, that he "hereby assigns and transfers the within note and coupons to ———," is the equvalent of a bank indorsement, and relieves an innocent holder from equities existing between the makers and payee. Leahy v. Haworth, 141 Fed. 850, 4 L. R. A. (N. S.) 267.

80. Duffy v. O'Connor, 7 Baxt. 498. Compare Wood v. Elwood, 90 Tex. 131, 37 S. W. 414, citing text.

81. Shelby v. Judd, 24 Kan. 166. See also Thorpe v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, as to an indorsement: "I hereby sell, transfer and assign the within note and interest coupons thereto attached" etc. In Gale v. Mayhew, 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648, it was held that an indorsement on a negotiable note that "I hereby assign my interest in this note to" a certain person, is not a legal indorsement but an assignment.

82. Brotherton v. Street, 124 Ind. 599, 24 N. E. 1068.

83. Aniba v. Yeomans, 39 Mich. 171. W. T. Aniba, payee of a note, sold it to S. A. Yeomans, writing on the back the following indorsement: "I hereby transfer my right, title, and interest of the within note to S. A. Yeomans, June 14, 1877, (signed) W. T. Aniba." Yeomans sued Aniba as indorser. Marston, J., said: "The indorsement upon a negotiable promissory note is something more than the mere transfer of the interest of the payee therein. It includes also the personal undertaking of the indorser that if the note is not paid at maturity, upon notice of that fact he will pay the same. Indeed, it goes farther and may pass a perfect title to the indorsee, and enable him to recover from the makers, in cases where the payee could not have recovered. The right or interest passing, therefore, under the usual and customary indorsement is much greater than the mere right, title, and interest of the payee, and where the transfer as made only attempts to pass the title and interest of the payee of the note, no greater right or interest than he then held can pass. The transfer in this case gave Yeomans the same rights that Aniba then had, but none other or greater. Yeomans could look to the makers thereof as Aniba could have done, but beyond this he could not go. To permit him to fall back upon Aniba, or to collect from the makers in case Aniba could not have collected, would be giving him more than Aniba's right and interest in the note. Such a transfer as was made in this case, it not being in accordance with the usual and customary method of transferring commercial paper, would throw doubt and suspicion upon the entire transaction and destroy the negotiable character of the paper. No one dealing in commercial paper would be willing to accept it afterward with such an indorsement standing thereon." Guaranty of payment written on back of a promissory note and sub-

note in the following form, "I, J. C. R., do hereby assign the within note to C. B. H.; said assignment is made without recourse on me either in law or equity," was held an indorsement in a commercial sense, cutting off defenses of the maker.[84] The question arising in such cases is a nice one, and depends upon rules of legal interpretation. The mere signature of the payee indorsed on the paper imports an executed contract of assignment, with its implications, and also an executory contract of conditional liability with its implications. The assignment would be as complete by the mere signature as with the words of assignment written over it. The conditional liability which is executory is implied by the executed contract of assignment, and the signature under it, which carries the legal title. And the question is: Does the writing over a signature on express assignment which the law imports from the signature *per se* exclude and negative the idea of conditional liability which the law also imports if such assignment were not expressed in full? We think not. It is from the fact that a payee assigns a bill or negotiable note by indorsement of his name on the back of it, that the law implies his liability as an indorser. His relation to the instrument creates the implication, and the circumstance that he sets forth that relation in express terms does not change it, for the maxim applies, *Expressio eorum quæ tacitæ insunt nihil operatur*. Did the payee intend merely to pass the title he should use the words "without recourse" or some phrase of equal import. His liability is implied without words expressly creating it. To be negatived, words should be used which negate the implication. If the executed contract created implications of several executory contracts then the expression of one of those implications might exclude others of the like class, by application of the maxim, *Expressio*

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scribed by payee, constitutes a transfer of the title of the note to the person who brings it under such guaranty. National Bank of Commerce v. Gallard, 14 Wash. 502, 45 Pac. 35; Hale v. Hitchcock, 3 Kan. App. 23, 44 Pac. 446; Fox v. Cipra, Kan. App. 312, 48 Pac. 452; Merchants' Sav. Bank v. Moore, 5 Kan. App. 362, 48 Pac. 455. Compare Stevens v. Hannan, 86 Mich. 305, 48 N. W. 951, 24 Am. St. Rep. 125. Though a written indorsement on the back of a note: "For value received the within note together with the collaterals securing the payment of same is transferred to" a certain person, destroyed its negotiability under the law merchant, yet Rev. Stats. of 1905, article 307, providing that if the instrument was in form negotiable at law, the form of the indorsement, whereby the transfer was accomplished, would not affect an innocent holder for value, places the indorsee in the same position as if the assignment was in blank. Rowe v. Gohlman, 44 Tex. Civ. App. 315, 98 S. W. 1077 (1907).

84. Hatch v. Barrett, 34 Kan. 230, citing the text.

est unius, est exclusio alterius. But when the thing done creates the implication of another to be done, we cannot think that the mere expression of the former in full, can be regarded as excluding its consequence when that consequence would follow if the expression were omitted.[85] The executory contract of the indorser to pay in the event of dishonor and notice has never in any case that we are aware of been written in full. And if the language does not negate that universally accepted implication it should be remembered that words are to be construed as strongly as their sense will allow against those using them; and the question resolved accordingly.

Under Negotiable Instrument statute.—Under the statute,[86] while an indorsement of the "right, title and interest" of the indorser is a qualified indorsement, it is a commercial indorsement and not a mere assignment, and does not, in law, discredit the paper or even bring it under suspicion.[87]

§ 689. Handwriting of indorsement—The indorser may write his own name, or he may authorize any one to write it for him. If the name be in the handwriting of the paper, but the indorser receives notice, is sued, suffers default and makes no defense or denial until after the maker absconds, he cannot deny his signature; or if he does, proof that he had assumed other paper similarly indorsed would be conclusive against him.[88]

§ 689a. Indorsement must be on the instrument.—The indorsement must, as a general rule, be somewhere on the paper itself, or attached thereto, and unless it is, the party cannot be held liable as

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85. See Adams v. Blethem, 66 Me. 19; § 962; Benjamin's Chalmers' Digest, 121; Bigelow on Bills and Notes, 134; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601, citing text; Markey v. Corey, 108 Mich. 184, 66 N. W. 61, 62 Am. St. Rep. 698, quoting text. *Contra*, Spencer v. Halpern, 62 Ark. 595.

86. Appendix, secs. 38, 65.

87. Evans v. Freemen, 142 N. C. 61, 54 S. E. 847, wherein the court said: "The indorsee is supposed to take it on the credit of the other parties to the instrument, Revisal 1905, § 2187 [Appendix sec. 38], though the indorser may still be liable on certain warranties specified in the statute. Revisal 1905, § 2214 [Appendix, sec. 65]. See Thorpe v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, as to an indorsement upon a note: "For value received, I hereby sell, transfer and assign the within note and the interest coupons thereto attached * * * without recourse."

88. Weed v. Carpenter, 10 Wend. 403.

an indorser,[89] but a promise made on a sufficient consideration will sustain an action upon its breach.[90]

When a note is transferred with guaranty, the transfer may be good, though the guaranty be void under the Statute of Frauds.[91] The addition of a guaranty has been held not to impair the negotiability of the instrument.[92]

In Nebraska, the words "For value received I hereby guarantee payment of the within note, and waive demand and notice of protest on the same when due," has been held to be an indorsement within the meaning of the law merchant.[93]

§ **690. Allonge.**—It is not necessary, however, that the indorsement should be upon the original bill or note, in order to constitute it such, in the full sense of the term. It sometimes happens that by rapid circulation from hand to hand, the back of the paper is completely covered by indorsements; and in such cases the holder may tack or paste on a piece of paper sufficient to bear his own and subsequent indorsements, and thereon the indorsements may be made. Such addition to the original instrument is called an *allonge*, and it becomes, for the purposes above named, incorporated as a part of it.[94] Transfers by separate instruments are hereafter considered.[95]

89. Fenn v. Harrison, 3 T. R. 757. See *post*, § 748*a*. And where at the time a promissory note was indorsed in blank, another between the same parties was folded in it, the indorsement of the former did not operate as an indorsement or to more than an equitable assignment of the latter, although such may have been the intent of the parties. Consequently, a holder could not maintain a suit upon the latter in his own name without equitable pleadings setting up the requisite facts. See National Bank v. Leonard, 91 Ga. 805, 18 S. E. 32; May v. Dyer, 57 Ark. 441, 21 S. W. 1064.

90. Moxon v. Pulling, 4 Campb. 51; Wilmington Bank v. Houston, 1 Harr. 227; French v. Turner, 15 Ind. 59.

91. Crosby v. Roub, 16 Wis. 616.

92. Hatcher v. National Bank, 79 Ga. 542.

93. Helmer v. Commercial Bank (Nebr.), 44 N. W. 482; Weitz v. Wolfe, 28 Nebr. 500, 44 N. W. 485; Heard v. Bank, 8 Nebr. 10; Bank v. Hayden, 14 Nebr. 480.

94. Crosby v. Roub, 16 Wis. 622, 626 (1863); Folger v. Chase, 18 Pick. 63; French v. Turner, 15 Ind. 59; Young v. Glover, 3 Jurist (N. S.), 637; Osgood v. Artt, 17 Fed. 575, where an assignment contained in a bond, of a note referred to in the bond, which, together with the note and a mortgage, three separate papers, were fastened together by eyelets, was held not to be an indorsement within the meaning of the law merchant. Story on Notes, §§ 121, 151, 172; Story on Bills, §§ 204, 218; Byles on Bills [*145], 263; Edwards on Bills, 267; Benjamin's Chalmers' Digest, 122; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080; citing text; Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17, citing text.

95. *Post*, §§ 748, 748*a*.

§ **691. Secondly: As to the varieties of indorsement.**—There are various liabilities which may be engrafted on a negotiable instrument, evidenced by the terms of the indorsement thereon. An indorsement may be (1) in full or (2) in blank; it may be (3) absolute or (4) conditional; it may be (5) restrictive; it may be (6) without recourse on the indorser; and there may be (7) joint indorsements of the instrument, (8) successive indorsements, and also (9) irregular indorsements.

§ **692. (1) In the first place, an indorsement in full** is one which mentions the name of the person in whose favor it is made; and to whom, or to whose order, the sum is to be paid. For instance: "Pay to B., or order," signed A., is an indorsement in full by A., the payee or holder of the paper to B. An indorsement in full prevents the bill or note from being indorsed by any one but the indorser.[96] And none but the special indorsee or his representative can sue upon it.[97] Where the payee wrote on the back of a note which he transferred, "I this day sold to Catherine M. Adams the within note," it was held an indorsement to the purchaser, Peters, J., saying: "We think that the defendant thereby assumed all the liabilities of an ordinary indorsement of the note. No word in the writing indorsed upon the note negatives or qualifies such an idea. * * * The only restriction is that the indorsement is made special to Catherine M. Adams."[98]

§ **693. (2) In the second place, an indorsement in blank** is one which does not mention the name of the indorsee, and consists, generally, simply of the name of the indorser written on the back of the instrument. When the bill or note is indorsed in blank, it is, as has been said, transferable by mere delivery to the transferee; but one indorsed in full must be indorsed against by the indorsee in order to render it transferable to every intent—for he who indorses to a particular person, declares his intention not to be made liable except by that person's indorsement over. As to an indorsement in blank, it was said by Lord Mansfield, in Peacock v. Rhodes, 2 Doug. 633: "I see no difference between a note indorsed in blank and one

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96. Mead v. Young, 4 T. R. 28.

97. See vol. II, § 1181; Lawrence v. Fussell, 77 Pa. St. 460; Reamer v. Bell, 79 Pa. St. 292; Spence v. Robinson, 35 W. Va. 313, 13 S. E. 1004, citing text.

98. Adams v. Blethen, 66 Me. 19 (1876). See §§ 688*a*, 698 *et seq.;* Jacobs v. Gibson, 77 Mo. App. 244, text cited.

payable to bearer. They both go by delivery, and possession proves property in both cases." [99]

Under Negotiable Instrument statute.—The statute contains several provisions with respect to indorsements in blank, and declares that an instrument is payable to bearer when the only or last indorsement is an indorsement in blank.[1] Where notes have been indorsed in blank, they are transferable by delivery, and one having them in possession is presumably the owner, and authorized to transfer a good title thereto by delivery to any good faith purchaser.[2] An indorsement in blank is not nullified by a subsequent indorsement guaranteeing payment. Such indorsement is not a notice of defenses, but merely enlarges the responsibility of the guarantor to that of an indorser.[3] The statute does not mean that an indorsement in blank converts a note nonnegotiable on its face and by its terms into a negotiable note.[4]

§ 694. Right of holder under blank indorsement.—The effect

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99. See Palmer v. Nassau Bank, 78 Ill. 380; Gaar v. Louisville B. Co., 11 Bush, 180; Carter v. Sprague, 51 Cal. 239; Morris v. Preston, 93 Ill. 215; Jacoby v. Ross, 12 Mo. App. 577; Fitzgerald v. Barker, 85 Mo. 19, citing the text; Belden v. Hann, 61 Iowa, 41. Indorsement on note "Pay to the order of ———," held to be equivalent to an ordinary indorsement in blank. Byers v. The Bellam-Price Investment Co., 10 Colo. App. 74, 50 Pac. 368; Tyson & Ralls v. Weston Nat. Bank, 77 Md. 412, 26 Alt. 520; Shaw & Schoonover v. Jacobs, 89 Iowa, 713, 55 N. W. 333, 56 N. W. 684, 48 Am. St. Rep. 411; Bank of Winona v. Wofford, *et al.*, 71 Miss. 711, 14 So. 262.

1. Appendix, secs, 9, 33, 34. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959. In Cleveland Co. v. Chittenden, 81 Conn. 667, 71 Atl. 939, the court said that where the indorsement was neither restrictive, qualifying nor conditional, it was absolutely immaterial to the creation of the relation between defendant as the maker of the instrument and the plaintiff as its holder, to the character of that relation, and the determination of the rights and obligation of the parties as between each other through that relation, whether the channel, through which in strict legal contemplation the holder's ownership was derived, was that of a special indorsement or a blank indorsement, which the holder might at his pleasure transform into a special one, or whether or not the blank indorsement had in fact been transferred into a special one. Where a check was indorsed "pay to the order of" with a signature line immediately below, and a sufficient blank space between the words of the order and the signature to permit writing therein the name of the holder in due course, this amounts to an indorsement in blank rendering the instrument payable to bearer and negotiable by delivery. State v. Hinton, 56 Ore. 428, 109 Pac. 24.

2. Irwin v. Deming, 142 Iowa, 299, 120 N. W. 645.

3. Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068.

4. Wettlaufer v. Baxter, 137 Ky. 362, 125 S. W. 741.

of an indorsement in blank by the payee, through his attorney in fact, is to transfer the legal title to the person to whom the note, with such indorsement, was sold and delivered.[5] The receiver of a negotiable instrument indorsed in blank, or any *bona fide* holder of it, may write over it an indorsement in full to himself, or to another, or any contract consistent with the character of an indorsement;[6] but he could not enlarge the liability of the indorser in blank by writing over it a waiver of any of his rights, such as demand and notice.[7] The indorsement may be before or after the instrument itself is completed, and while it is yet in blank; and the indorser will be bound according to its terms when filled up, the indorsement of a blank paper being considered "a letter of credit for an indefinite sum."[8]

§ **694a. Successive indorsements in blank.**—Where there are several indorsements in blank, the holder may fill up the first one to himself, or he may deduce his title through all of them.[9] He may also strike out any number of several indorsements. Thus, if there were six, he might strike out the fourth, fifth, and sixth, and sue the

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5. McLaughlin v. Braddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681 (as to an indorsement by the payee through his attorney in fact).

6. See, *ante*, § 142 *et seq.*, and *post*, §§ 1195, 1196; Evans v. Gee, 11 Pet. 80; Rees v. Conecocheague Bank, 5 Rand. 329; Hance v. Miller, 21 Ill. 636; Hunter v. Hempstead, 1 Mo. 67; Riker v. Crosby, 2 Pa. St. 911; Central Bank v. Davis, 19 Pick. 376; Tenney v. Prince, 4 Pick. 385; Condon v. Pearce, 43 Md. 83; Johnson v. Mitchell, 50 Tex. 212; Andrews v. Simms, 33 Ark. 771; Weyerhauser v. Dun, 100 N. Y. 150; State Nat. Bank v. Haylen, 14 Nebr. 482; Scott v. Calkin, 139 Mass. 529. In this case it was held that the indorsee might write over the indorsement in blank, "I guarantee payment of the within note," without impairing the legal effect of the indorsement. But in Iowa the contrary has been held, upon the ground that the effect of such indorsement would be to deprive the indorser of his right to notice in case of nonpayment. Belden v. Hann, 61 Iowa, 42. "A blank indorsement of a premium note by an assignee of the policy authorizes the holder to write in 'the undersigned, in consideration of the assent to the assignment of the policy, becomes bound by the within contract for the payment of the premium thereon.'" Equitable Marine Ins. Co. v. Adams, 173 Mass. 436, 53 N. E. 883; Bradford Nat. Bank v. Taylor, 75 Hun, 297, 27 N. Y. Supp. 96; Iowa Valley St. Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407, citing the text; Middleton v. Griffith, 57 N. J. L. 442, 31 Atl. 405, 51 St. Rep. 617, citing text.

7. 2 Parsons on Notes and Bills, 20; Edwards on Bills, 273; Central Bank v. Davis, 19 Pick. 376.

8. Violett v. Patton, 5 Cranch, 142; Lord Mansfield, in Russell v. Langstaffe, 2 Doug. 514. See *ante*, § 142; *post*, §§ 841, 844 *et seq.;* § 1405 *et seq.*

9. Ritchie v. Moore, 5 Munf. 388; Craig v. Brown, Pet. C. C. 171; Ellsworth v. Brewer, 11 Pick. 316; Cole v. Cushing, 8 Pick. 48; Emerson v. Cutts, 12 Mass. 7, 8.

others; [10] but if he strikes out any intermediate one he releases all who indorsed subsequently, as he deprives them of their recourse against him.[11] But where there is a special indorsement to a particular person, it has been held that the holder cannot strike it out and insert his own name; for, being payable to the order of the special indorsee, the law cannot presume that it has come rightfully into the hands of the holder until there is a special indorsement to him, or an indorsement in blank. To hold otherwise would defeat the very object of the special indorsement, which is to notify the world that it can only be transferred to a stranger by the actual indorsement of the special indorsee, and especially is it notice to the maker not to pay to any one but the special indorsee. And if he pays it to a stranger when it is without indorsement by the special indorsee, he acts at his own risk.[12] And if the special indorsee or his assignee strike out his name in the special indorsement and insert his own, it is a material alteration of the special indorser's contract, and no recovery can be had against him.[13]

It has been held, that if a holder through several indorsements fills up an early blank indorsement payable to himself, without striking out the subsequent indorsements, he does not discharge such subsequent indorsers; but that he may, after suing unsuccessfully those prior to the one filled up to himself, sue the subsequent indorsers,[14] and this view has been recently approved, and seems to us correct.[15]

§ 695. In a Virginia case,[16] Green, J., said, in delivering the opinion of the court: "A blank indorsement does not *per se* transfer a title; [17] but is an authority to the holder, either to hold it as the agent of the indorser, or to claim it as his own by assignment, at his election, without any further act to be done by the assignor. The blank in-

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10. Ritchie v. Moore, 5 Munf. 388.

11. Curry v. Bank of Mobile, 8 Port. 360.

12. Porter v. Cushman, 19 Ill. 572. See *ante*, chapter XX, section I.

13. Grimes v. Piersol, 25 Ind. 246.

14. 2 Parsons on Notes and Bills, 19; Cole v. Cushing, 8 Pick. 48. See 2 Parsons on Notes and Bills, 19, note, and the observations of the author on the case cited.

15. Bank of British North America v. Ellis, 2 Fed. 46 (1880), U. S. C. C. Oregon, in which case it was held that subsequent indorsers for accommodation were not discharged by such filling up of an early blank indorsement.

16. Rees v. Conecocheague Bank, 5 Rand. 329.

17. See Clark v. Pigot, 1 Salk. 126; Lucas v. Haynes, 1 Salk. 130.

dorsement is conclusive proof of the assent of the indorser to transfer the note to the holder, if he elects to take it as a transfer. The assent and election of the holder to treat the indorsement as a transfer, is proved as well by suing upon it in his own name as by writing over it an assignment to himself, and it is the assent of both parties to the transfer which perfects it, and not the form in which that assent is evidenced."

§ 696. Effect of single indorsement in blank, with subsequent indorsement in full.—If a bill or note be once indorsed in blank, though afterward indorsed in full, it will still, as against the drawer, acceptor, maker, payee, the blank indorser, and all indorsers before him, be payable to bearer, though as against the special indorser himself, title must be made through his indorsee.[18]

§ 696a. Entirety of blank indorsement.—The holder under a blank indorsement cannot fill it up so as to make the note payable in part to one person and in part to another. The indorser's contract is single and entire to pay the note to the party, or to that person named by him; and it is no part of his contract that the sum shall be broken into fragments, and he obliged to pay in fractions to different persons.[19]

§ 697. (3 and 4) In the third and fourth places, as to absolute and conditional indorsements.—An absolute indorsement is one by which the indorser binds himself to pay, upon no other condition than the failure of prior parties to do so, and of due notice to him of such failure (protest preceding it when necessary, as in the case of a foreign bill). A conditional indorsement is one by which the indorser annexes some other condition to his liability. Sometimes the condition is precedent, and sometimes subsequent. Thus, "Pay to A. B., or order, if he arrives at twenty-one years of age," or, "if he is living when it becomes due," is an indorsement upon a condition precedent. "Pay A. B., or order, unless, before payment, I give you notice to the contrary," is upon a condition subsequent. The condition attached to the indorsement in no manner affects the negotiability of the paper.[20]

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18. Smith v. Clarke, Peake, 225; Walker v. McDonald, 2 Exch. 527; Habersham v. Lehman, 63 Ga. 383; Johnson v. Mitchell, 50 Tex. 212; *ante*, § 663.

19. Erwin v. Lynn, 16 Ohio (N. S.), 547; *ante*, § 668.

20. Story on Notes, § 149; Story on Bills, § 217. A commercial indorsement by

Where a bill was indorsed, payable to the indorsee or transferee in a certain condition, and was afterward accepted and passed through several hands, and was finally paid by the acceptor before the condition was satisfied, it was held that the acceptor was liable to pay the bill again to the payee.[21] But it seems that a bill cannot be indorsed with a condition that in a certain event the indorsee shall not retain the power of indorsing it to another.[22]

"The acceptor is bound to take notice of the condition annexed to an indorsement, for when a person accepts a bill after a conditional indorsement, and pays it to an indorsee of this conditional indorsee while the condition of the first indorsement is unfulfilled, he is liable in second payment to the first indorser, being bound to look at the conditional indorsement as a limitation *ex facie* of the bill, in the title of the party claiming payment." [23]

§ 698. (5) In the fifth place, as to restrictive indorsements.— An indorsement may be so worded as to restrict the further negotiability of the instrument; and it is then called a restrictive indorsement. Thus, "Pay the contents to J. S. only," or "to J. S. for my use," or "to order for my use," or "for me," are restrictive indorsements, and put an end to the negotiability of the paper.[24] Of the like character is an indorsement, "Credit my account," [25] or "Pay J. S.

the payee of a negotiable promissory note, and a contemporaneous written agreement limiting the effect of such indorsement, are to be construed as if parts of one instrument. New Blue Springs Milling Co. v. De Witt, 65 Kan. 665, 70 Pac. 647.

21. Robertson v. Kensington, 4 Taunt. 30; Savage v. Aldren, 2 Stark. 232 (3 Eng. C. L.).

22. Soares v. Clyn, 14 L. J. Q. B. 313, 8 Q. B. 24 (35 Eng. C. L.).

23. Thompson on Bills, 232; United States Nat. Bank v. Ewing, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. Rep. 615.

24. Power v. Finnie, 4 Call, 411; Wilson v. Holmes, 5 Mass. 543; Williams v. Potter, 72 Ind. 354; Edie v. East India Co., 2 Burr. 1221; Johnson v. Mitchell, 50 Tex. 212; Hook v. Pratt, 78 N. Y. 371; Brown v. Jackson, 1 Wash. C. C. 512; Ancher v. Bank of England, Doug. 637; Robertson v. Kensington, 4 Taunt. 30; Sigourney v. Lloyd, 8 B. & C. 622; Snee v. Prescott, 1 Atk. 247. The following case arose in Texas: L. & M. made a note payable "to B. S. & Co. for the use of E. & M. S." At the time the note was made B. S. & Co. indorsed it in blank and delivered it to the usees, E. & M. S., who, alleging the insolvency of L. & M., sued B. S. & Co. as original obligors. The consideration of the note was money used by the usees. B. S. & Co. were held liable as original promisors or sureties. Harrison v. Sheirburn, 36 Tex. 73.

25. Lee v. Chillicothe Bank, 1 Bond, 387; First Nat. Bank v. Reno County, 3 Fed. 257.

or order for account or on account of C. D.," [26] or "for collection," or "for collection and immediate returns." [27] These and similar restrictive words indicate that the indorsee is merely an agent to receive the money, and that he paid no consideration for the paper, as a purchaser would not intelligently accept such an indorsement. The indorsee in such a case can only collect the money; he cannot sell or hypothecate the instrument for his own benefit, nor can he hold the indorser liable to himself. The restrictive words of the indorsement give notice of the trust engrafted upon it, and if the indorsee passes it off for his own debt, or in any other manner violative of the trust, the transferee would take it subject to the trust.[28] And an indorsement of a note "Previous indorsements guaranteed" amounts only to a guaranty of the genuineness of the indorsement, and does not render such an indorser liable on the note.[29] Where a bill was indorsed by A., "Pay B., or his order, for my use," and B. discounted it with his bankers, who received payment of the acceptors, it was held that in an action by A. against the bankers for money had and received, they were bound to refund the amount.[30] Where the indorsement was, "Pay A. B., or order, for account of C. D.," and A. B. pledged the paper to the defendant, who received the money, it was held that the form of the indorsement carried notice to the defendant that A. B. had no authority to raise money on the bill for his own benefit, and that C. D. could recover against him in an action of trover.[31] And where a bill was indorsed, "Pay J. C. or order on account of B. G. & S.," it was held to operate as notice that J. C. held the bill in trust for B. G. & S., and that neither he nor his indorsees had any property in it.[32]

§ **698a. Indorsee of restrictive indorsee.**—It follows from these

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26. White v. National Bank, 102 U. S. (12 Otto) 658; Treuttel v. Barandon, 8 Taunt. 100, 5 Moore, 543; Blaine v. Bourne, 11 R. I. 1; Mechanics' Bank v. Valley Packing Co., 4 Mo. App. 200; City Bank of Sherman v. Weiss, 61 Tex. 331.

27. Continental Nat. Bank v. Weems, 69 Tex. 489.

28. Hook v. Pratt, 78 N. Y. 371; Claflin v. Wilson, 51 Iowa, 15; Fawsett v. National Life Ins. Co., 97 Ill. 9; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 50 N. E. 723, 65 Am. St. Rep. 748.

29. Johnston v. Schnabaum, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838, 126 Am. St. Rep. 1082.

30. Sigourney v. Lloyd, 8 B. & C. 622 (15 Eng. C. L.), 5 Bing. 525, 3 Y. & J. 220.

31. Treuttel v. Barandon, 8 Taunt. 100.

32. Blaine v. Bourne, 11 R. I. 1; Hook v. Pratt, 78 N. Y. 371.

principles and decisions that a person who takes a bill or note, the circulation of which beyond the restrictive indorsee has been restrained by a restrictive direction or indorsement, cannot sue the drawer or acceptor upon it, but holds the bill or the money received by him as the trustee of the restraining party, and is liable to refund the bill, or money recovered upon it, to the party making the restrictive indorsement. The subsequent indorsee in such a case can have no action on the bill or note if it is dishonored; and if instead of paying the money to the principal he chooses to pay it to the intermediate agent, he becomes responsible for its misapplication, and so does any one who pays the money to him.[33]

§ **698b.** The mere mention of the consideration in the indorsement, as, for instance, "Pay J. S., or order, value in account with C. D.;" [34] or, "Pay the contents to A. B., being part payment of goods sold him by me," or, "being in full of debt due to him by me," [35] would not render the indorsement restrictive.

And this is to be observed about restrictive indorsements: that whenever the beneficial interest in the proceeds of the paper, and the title to it, are united in one person, any indorsee from him is entitled to protection as an innocent purchaser of commercial paper exonerated from subjection to the trust.[36]

33. Byles on Bills (Sharswood's ed.) [*153]. See also Story on Bills, § 211; White v. National Bank, 102 U. S. (12 Otto) 658. The case of Evans v. Cramlington, Corth. 5, 2 Vent. 296, 307, Holt, 108. Chitty, Jr., on Bills, 174 (A. D. 1687), is not in accordance with this doctrine, and the indorsee of a restrictive payee recovered against the drawer of an accepted bill. But in Sigourney v. Lloyd, 8 B. & C. 622 (1828), Lord Tenterden, C. J., said the only question which it was necessary to decide in that case was whether the bill, being in trust only for the use of Calvert, was liable to be seized under the extent against him; and he added: "Such an indorsement ('for my use') will not prevent the indorsee from recovering the money from the acceptor when the bill becomes due. If he pay it to his principal, all will be well; but the indorsee must look to him for the application of it." And this may be regarded as settled law. See cases *supra*. Where a restrictive indorsement appears upon the paper, the right of the drawer or indorser may be made effective against any holder. Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885.

34. Buckley v. Jackson, L. R., 3 Exch. 135.

35. Potts v. Reed, 6 Esp. 57; Story on Bills, §§ 213, 214.

36. Fawsett v. National Life Ins. Co., 97 Ill. 19 (1880). In this case a note payable to A. F. Fawsett or order was indorsed in blank by him as security to a bank for a debt due to it by an insurance company in which he was a stockholder. G. F. Harding became subsequent holder of the note, and wrote over Fawsett's indorsement: "Pay to Second National Bank of Monmouth for col-

§ 698c. Other illustrations of restrictive indorsements.—An interesting case as to the effect of a restrictive indorsement was recently decided by the United States Supreme Court, where a draft was drawn by the Silver Reducing Company, payable "to the order of the Miners' National Bank, Georgetown, Colorado, payable at the Third National Bank, New York City." It was indorsed by the payee as follows: "Pay S. V. White, or order, for account Miners' National Bank, Georgetown, Colorado,"—the indorsee paying full value minus the discount. Though accepted, the draft was not paid at maturity, and thereupon White sued the indorser. The court considered that the indorsement was restrictive, the plain meaning being that the acceptor was to pay to the indorsee for the use of the indorser; that the language was without ambiguity and needed no explanation by parol evidence or resort to usage; and that it did not purport to transfer the title of the paper or the ownership of the money when received. Accordingly it was held that there could be no recovery on the draft; but both parties, the indorser and indorsee, thinking there was a valid sale of the draft, the money given for it had been paid without consideration, and by mutual mistake, and the plaintiff might recover on the count in the declaration for money paid to the use of the defendant.[37] In Missouri, A. being in debt to V., asked him to draw a bill for the amount, which he, the drawee, would raise money upon and remit proceeds. V. drew the bill, payable to order of the F. Bank, whose cashier indorsed it, "Pay to H., or order, for collection for account of F. Bank." A. on receiving the bill, by agreement with the M. Bank, erased the indorsement; the M. Bank discounted the bill, and A. remitted proceeds to V. In an action by the M. Bank against B. it was held that the bank could not recover, because the indorsement was restrictive, and destroyed negotiability of the bill; because also the erasure was made without V.'s consent; and proof of the parol agreement about the matter was inadmissible.[38]

lection for account of G. F. Harding, executor of A. C. Harding, deceased." Afterward the Second National Bank of Monmouth returned the note to G. F. Harding by indorsement without recourse, and the latter transferred them to the First National Bank of Chicago by the indorsement, "George F. Harding, executor of the estate of Abner C. Harding, deceased." Craig, J., said: "When the notes were indorsed by the Monmouth Bank and returned to Harding, then the beneficial interest and title were united in him; and any person who might purchase from him and receive the notes indorsed, is entitled to protection as an innocent purchaser of commercial paper."

37. White v. National Bank, 102 U. S. (12 Otto) 658 (1880). See also Third Nat. Bank v. National Bank, 102 U. S. (12 Otto) 663.

38. Mechanics' Bank v. Valley Packing Co., 4 Mo. App. 200, 70 Mo. 643.

§ **698d. Indorsement for collection.**—An indorsement on draft, note or check: "Pay to any bank or banker or order," is not such an indorsement as to pass the title to the instrument; it merely authorizes any bank or banker into whose hands it might come to collect and remit the proceeds.[39] The words "*for collection,*" which are frequently inserted in indorsements of negotiable instruments put in bank to be collected, make the indorsement restrictive; and the indorser may show that he was not the owner of the paper, and did not mean to transfer title either to it or its proceeds when collected.[40] Such an indorsement merely makes the indorsee agent for the indorser to collect the amount due; [41] but it has been held does not invest him with such title as to make him a proper party plaintiff in a suit.[42]

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39. Johnston v. Schnabaum, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838, 126 Am. St. Rep. 1082; First Nat. Bank of Minneapolis v. City Nat. Bank of Holyoke, 182 Mass. 130, 65 N. E. 24, 94 Am. St. Rep. 637; Nat. Bank of Rolla v. First Nat. Bank of Salem, 141 Mo. App. 719, 125 S. W. 573; Bank of Indian Territory v. First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537; Bank of America v. Waydell, 187 N. Y. 115, 79 N. E. 857; Gregory v. Sturgis Nat. Bank (Tex. Civ. App.), 71 S. W. 66.

40. Sweeney v. Easter, 1 Wall. 166; Peck v. First Nat. Bank, 43 Fed. 357. See *ante*, § 336, note 63, where the various decisions involving the construction and effect of restrictive indorsements for purposes of collection are classified. Northwestern Nat. Bank v. Kansas City Bank, 107 Mo. 402, 17 S. W. 982; Kempner v. Jordan, 3 Tex. Civ. App. 129, 22 S. W. 1001.

41. Rock County Nat. Bank v. Hollister, 21 Minn. 385. See § 1192; Mechanics' Bank v. Valley Packing Co., 4 Mo. App. 200, 70 Mo. 643; Claflin v. Wilson, 51 Iowa, 15; First Nat. Bank v. Reno County, 3 Fed. 257; First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 30 N. E. 723, 65 Am. St. Rep. 748 (see comment on this case, § 672); Boykin v. Bank, 118 N. C. 566, 24 S. E. 357; Bank v. Bank, 119 N. C. 307, 25 S. E. 971; People's Bank v. The Jefferson County Savings Bank, 106 Ala. 524, 17 So. 728, 54 Am. St. Rep. 59; Branch v. National Bank, 50 Nebr. 470, 70 N. W. 34; Moody v. National Bank, 19 Tex. Civ. App. 278, 46 S. W. 660. Where a negotiable promissory note is indorsed for collection, and sent to the place of payment, the person receiving such note, with such indorsement, has no power to sell or transfer the note; his power is limited to collection. People's & Drovers' Bank v. Craig, 63 Ohio St. 374, 59 N. E. 102, 52 L. R. A. 872, 81 Am. St. Rep. 639. An indorsement "for deposit" to the credit of the indorser, though restricted in the sense that it disclosed a trust, did not prevent the bank from passing the legal title subject to the trust to a bank or person ultimately called upon to collect. Haskell v. Avery, 181 Mass. 106, 63 N. E. 15, 92 Am. St. Rep. 401.

42. Berney v. Steiner Bros., 108 Ala. 111, 19 So. 806, 54 Am. St. Rep. 144; Rock County Nat. Bank v. Hollister, 21 Minn. 385; Meadowcraft *et al.* v. Walsh, 15 Mont. 544, 39 Pac. 914; Iselin v. Rowlands, 31 Hun, 468. It is so held in a

The negotiability of an instrument having been restricted, it may be revived by a subsequent indorsement.[43]

If the paper be originally negotiable, an indorsement, in order to be restrictive, must be made so by express words, and if it simply direct payment to a certain person by name, without adding the words "or order," it will not be considered a restrictive indorsement and payable to him only.[44]

It has been held that an indorsement to a bank in unrestricted terms, but intended merely for collection, will not make the indorser liable to a subsequent holder under the indorsement "*for collection.*"[45]

§ 699. An indorsement "for my use," or "for collection"—not being an actual transfer of the amount—may be recalled at pleasure.[46] All the presumptions are against restrictions to negotiable paper, and unless clearly restrictive the indorsements will be held otherwise.[47]

State in which every action must be brought in the name of the real party in interest, with certain exceptions. Bohart Commission Co. v. Buchingham, 62 Kan. 658, 64 Pac. 627. But compare Wilson v. Tolson, 79 Ga. 137; Wintermute v. Torrent (Mich.), 47 N. W. 359; Rossi v. National Bank, 71 Mo. App. 150; Midland Nat. Bank v. Roll, 60 Mo. App. 585; Cummings v. Kohn, 12 Mo. App. 585. See *post*, § 1191. It would be otherwise if owner indorses paper in blank to bank for collection and bank, wrongfully assuming to be the owner, sells and disposes of it to third person who has no knowledge of want of ownership in the bank—in that event third person is invested with good title and can retain proceeds as against the indorser to the bank. Coors v. German Nat. Bank, 14 Colo. 202, 23 Pac. 328. Where parties drew a draft in favor of themselves, and indorsed it to a bank for collection, with a letter of advice stating that if the bank desired to discount the draft on the same terms as it had a former one and to send check for the amount, it could have the paper, and upon the acceptance of the draft by the drawee, the bank discounted the same as requested by the drawers, and sent them a check for the amount which they received under the proposition to the bank to discount the bill. The bank thereby became the holder and owner of the bill as payee for value, with full power to sue for and recover in a proper action, in case same was dishonored. See Payne v. Albany City Nat. Bank, 3 Ind. App. 214, 28 N. E. 432.

43. Holmes v. Hooper, 1 Bay, 160.

44. Leavitt v. Putnam, 3 N. Y. 494; More v. Manning, 1 Comyns, 311; Story on Notes, § 142; Story on Bills, §§ 19, 56; 1 Parsons on Notes and Bills, 17.

45. Freeman's Nat. Bank v. National Tube Works (Mass.), 24 N. E. 779.

46. Thompson on Bills (Wilson's ed.), 184; Marius, 72 Daugherty v. Eastburn, 74 Tex. 69, citing the text. But an indorsement "for discount and credit for myself" has been held to pass good title. Oliphant v. Vannest, 58 N. J. L. 162, 33 Atl. 382.

47. Potts v. Read, 6 Esp. 57; Treuttel v. Barandon, 8 Taunt. 100.

An indorsement "for collection" made by the payee is canceled by his subsequent indorsement to another indorsee for value.[48]

It is clear that a parol agreement on the indorsement of a promissory note to the effect that the transfer should be without recourse upon the indorser, cannot be interposed as a defense against a subsequent *bona fide* holder without notice. Nor would the case be varied by the fact that it was transferred to such holder by mere delivery, and that he declared on the prior indorsement as though made to himself.[49]

§ 700. (6) In the sixth place, as to qualified indorsements or indorsements without recourse.—An indorsement qualified by the words "without recourse," "*sans recours*," or "at the indorsee's own risk," renders the indorser a mere assignor of the title to the instrument, and relieves him of all responsibility for its payment,[50] though not from certain liabilities which have been already enumerated.[51] Such an indorsement does not destroy the negotiability

48. Atkins v. Cobb, 56 Ga. 86.

49. Skinner v. Church, 36 Iowa, 91; Hill v. Shields, 81 N. C. 250. See *post*, § 719.

50. Welch v. Lindo, 7 Cranch S. C. 159; Chitty on Bills [*235], 268; Wood's, Byles on Bills and Notes [*154], 266; Wilson v. Codman's Exrs., 3 Cranch, 192; Rice v. Stearns, 3 Mass. 225; Upham v. Prince, 12 Mass. 13; Richardson v. Lincoln, 5 Metc. (Mass.) 201; Mott v. Jicks, 1 Cow. 512; Craft v. Fleming, 56 Pa. St. (10 Wright) 140; Lawrence v. Dobyn, 30 Mo. 196; Fitchburg Bank v. Greenwood, 2 Allen, 434; Cady v. Shepard, 12 Wis. 639; Davenport v. Schram, 9 Wis. 119; Lyon v. Ewing, 17 Wis. 61; Borden v. Clark, 26 Mich. 410. An indorsement "without recourse" of a purchase money note, in which title to the property for which it was given is reserved in the payee, does not carry with it the title to such property to the indorsee. Bradley v. Cassels, 117 Ga. 517, 43 S. E. 857. An indorsement without recourse serves merely to transfer title, as in case of delivery when payable to bearer, and it is competent to show by parol that the purchaser agreed to take the paper at his own risk, absolutely, and thus relieve the vendor of all liability. Carroll v. Nodine, 41 Or. 412, 69 Pac. 51, 93 Am. St. Rep. 743. See *post*, §§ 717, *et seq.* Where a payee in certain promissory notes, which were secured by a chattel mortgage, sold and transferred such notes, together with the mortgage, and at the same time indorsed upon the back of the notes the following: "By agreement with recourse after all security has been exhausted, waiving protest," it was held that such conditional indorsement obligated appellant to pay only such balance as might be due after the security has been exhausted, and that, until such security was exhausted, no cause of action accrued against such indorser, and therefore that he could not be joined with the mortgagors as a defendant in an action to foreclose such mortgage. Smith v. Bradley (N. D.), 112 N. W. 1062.

51. See *ante*, § 670.

of the note,[52] nor deprive the indorsee of his rights as an innocent purchaser.[53] As said in Virginia,[54] by Green, J.: "An indorsement without recourse is not out of the due course of trade. The security continues negotiable, notwithstanding such an indorsement. Nor does such an indorsement indicate, in any case, that the parties to it are conscious of any defect in the security, or that the indorsee does not take it on the credit of the other party or parties to the note. On the contrary, he takes it solely on their credit, and the indorser only shows thereby that he is unwilling to make himself responsible for the payment."

Under Negotiable Instrument statute.—The statute declares that a qualified indorsement, such as one adding to the indorser's signature the words "without recourse," or any words of similar import, does not impair the negotiable character of the instrument.[55]

§ 700a. Some peculiar cases; " without recourse " must be clearly indicated.—If a party promises to transfer paper due him by indorsement, he is *prima facie* bound to put on it his unrestricted indorsement.[56] "I transfer all my right and title to the within note, to be enjoyed in the same manner as may have been by me," has been held in effect an indorsement without recourse.[57] The words "without recourse," written under the signature of one not the payee, upon the back of a note, are regarded as surplus and ineffectual.[58] In New York, where the firm of Brander & Hubbard discontinued business save the adjustment and liquidation of its affairs, and was succeeded by a new firm of the same name wherein Hubbard was a partner, and the latter indorsed a note on account of the old firm as follows,

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52. Consterdine v. Moore, 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620; Coddington Sav. Bank v. Anderson, 64 Nebr. 205, 89 N. W. 787.

53. Neely v. Black, 80 Ark. 212, 96 S. W. 984; American Sav. Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837; Dollar Sav. & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089.

54. Lomax v. Picot, 2 Rand. 260. See also Stevenson v. O'Neil, 71 Ill. 314; Kelly v. Whitney, 45 Wis. 117.

55. Appendix, sec. 38. Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068; Thorpe v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003.

56. Goodrich v. Stanton, 71 Conn. 426, 42 Atl. 74.

57. Halley v. Falconer, 32 Ala. 536. See *ante*, §§ 686, 688*a*. But in Gale v. Mayhew, 161 Mich. 96, 125 N. W. 781, 29 L. R. A. (N. S.) 648, it was held that the words "I hereby assign my interest in this note" are not equivalent to an indorsement without recourse.

58. Childs v. Wyman, 44 Me. 433; Lowell v. Gage, 38 Me. 35.

"Brander & Hubbard, old firm in liquidation," it was insisted that the form of the indorsement showed that it was made merely for the purpose of transferring title, and precluded the idea of any assumption of liability upon the indorsement. But it was held otherwise, Grover, J., saying: "To relieve one who indorses paper from liability as such, he must insert in the contract itself words clearly expressing such an intention." [59]

Where the payee of a note whose name was Albert N. Stanton, indorsed it as "Albert Stanton, without recourse," and wrote his name a second time under the first signature, as "Albert N. Stanton," it was held ambiguous.[60]

§ 701. In Iowa, where a promissory note was indorsed by a subsequent holder, as follows, "I, the undersigned, do agree that I will not sell or dispose of a note given by R. R. P." (the maker of the note in question), it was held that such indorsement did not destroy the negotiability of the note, nor render it, in the hands of a holder subsequently acquiring it, subject to defenses existing against it, of which he had no notice, and Cole, J., said: "The agreement not to sell or dispose of the note was then an independent agreement, upon breach of which, if made for a consideration, the obligor might be liable; but it could not have the effect to destroy the negotiability of the note." [61]

In Texas, this case occurred: The executor of a decedent, acting in his fiduciary capacity, bought out the interest of the widow in the decedent's estate, and, in part payment for it, indorsed to her certain overdue notes executed by third parties to the decedent in his lifetime. The indorsement was in blank, and was signed "W. W., executor of D. W.," and it was made in pursuance of a written contract between the parties, which showed that the widow entirely released

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59. Fassin v. Hubbard, 55 N. Y. 470 (1874).

60. In Goodrich v. Stanton, 71 Conn. 426, 42 Atl. 74, the court, per Baldwin, J., said: "The note being drawn in favor of the defendant by the name of Albert Stanton, when it should have described him as Albert N. Stanton, there would be nothing unusual in his indorsing it with either or with each name, and the writings on the back of the note might, if unexplained, be read as constituting a single and qualified indorsement. But these writings would express the meaning of the parties with equal precision, if, after the completion of a qualified indorsement signed by the defendant by the name given him in the note, he had put his proper name upon it, as a distinct and separate act, in order to create the unqualified obligation of an ordinary indorser."

61. Leland v. Parriott, 35 Iowa, 454.

her husband's estate, and did not stipulate for any indorsement of the notes, or for recourse on any one besides the makers of them. *Held*, that, under the circumstances, neither the executor individually, nor the estate he represented, was liable on the indorsement, which must be regarded as nothing more than a mere transfer of the right of action on the notes.[62]

§ 701a. (7) In the seventh place, as to joint indorsements.—If a bill or note be made payable to several persons not partners, the transfer can only be made by a joint indorsement of all of them;[63] and as Chitty says, "If a bill has been transferred to several persons not in partnership, the right to transfer is in all collectively, and not in any one individually."[64] Where, however, one of two or more joint payees or transferees undertake to transfer the instrument, the extent of the transfer will depend upon the nature of his interest. Such interest whatever it is passes to his indorsee or assignee; but nothing beyond that, as against his coparty, unless indeed there be some other element in the transaction in the nature of fraud, agency or other circumstance, modifying the rights of the parties.[65] No action could be maintained on the indorsement of one of the joint parties,[66] the interest passing thereby being equitable merely.

But one of two joint payees may transfer and indorse his interest on a note to the other.[67]

§ 702. Forms of indorsements.—The following are samples of the different modes or forms of indorsements:

1. Indorsement in full by payee to a copartnership.

   "*Pay Charles Davis & Co., or order.*

   "*Abraham Coles.*"

2. Absolute indorsement in blank by indorsee:

   "*Charles Davis & Co.*"

3. Indorsement upon a condition precedent:

   "*Pay to Edward Francis, or order, provided he arrives at twenty-one years of age.*

   "*Abraham Coles.*"

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62. Wade v. Wade, 36 Tex. 529.

63. See *ante*, § 684; *post*, § 704; also § 668; Story on Bills, § 197; Edwards on Bills, 254.

64. Chitty on Bills (13th Am. ed.) [*201], 232.

65. Brown v. Dickinson, 27 Gratt. 693, Staples, J.

66. Caverick v. Vickery, 2 Doug. 652; Bond, Admr. v. Holloway, 18 Ind. App. 251, 47 N. E. 838, citing text.

67. See *ante*, § 684.

4. Indorsement upon a condition subsequent:

"*Pay George Henry, or order, unless before maturity I notify you to the contrary.*

"*Edward Francis.*"

5. Indorsement by an agent:

"*Per procuration Edward Francis.*

"*Isaac Jacobs.*"

or,—

"*As agent for Edward Francis.*

"*Isaac Jacobs.*"

6. Restrictve indorsement.

"*Pay to Kenneth Lampkin only.*

"*Isaac Jacobs.*"

or,—

"*Pay to Kenneth Lampkin for my use.*

"*Isaac Jacobs.*"

7. Restrictive indorsement for collection:

"*Pay to Central National Bank for Collection.*

"*Kenneth Lampkin.*"

8. Indorsement without recourse:

"*Moses Newcomb,*
without recourse."

or,—

"*Moses Newcomb, with intent to transfer title only, and not to incur liability as indorser.*" [68]

9. Indorsement in full, with direction *au besoin*:

"*Pay to Richard Steele, or order.*

"*Oliver Perry.*"

"*Au besoin,*
"*No. 100 Wall. St.*"

10. Indorsement waiving protest:

"*Return without protest,*" *or,* "*waiving protest.*

"*Thomas Urquhart.*"

§ 703. (8) In the eighth place, as to successive indorsements.— When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint obligation, whether the indorsements be made for accommodation or for value received, unless there be an agreement *aliunde* different from that evidenced by the indorsements. When the successive indorsements are for accommodation of other parties, the

68. Where a party indorsed a note merely to transfer title and enable a third party to collect it, omitting the restrictive words "without recourse," it was held that there was an implied contract on the part of such third party (to whom the paper belonged) to reimburse him when compelled to pay the note by an innocent holder. Abraham v. Mitchell, 112 Pa. St. 232, 3 Atl. 830.

indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them.

This doctrine rests upon very clear and satisfactory principles. Each indorser places his name upon the instrument, whether for accommodation or otherwise, knowing that he renders himself conditionally liable to every subsequent and successive indorsee; and that he has his recourse against every antecedent party, for the whole amount which he may be obliged to pay. With such knowledge of his liabilities and his remedies he voluntarily assumes his relation to the instrument with others who assume a different relation, accompanied by increased or diminished risk of loss. And contribution does not arise between such successive indorsers for the accommodation of another party by operation of law, but only when established by special agreement.[69] Nor is there any liability for contribution

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69. Phillips v. Preston, 5 How. 278; McCarty v. Roots, 21 How. 432; Rey v. Simpson, 22 How. 350; McDonald v. Magruder, 3 Pet. 470; Gillespie v. Campbell, 39 Fed. 724; Moody v. Findley, 43 Ala. 167; Kirkner v. Conklin, 40 Conn. 81; Syme v. Brown, 19 La. Ann. 147; Gore v. Wilson, 40 Ind. 206; Reinhart v. Schall, 69 Md. 355, citing the text; Wescott v. Stevens, 85 Me. 325, 27 Atl. 146; Woolidge v. Wiggin, 62 Me. 568; Smith v. Merrill, 54 Me. 48; Enterprise Brewing Co. v. Canning, 210 Mass. 285, 96 N. E. 673; Clapp v. Rice, 13 Gray, 403; Weston v. Chamberlain, 7 Cush. 404; Sweet v. McAlister, 4 Allen, 355; Shaw v. Knox, 98 Mass. 214; Woodward v. Severance, 7 Allen, 340; Harrah v. Doherty, 111 Mich. 175, 69 N.W . 242, citing text; Farwell v. Ensign, 66 Mich. 602; Hillegas v. Stephenson, 75 Mo. 118; McCune v. Belt, 45 Mo. 174; Paul v. Rider, 58 N. H. 119; Polhemus v. Prudential Realty Corp., 74 N. J. L. 570, 67 Atl. 303; Easterly v. Barber, 66 N. Y. 433; Kelly v. Burroughs, 102 N. Y. 95; Davis v. Morgan, 64 N. C. 576; Russ v. Sadler, 197 Pa. St. 51, 46 Atl. 903; Ross v. Espy, 66 Pa. St. 481; Crompton v. Spencer, 20 R. I. 330, 38 Atl. 1002; Sloan v. Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. Ct. Rep. 559, citing text; Chalmers v. McMurdo, 5 Munf. 552 (*contra*), Storall v. Border Grange Bank, 78 Va. 194, *obiter*, citing Daniel v. McRae, 2 Hawks (N. C.), 590—; Farmers Bank v. Vanmeter, 4 Rand. 553; Bank of the United States v. Beirne, 1 Gratt. 265; Hogue v. Davis, 8 Gratt. 4; Kiel v. Choate, 92 Wis. 517, 67 N. W. 431, 53 Am. St. Rep. 936, citing text. In a New Jersey case, (Johnson v. Ramsay, 14 Vroom [42 N. J. L.], the second indorser sued the payee who was first indorser, and the latter pleaded that there was an agreement between them at the time of putting their names on the paper that such indorsement should constitute a joint and not a successive liability. Held inadmissible on the ground that an indorsement is a written contract having a complete import and must speak for itself. No distinct precedent applying that principle to such a case was quoted, and the decision is not consistent with the general tenor of the authorities. In Givens v. Merchants' Nat. Bank, 85 Ill. 443,

on the part of indorsers to a surety of the note upon it when it came to them.[70] Where there are two accommodation indorsers of a note, and the maker provides the second indorser with the means to make payment, a trust is created in favor of the first indorser as well as the holder to have the fund so applied, and the first indorser may sue to enforce it.[71]

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where, after the payee's name indorsed in the note, there were the names of two other parties indorsed in blank, the court said that this, "instead of raising the presumption that the undertaking was joint, authorizes the presumption that it was not joint, but that of successive indorsers." To the same effect see Hale v. Danforth, 46 Wis. 555. As between a first and second indorser, the first indorser is ultimately liable for the payment of the note, but he is not primarily liable for it as between himself and subsequent indorsers, in the sense that, as between a principal and surety, the principal is primarily liable; it is not the duty of the first indorser, as between himself and a subsequent indorser, to pay in the first instance. Bank of America v. Wilson, 186 Mass. 214, 71 N. E. 312, 104 Am. St. Rep. 570. Where a note was indorsed by three persons before delivery to the payee and for his accommodation, while they are joint makers as to the holder, yet as between themselves they are liable in the order of their indorsement, and the first indorser is liable for the whole amount of the note, and, in the absence of an agreement to the contrary, the other indorsers are not liable to contribute anything to him. Porter v. Huie, 94 Ark. 333, 126 S. W. 1069, citing text. See *post*, § 713*a*. Where a statute provides that "whenever the principal maker of any note shall die, if the creditor shall not, within two years after the granting of letters testamentary or of administration, present the same to the proper court for allowance, the sureties thereon shall be released from the payment thereof," etc., the term "principal maker" refers to the person who would have been the party to the note had there been no sureties or indorsers, and several indorsers of a note for the accommodation of the principal cannot agree among themselves by parol that the indorsers in their order shall successively be principal makers of the note as to their subsequent indorsers so as to require the holder, under the above statute, to follow the estates of each in the order named, in case of death, or lose his debt or release the sureties. Tinker v. Cathin, 205 Ill. 108, 68 N. E. 773. But in Bunker v. Osborn, 132 Cal. 480, 64 Pac. 853, it was held that when two indorsers of a corporation note jointly indorsed the note, the presumption arising from that fact is that they were equally liable, and as between themselves liable to contribution. Where a note payable to the order of the maker was signed by several accommodation indorsers and then by the maker himself, and there was protest for nonpayment and notice of protest, the possession of the note by one of the indorsers after protest and notice of dishonor justified the conclusion that he had performed his contract as indorser, with the holder, by taking up the notes, and was entitled to call upon a prior indorser to pay him. Hill v. Buchanan, 71 N. J. L. 301, 60 Atl. 952. The fact that in a series of renewals of a note the order of the indorsements was changed does not raise a presumption that the indorsers jointly agreed to guarantee the note. Enterprise Brewing Co. v. Canning, 96 N. E. 673, 210 Mass. 285.

70. Armstrong v. Harshman, 61 Ind. 52.

71. Price v. Trusdell, 28 N. J. Eq. 20.

Under Negotiable Instrument statute.—With respect to the sections of the statute defining the liabilities of the parties and the requirements for presentment for payment,[72] it has been said that they show an intention by the legislature to leave the order of liability among those whose names are on the instrument to determination by any competent evidence.[73]

§ **703a.** The relations of the parties, who become successive indorsers for the accommodation of a stranger, to themselves, and to the debt evidenced by the paper, may have a bearing upon the question of their liability as between themselves. In an English case, before the House of Lords and Privy Council, it appeared that the directors of a company mutually agreed with each other to become sureties to a bank for the same debts of the company, and thereupon successively indorsed three promissory notes of the company. It was held that they were entitled to contribution *inter se*, and were not liable to indemnify each other according to the priority of their indorsements.[74]

72. Appendix, secs. 110 to 148.

73. Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136.

74. McDonald v. Whitfield, 8 App. Cas. 733, 36 Eng. Rep. 34 (distinguishing Steele v. McKinlay, 5 App. Cas. 754, 34 Eng. Rep. 99), Lord Watson saying: "In the present case the directors of the St. Johns' Stone China-ware Company, one and all agreed with each other to become sureties to the bank for the same debts of the company. That was the substance of the agreement to which they came on the 5th of August, 1875, and the fact that the machinery which they adopted for carrying out their agreement was the making of three promissory notes by the company, payable to the appellant, and successively indorsed by him and his codirectors, cannot have in law the effect of altering the mutual relations established by that agreement, and of substituting for them the liabilities of proper indorsers of an ordinary commercial note. * * * The respondent's counsel, in the course of argument, referred to the case of Jansen v. Paxton, 28 Up. Can. Com. Pl. 439, decided by the Court of Error and Appeal in Upper Canada, and to three other decisions of the Canadian courts. With the same view they cited the case of Macdonald v. Magruder, 3 Pet. 470, 8 Curt. 491, decided in 1830 by the Supreme Court of the United States. These authorities were relied upon as establishing the doctrine that where several persons mutually agree to give their indorsements on a bill as securities for the holder, who wishes to discount it, they must be held to have undertaken liability to each other, not as sureties for the same debt, and so jointly liable in contribution, but as proper indorsers, liable to indemnify each other successively, according to the priority of their indorsements, unless it had been specially stipulated that they were to be liable as cosureties. It is unnecessary to enter into a minute criticism of the cases. Some of them are, in their circumstances, distinguishable from the present case;

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So in Maine, where three persons severally promised to indorse a note made by the maker and payable to his own order and signed it successively as they happened to be found, it was held that they intended to divide the risk and were liable amongst themselves for contribution.[75]

And where two officers of a corporation individually indorsed a note of the corporation, blank as the payee, before its discount for the benefit of the corporation, they are liable as joint makers, in the absence of any agreement that they should be considered indorsers, and when liable as joint makers, the first signer, having paid the note, may recover from his co-signer half of the amount paid on the note.[76]

§ 704. Actual date of indorsement; presumptions as to priority of indorsers.—The indorser is not necessarily bound according to the actual date of indorsation, but according to the contract; and if it appear that the instrument was indorsed by one party with the agreement that another should become prior indorser, the latter will

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but there are undoubtedly to be found in the opinions of the learned judges by whom they were decided, *dicta* which seem to recognize the doctrine contended for by the respondent. If they are to be regarded as authorities to that effect, their Lordships cannot accept these cases as conclusive of the law of England, or as precedents which ought to govern the decision of this appeal. The Civil Code of Lower Canada (art. 2340) enacts that, 'in all matters relating to bills of exchange not provided for in the Code, recourse must be had to the laws of England in force on the 30th day of May, 1849.' By article 2346 of the Code, the same law is made applicable to promissory notes as to bills of exchange, in so far as regards the liability of the parties; and seeing that the Code makes no provision regarding the question raised between the appellant and the respondent, that question must, in the opinion of their Lordships, be decided according to the law of England, as laid down by the Court of Common Pleas in Reynolds v. Wheeler, 10 C. B. (N. S.) 561." See also Middleton v. McCarter, 2 Mackey, 420; Wescott v. Stevens, 85 Me. 329, 27 Atl. 146; Crompton v. Spencer, 20 R. I. 330, 38 Atl. 1002.

75. Hagerthy v. Phillips, 83 Me. 336, 22 Atl. 223.

76. Keyser v. Warfield, 100 Md. 72, 59 Atl. 189. Under sections 3116 and 3117, Cal. Civ. Code, providing that indorsers impliedly warrant that the note "is in all respects what it purports to be" and "that the signatures of all prior parties are bringing upon them," where one of two joint indorsers of a corporation note has been compelled to pay it, he may recover from his co-indorser in an action for contribution whether the note was legally executed by the corporation or not, and whether the indorsement was for the accommodation of the corporation or not. Bunker v. Osborn, 132 Cal. 480, 64 Pac. 853. Where there was an understanding between the directors of a corporation, that they should indorse the notes for the benefit of the corporation, and it was intended and understood that the indorsements were to be joint, and not several, the indorsers were, as between themselves, cosureties. Weeks v. Parsons, 176 Mass. 570, 58 N. E. 157.

be held responsible first in point of contract though second in point of time.[77]

Where a note is indorsed by payee and by a third party, the legal inference is that the payee is prior indorser, but it may be proved otherwise by parol evidence.[78] And if there be any mistake by which one indorser signs before another, the true intention of the parties may, as between themselves, be shown by parol evidence, and corrected in equity; [79] or in a suit against the indorser who appears as prior, he may show that he signed above the second indorser unintentionally, and if he has paid part of the amount to the holder, he may recover it back from the indorser, apparently second, but really prior.[80]

The parties will not be regarded as successive indorsers where they are joint payees of a note, and themselves indorse it. In such a case it matters not which signs first, the note being payable only to their joint order, and transferable only by their joint act, they will be considered joint indorsers.[81]

Under Negotiable Instrument statute.—The statute provides that, as respects one another, indorsers are liable *prima facie* in the order in which they indorse, but evidence is admissible to show that as between or among themselves they have agreed otherwise.[82] Under the statute the note is only *prima facie* evidence of the order of liability, and parol evidence is admissible, even between indorsers, to show that

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77. Chalmers v. McMurdo, 5 Munf. 252; Slack v. Kirk, 67 Pa. St. 380; Kiel v. Choate, 92 Wis. 517, 67 N. W. 431, 53 Am. St. Rep. 936, citing text.

78. Slagle v. Rust, 4 Gratt. 274; Caddy v. Sheppard, 12 Wis. 639; Blakeslee v. Hewitt, 44 N. W. 1105; Lewis v. Monahan, 173 Mass. 122, 53 N. E. 150. In North Carolina held: Where A. indorses a note for the maker, and subsequently, but before it was discounted, F. indorsed it and A. paid the note, that was a co-surety and the doctrine of contribution applies for A.'s benefit. Atwater v. Farthing, 118 N. C. 388, 24 S. E. 736.

79. Reinhart v. Schall, 69 Md. 355; Cahal v. Frierson, 3 Humphr. 411; Brockway v. Comparree, 11 Humphr. 355. A third indorser having indorsed a note on the faith of the solvency of a prior indorser, and on a renewal of the note the order of the indorsements having been changed without the consent of this third indorser, who for the convenience of renewing the note, left his blank indorsement with the makers, a court of equity will relieve him as against the indorser who should have preceded him. So held in Slagle v. Rust, 4 Gratt. 274; Slagle v. Bank of Valley, 4 Gratt. 274.

80. Slack v. Kirk, 67 Pa. St. 380.

81. Lane v. Stacy, 8 Allen, 41. See Culver v. Leovy, 19 La. Ann. 202, and *ante*, §§ 70, 684; Russ v. Sadler, 197 Pa. St. 51, 46 Atl. 903.

82. Appendix, sec. 68.

between themselves they have agreed as to the liability otherwise than as appears from the order of their indorsement upon the note,[83] though it is not necessary that there shall be proof of an actual formal contract.[84] And so, evidence is admissible to show that each has agreed to be liable for the principal debtor alone, and therefore that all indorsers are cosureties with each other and liable to contribution.[85] But in the absence of any agreement among accommodation indorsers, the law fixes their liability in accordance with the order of the names on the paper, and an indorser who pays a bill or note has recourse against each prior indorser for reimbursement.[86]

§ 705. (9) In the ninth place, as to irregular intervening indorsements.—There are some cases of irregular indorsements that call for attention. Thus, suppose a bill be indorsed specially to A., and then, before A.'s indorsement, there appears the indorsement of B. In such a case, Alderson, B., said: "The indorsement only operates as against the party making it, and then as a fresh drawing." [87] Upon such an indorsement of a note, the party cannot be sued as a maker. Littledale, J., said, in such a case: "It may be correct to say that an indorsement of a bill is in the nature of a new drawing. But supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker." It was held, therefore, that the party must be sued as an indorser; but that a prior party could not be sued at all, as a link in the chain of title was lacking.[88]

§ 706. In the United States Supreme Court it has been held that where a promissory note was payable to the order of several persons, the name of one of whom was inserted by mistake, or inadvertently left on when the note was indorsed and delivered by the real payees,

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83. Morgan v. Thompson, 72 N. J. L. 244, 62 Atl. 410; Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413.

84. George v. Bacon, 123 N. Y. S. 103, 138 App. Div. 208, holding that where there was an agreement for equal liability and one has actually paid the note, he is entitled to contribution.

85. Harris v. Jones (N. D.), 136 N. W. 1080, holding further that the burden is upon the indorser whose name appears after that of another indorser to show that they were in fact sureties for the maker.

86. *In re* McCord, 174 Fed. 72.

87. Penny v. Innes, 1 Cromp., M. & R. 439, 5 Tyrw. 107. See Birchard v. Bartlett, 14 Mass. 279.

88. Gwinnell v. Herbert, 5 Ad. & El. 430 (31 Eng. C. L.).

one of whom was also the maker of the note, the indorsee had a right to recover upon the note, although the names of all the payees were not upon the indorsement, and had a right also to prove the facts by evidence.[89] In Michigan, where G. made a note payable to the order of J., and while it was unindorsed by G. procured M. to indorse it, agreeing to procure the indorsement of G., the payee, before negotiating it; and then transferred it to the plaintiff without procuring J.'s indorsement, it was held that M. was not bound as indorser.[90]

SECTION IV

WHETHER OR NOT THE PARTY IS INDORSER, MAKER, OR GUARANTOR

§ **707. When indorsement is regular and successive.**—There is no doubt that, if a note be made payable to the order of the payee, and is indorsed by him, that his liability will be that of an indorser, and not that of a maker.[91] If subsequent to his name, there appears the name of another person indorsed upon it, such person cannot be regarded in any other light than as indorser, and no parol evidence will be admissible, as against a *bona fide* holder without notice, to show that he intended to bind himself in a different character. This view of the law rests upon the fact that there is no ambiguity in the position of his name, and none in his relation to subsequent parties to the instrument. Upon its face the instrument evidences that he intended to bind himself as an indorser, for it purports to have been regularly transferred to him, by the payee's indorsement, and by him transferred, by his own indorsement, to the indorsee. And unless he has indicated an intention to become liable as a surety or guarantor, by some expression to that effect, he will very clearly be bound as an

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89. Pease v. Dwight, 6 How. 190.

90. Gibson v. Miller, 29 Mich. 355 (1874), Graves, C. J.: "In receiving it as it then was, and without indorsement by the payee, he (the holder) accepted paper which he was bound to know would be open in his hands, when thus irregularly taken, to any defense of the nature of that made here, which Miller might make to it." See also Morton v. Preston, 18 Mich. 60; Lancaster Nat. Bank v. Taylor, 100 Mass. 18; Whistler v. Forster, 18 C. B. (N. S.) 248, 1 Am. Rep. 71.

91. Finley v. Green, 85 Ill. 535, Breese, J.: "He being the payee of the note could not at the same time be the maker and be bound by a promise to pay himself." Coon v. Pruden, 25 Minn. 105; Snell v. Northside Mill Co., 89 Ill. 582; *ante*, § 704; Lilly v. Barker, 88 N. C. 154, citing the text.

indorser, and be entitled to require demand and notice as a condition precedent to his determinate liability.[92] The form of the contract must at least *prima facie* determine its construction.[93]

§ 707a. Note made payable to maker's order or to bearer, and indorsed.—Any person who puts his name on the back of a note payable to the order of the maker or in terms to the bearer, under the indorsement of the maker, becomes an indorser only.[94] Such a case as this, as said by Bigelow, J., in Massachusetts,[95] in a case where the note was payable to and indorsed by the maker, "does not fall within that anomalous class of cases where a third person, neither maker nor payee, puts his name on the back of a note before its indorsement by the payee, but is the ordinary case of an indorsement of a note payable to bearer, the effect of which cannot be varied or controlled by parol proof."

§ 707b. Party deemed regular indorser when payee afterward indorses before him.—If a party not the payee at the inception of the note puts his name on the back of it, and the payee afterward indorse it over such party's name, the latter will then be second indorser, and his liability cannot be varied by parol evidence.[96] And

92. Roberts v. Masters, 40 Ind. 463; Vore v. Hurst, 13 Ind. 551; Dale v. Moffitt, 22 Ind. 114; Clapp v. Rice, 13 Gray, 403; Moies v. Bird, 11 Mass. 436; Howe v. Merrill, 5 Cush. 80; Rickey v. Dameron, 48 Mo. 61; Heidenheimer v. Blumenkron, 56 Tex. 312; Morrison Lumber Co. v. Lookout Mountain Hotel Co., 92 Tenn. 6, 20 S. W. 292; Pauly v. Murray, 110 Cal. 13, 42 Pac. 313.

93. Sawyer v. Brownell, 13 R. I. 141; Foley v. Brewing Co., 61 N. J. L. 429, 39 Atl. 650.

94. Thatcher v. Stevens, 48 Conn. 561; Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773; Camden v. McKoy, 3 Scam. 437; Claflin Co. v. Fiebelman & Co. *et al.*, 44 La. Ann. 518, 10 So. 862, citing text; Yates v. Goodwin, 96 Me. 90, 51 Atl. 804; Dubois v. Mason, 127 Mass. 37; Bigelow v. Colton, 13 Gray, 309; First Nat. Bank v. Payne, 111 Mo. 291, 20 S. W. 41; Harnett v. Holdredge, 73 Nebr. 570, 103 N. W. 277, 119 Am. St. Rep. 905, affirming 5 Nebr. (Unof.) 114, 97 N. W. 443 (holding further that his liability cannot be varied by parol); National Bank v. Dorset Marble Co., 61 Vt. 106; See also *post*, § 716.

95. Bigelow v. Colton, 13 Gray, 309.

96. Clapp v. Rice, 13 Gray, 403; Dubois v. Mason, 127 Mass. 37; Grensel v. Hubbard, 51 Mich. 95, 47 Am. Rep. 550; McMoran v. Lange, 25 App. Div. 11, 48 N. Y. Supp. 1000. Where one indorses a promissory note before delivery thereof to the payee, in order to hold such indorser liable, it is necessary to allege in the pleading that the indorsement was made in order to give the maker credit with the payee, or as surety for the maker—a failure so to allege is fatal. This action was commenced after the enactment of the new Negotiable Instruments

the like result is reached if the payee's name be left blank, and the holder of the note in negotiating it fills it up with the name of the party who has signed his name on the back.[97]

§ 707c. When note blank as to payee is irregularly filled up.—In Virginia, where a note blank as to payee was indorsed in blank for the maker's accommodation, and in that form negotiated by the maker to a third party, the bookkeeper of the latter inserted his (the holder's) name as payee, it was held that such holder could recover against the accommodation indorser.[98] And the like view has been taken in England in a similar case.[99]

§ 708. Irregular indorser of note styling himself "backer" or "surety."—In New York, where P. made a note payable to S. or bearer, with a view of borrowing money from him, and before delivery it was indorsed thus, "J. I. H., backer, Schoharie," it was held that J. I. H. seemed "to have added the word 'backer' for the purpose of declaring still more explicitly that he was not to be regarded as an indorser." [1] And in Indiana, where a party wrote his name on the back of a note, at its execution as "surety" he was regarded as a joint maker. These decisions seem to depend on well-recognized principles, and to be correct in their conclusions.

§ 708a. Regular indorser styling himself surety or guaranty.—If indorsers in regular order style themselves sureties, it has been held in New York that they do not divest themselves of their character as indorsers. The only effect of such designation is to indicate the character in which they indorse, and to give them the knowledge of sureties in addition to their rights as indorsers. "As indorsers they could not be made liable without demand and notice; as sureties

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Law (see § 114 of said act), but the cause of action arose prior to said enactment. It was indicated in the opinion, though not decided, that it would be otherwise, if the cause of action had occurred after the passage of the new law.

97. Armstrong v. Harshman, 61 Ind. 52.

98. Frank v. Lilienfeld, 33 Gratt. 393.

99. Morriss v. Walker, 69 Eng. C. L. 588. In this case the action was on a negotiable note by the holder, who was the first indorser, against the second indorser. It was decided that the action was maintainable on the facts stated in the pleadings, and that the proper form of pleading in such a case is for the plaintiff to declare on the indorsement by him to the defendant as "without consideration."

1. Seabury v. Hungerford, 2 Hill (N. Y.), 80, Bronson, J.

they are entitled to all the privileges of that character."[2] The case of a regular transfer accompanied by a guaranty is hereafter considered.[3]

§ 709. Whether one not payee writing his name on back of paper before him is an indorser.—When a note is made payable to the order of the payee, and the name of another appears indorsed in blank upon it, and was then indorsed before the note was delivered to, or indorsed by, the payee, a very different question, and one upon which the authorities are very much at issue, arises. In such cases such person does not appear upon the face of the paper to have held, and to have transferred the title, but rather to have placed his name upon its back to add strength and credit to it, and thus render it more easy of circulation; and the inquiry is presented whether he intended to bind himself for its payment as a joint maker or surety, as a guarantor, or only as an indorser, whose liability can only be fixed by due demand and notice.

If the note be not negotiable, it is plain that such party cannot be regarded as an indorser, for the simple reason that there is no such thing as an "indorsement," in its strict and proper commercial sense, of any other than negotiable paper.[4]

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2. Bradford v. Corey, 5 Barb. 461 (1849). See to same effect, Kamm v. Holland, 2 Oreg. 59 (1863). See also chapter XLI, on Principal and Surety, vol. II; Maddox v. Duncan, 143 Mo. 613, 45 S. W. 688, 65 Am. St. Rep. 678, note.

3. See vol. II, § 1781.

4. Watson v. Hurt, 6 Gratt. 644; Hall v. Newcomb, 7 Ill. 416; Griswold v. Slocum, 10 Barb. 402; Orrick v. Colston, 7 Gratt. 189; Commonwealth v. Powell, 11 Gratt. 826; Comparree v. Brockway, 11 Humphr. 358; Fear v. Dunlap, 1 Greene (Iowa), 334; Gorman v. Ketchum, 33 Wis. 427; Pool v. Anderson, 116 Ind. 95; Vore v. Hurst, 13 Ind. 551; Iron Works v. Paddock, 37 Kan. 513, citing the text; Graham v. Wilson, 6 Kan. 490; Roe v. Hallett, 41 N. Y. Sup. Ct. (34 Hun) 128; McMullen v. Rafferty, 89 N. Y. 458. By the law of New York, one who puts his name on the back of a note before delivery, is a mere indorser, and not a joint maker or guarantor. Meyer v. Hibsher, 47 N. Y. 265; Phelps v. Vischer, 50 N. Y. 69, 10 Am. Rep. 433. In Tennessee held to be comaker. Logan v. Ogden, 101 Tenn. 392, 47 S. W. 489; Bank v. Lumber Co., 100 Tenn. 479, 47 S. W. 85; Assurance Society v. Edmonds, 95 Tenn. 53, 31 S. W. 168; Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211, 36 Am. St. Rep. 100. See note to Fullerton v. Hill (Kan.), 18 L. R. A. 33; New York Security & Trust Co. v. Storm, 81 Hun, 33, 30 N. Y. Supp. 605; Richards v. Warring, 1 Keyes, 576; Cromwell v. Hewitt, 40 N. Y. 491, 100 Am. Dec. 527. In Massachusetts, it has been recently held that "though a person who indorses a note before delivery to the payee, is entitled to notice as an indorser under the public statutes, he is, in all other respects, a comaker. See Brooks v. Stackpole, 168 Mass. 537. In the State of Michigan

§ 710. General admissibility of parol evidence to ascertain intention as between immediate parties.—When the note is negotiable the question is by no means capable of such easy and satisfactory solution; but whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be in every case such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction.[5] If the person who places his name on the back of the note before the payee intended at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor or an absolute promisor to the payee.[6] If he

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such an indorser is held to be an ordinary promisor. Tredway v. Antisdel, 86 Mich. 82, 48 N. W. 956. Kingman & Co. v. Cornell, etc., Co., 150 Mo. 283, 51 S. W. 727; Sylvester Bleckley Co. v. Alewine, 48 S. C. 308; Wade v. Creighton, 25 Oreg. 455, 36 Pac. 289.

5. Good v. Martin, 95 U. S. (5 Otto) 95 (1877); Rey v. Simpson, 22 How. 241; Boteler v. Dexter, 20 D. C. 26, 26 N. E. 151; McKenzie v. Wimberly, 86 Ala. 195; Graves v. Johnson, 48 Conn. 160; Quin v. Sterne, 26 Ga. 224 (1858); Nurre v. Chittenden, 56 Ind. 465; Spencer v. Sloan, 108 Ind. 183, citing the text; Houck v. Graham, 106 Ind. 195; Porter v. Waltz, 108 Ind. 40; Tombler v. Reitz, 134 Ind. 9, 33 N. E. 789, citing text; De Pauw v. Bank of Salem, 126 Ind. 553, 25 N. E. 705; Preston v. Gould, 64 Iowa, 47; Shaffer v. Hohenschild, 2 Kan. App. 516, 43 Pac. 979; Chapeze v. Young, 87 Ky. 477; Owings v. Baker, 54 Md. 82; Ives v. Bosley, 35 Md. 562; Mansfield v. Graham, 136 Mass. 15; Barger v. Farnham, 130 Mich. 487, 90 N. W. 281; Richardson v. Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 483; Jennings v. Thomas, 13 Smedes & M. 617; Herndon v. Lewis, 175 Mo. 116, 74 S. W. 976; Kingman & Co. v. Cornell, etc., Co., 150 Mo. 283, 51 S. W. 727, citing text; Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466; Drexel v. Pusey, 57 Nebr. 30, 77 N. W. 351; Elliott v. Moreland, 69 N. J. L. 216, 54 Atl. 224; Chaddock v. Van Ness, 35 N. J. L. 571; Cadwallader v. Hirshfield, 62 N. J. L. 752, 42 Atl. 1075; Building Assn. v. Leeds, 31 Vroom, 517; Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136, affirming 103 N. Y. S. 584; Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507, citing text; Schram v. Werner, 85 Hun, 293, 32 N. Y. Supp. 995; Bank v. Pegram, 118 N. C. 671, citing text; Carolina Sav. Bank v. Florence Tobacco Co., 45 S. C. 373, 23 S. E. 139; Iser v. Cohen, 57 Tenn. 421, Comparree v. Brockway, 11 Humphr. 358; Williams v. Ogg, 42 Tex. Civ. App. 558, 94 S. W. 420; Woodsville Guaranty Sav. Bank v. Rogers (Vt.), 83 Atl. 537; Lyndon Sav. Bank v. International Co., 75 Vt. 224, 54 Atl. 191; Sylvester v. Downer, 20 Vt. 355 (1848); Allen v. Chambers, 13 Wash. 327; Harmon v. Hale, 1 Wash. Ter. 422. See *post*, §§ 715, 717.

6. Camden v. McKoy, 3 Scam. 437 (1842); Seymour v. Farrell, 51 Mo. 95; Taylor v. French, 2 Lea, 560; Worden v. Salter, 90 Ill. 160. Indorsers upon a note, made payable to a particular person or order, and given for a debt of

intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor.[7] And if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee.[8]

§ 711. **Grounds for admissibility of parol evidence.**—The ground upon which parol proof of intention and agreement in such cases is admitted is, that the position of the name upon the paper is one of ambiguity in itself—that it is not a complete contract as is the case of an indorsement by the payee, which imports a distinct and certain liability; but rather evidence of authority to write over it the contract that was entered into; and that parol proof merely discloses and brings to light the terms of the unwritten contract that was made between the parties.[9]

§ 712. **Parol proof between remote parties.**—Whether or not there is the same liberty in the use of parol proof when the note has been passed to a *bona fide* holder for value, and without notice, is

maker, are liable as joint makers, and without demand, protest, or notice having been made and given, when they indorsed note before delivery and as additional security to the payee, and it is admissible to show by parol that indorser's liability is different from that indicated by the form and order of the indorsements. Bank of Jamaica v. Jefferson, 92 Tenn. 537, 22 S. W. 211. In Cadwallader v. Hirshfield, 62 N. J. L. 749, 42 Atl. 1075, 72 Am. St. Rep. 671, note, Lippincott, J., says: "The signature thereon is not formally in the place and order to give rise to the application of the rules of law governing the liability of parties upon ordinary commercial paper. Whilst the promissory note may be the basis of the action, no contract whatever of liability to the payee against such indorser arises." Columbia Finance & Trust Co. v. Purcell, 146 Fed. 85.

7. Rey v. Simpson, 22 How. 341; Walz v. Alback, 37 Md. 404. In Scotland, if one not payee indorse a bill in his own name, he is liable as a new acceptor; and if such a person indorses a note, he is liable as a joint maker. Thompson on Bills (Wilson's ed.), 174; Raymond v. McNeal, 36 Kan. 172; Metropolitan Bank v. Muller *et al.*, 50 La. Ann. 1278, 24 So. 295, 69 Am. St. Rep. 475.

8. Eberhart v. Page, 89 Ill. 550; Mammon v. Hartman, 51 Mo. 169. Wagner, J.: "When a party writes his name on the back of a note, of which he is neither payee nor indorsee, in the absence of extrinsic evidence, he is to be treated as the maker thereof. But parol evidence is admissible to show that he did not sign as maker, but as indorser." Lewis v. Harvey, 18 Mo. 474; Western Boatmen's Benevolent Assn. v. Wolff, 45 Mo. 104; Kuntz v. Tempel, 48 Mo. 71.

9. Heidenheimer v. Blumenkron, 56 Tex. 312, citing the text; Witherow v. Slayback, 158 N. Y. 649, 53 N. E. 681, 70 Am. St. Rep. 507, citing text; Barton v. American Nat. Bank, 8 Tex. Civ. App. 223, 29 S. W. 210, quoting text; Kingman & Co. v. Cornell, etc., Co., 150 Mo. 283, 51 S. W. 729, citing text; The Kankakee Coal Co. v. The Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 935.

a question upon which the authorities are by no means so uniform. Some of them confine parol proof to cases in which the note is still in the hands of the original party to whom it was first delivered as a valid instrument;[10] but others declare that it is equally competent in a suit by a *bona fide* holder on the ground that a contract is ambiguous; and that whenever a written contract is presented for construction, and its terms are ambiguous or indefinite, it is always allowable to weigh its language in connection with the surrounding circumstances, in order to reach the true intention of the parties.[11] In a case before the United States Supreme Court, where the question arose between a *bona fide* indorsee and the original party so signing his name, the court, while recognizing "irreconcilable conflict" of the authorities, said: "But there is one principle upon the subject almost universally admitted by them all, and that is, that the interpretation of the contract ought in every case to be such as will carry into effect the intention of the parties, and in most cases it is admitted that proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed."[12]

§ 713. Presumptions as to irregular indorsements.—When nothing appears but the instrument itself, bearing a third person's name before the payee's, in a suit by an indorsee of the payee, the question next arises, what is to be presumed to have been the contract and liability of such person? It will be presumed, in the first place, from the fact that the name is before that of the payee in order, that it was placed there before his in point of time, and was placed upon the note in its inception with a view to strengthening its credit with the payee, and inducing him to take it;[13] and it follows that it would be

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10. Houston v. Bruner, 39 Ind. 383; Whitehouse v. Hansen, 42 N. H. 18; Schneider v. Schiffman, 20 Mo. 571.

11. Greenough v. Smead, 3 Ohio St. 415. See Rey v. Simpson, 22 How. 341.

12. Good v. Martin, 95 U. S. (5 Otto) 95 (1877). See Cavazos v. Trevino, 6 Wall. 773; Denton v. Peters, L. R., 5 Q. B. 475; Frank v. Lilienfeld, 23 Gratt. 392. In Thatcher v. Stevens, 46 Conn. 561, Pardee, J., after quoting the text, says, that in the cases cited the party had notice of the irregular indorsement, and held that if the indorsements were regular in appearance, evidence to vary them was inadmissible as between remote parties. This view is clearly correct. Williams v. Bank, 67 Tex. 607, citing the text; Atkinson v. Bennet, 103 Ga. 508, 30 S. E. 599; Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48.

13. Union Bank v. Willis, 8 Metc. (Mass.) 504; Western Boatmen's Benevolent Assn. v. Wolff, 45 Mo. 104; Way v. Butterworth, 108 Mass. 508; Cecil v.

presumed also that the signature was there placed as a part of the contract, and for the same consideration as the note itself.[14]

§ 713a. View presented that party signing on back of note before payee is presumably a joint maker.—For the reason that a third party whose name is on the back of a note before that of the payee does not appear to have derived title to the note by any indorsement or assignment to himself, it is held by numerous authorities that he must be regarded *prima facie* as a joint maker.[15] And especially is

Mix, 6 Ind. 478; Marienthal v. Taylor, 2 Minn. 147. See Bigelow on Bills and Notes, 44; and as to New York rule, §§ 713*d*, 713*e*, and notes.

14. Good v. Martin, 95 U. S. (5 Otto) 90; Austin v. Boyd, 41 Mass. 64; Sylvester Bleckley Co. v. Alewine, 48 S. C. 308, 26 S. E. 609; Portsmouth Sav. Bank v. Wilson, 5 App. D. C. 8. *Contra*, Johnston v. McDonald, 41 S. C. 81, 19 S. E. 65.

15. Good v. Martin, 95 U. S. (5 Otto) 95; Rey v. Simpson, 22 How. 241; First Nat. Bank v. Lockstitch Fence Co., 24 Fed. 224; Randle v. Davis Coal Co., 15 App. D. C. 357; Chandler & Taylor Co. v. Norwood, 14 App. D. C. 357; Ross v. De Campi, 140 Ala. 327, 36 So. 1003; Scanland v. Porter, 64 Ark. 470, 42 S. W. 897; Heise v. Bumpass, 40 Ark. 547; Nathan v. Sloan, 34 Ark. 524; Kiskadden v. Allen, 7 Colo. 206; Best v. Hoppie, 3 Colo. 139; City Nat. Bank v. Goodrich, 3 Colo. 137; McCallum v. Driggs, 35 Fla. 277, 17 So. 407; Melton v. Brown (Fla.), 6 So. 211; Bradford v. Prescott, 85 Me. 485, 27 Atl. 461; Stevens v. Parsons, 80 Me. 353; Childs v. Wyman, 44 Me. 433; Woodman v. Boothy, 66 Me. 389; Schroeder v. Turner, 68 Md. 508; Owings v. Baker, 54 Md. 82; Third National Bank v. Lange, 51 Md. 138; Norris v. Despard, 38 Md. 491; Schley v. Merrit, 37 Md. 352; Walz v. Alback, 37 Md. 404; Ives v. Bosley, 35 Md. 262; Nat. Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444; Spaulding v. Putman, 128 Mass. 363; Woods v. Woods, 127 Mass. 141 (see this case as to Massachusetts statute); Hawkes v. Phillips, 7 Gray, 284; Draper v. Weld, 13 Gray, 580; Union Bank v. Willis, 8 Metc. (Mass.) 504; Sweet v. Woodin, 72 Mich. 395; Grensel v. Hubbard, 51 Mich. 95; Moynahan v. Hanford, 42 Mich. 330; Herbage v. McEntee, 40 Mich. 337; Sibley v. Muskegon Nat. Bank, 41 Mich. 196; Rothschild v. Grix, 31 Mich. 150; Weatherwax v. Paine, 2 Mich. 555; Fay v. Jenks (Mich.), 44 N. W. 380; Robinson v. Bartlett, 11 Minn. 410; Peckham v. Gilman, 7 Minn. 449; McComb v. Thompson, 2 Minn. 139; Holmes v. Preston, 70 Miss. 153, 12 So. 202; Polkinghorne v. Hendricks, 61 Miss. 366; Semple v. Turner, 65 Mo. 696; First Nat. Bank v. Payne, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520; Cohn v. Dutten, 60 Mo. 297; Mammon v. Hartman, 51 Mo. 169; Seymour v. Farrell, 51 Mo. 95; International Bank v. Enderle, 133 Mo. App. 222, 113 S. W. 262; Ross v. Schawacker, 66 Mo. App. 67; Barnett v. Nolte, 55 Mo. App. 184; Schmidt Matting Co. v. Miller, 38 Mo. App. 251; Cayuga Nat. Bank v. Dunkin, 29 Mo. App. 442; Boyer v. Boogher, 11 Mo. App. 130; Crelle v. Loxen, 7 Mo. App. 97; Drexel v. Pusey, 57 Nebr. 30, 77 N. W. 351; Salisbury v. First Nat. Bank, 37 Nebr. 872, 56 N. W. 727, 40 Am. St. Rep. 527; Martin v. Boyd, 11 N. H. 385; Fetrich v. Woodrow, 67 N. H. 174, 38 Atl. 18; Baker v. Robinson, 63 N. C. 191; Barr v. Mitchell, 7 Oreg. 346; Perkins v. Barstow, 9 R. I.

it so considered when the third party signed his name to the instrument or on the back thereof before its delivery.[16]

507; Carpenter v. Oaks, 10 Rich. (S. C.) 17; Watson v. Barr, 37 S. C. 463, 16 S. E. 188; Sylvester Bleckley Co. v. Alewine, 48 S. C. 308, 26 S. E. 609; Gilpin v. Marley, 4 Houst. 284; Massey v. Turner, 2 Houst. 79; Beissner, Admr. v. Weeks, 21 Tex. Civ. App. 14, 50 S. W. 138, citing text; Kennon v. Bailey, 15 Tex. Civ. App. 28, 38 S. W. 377; McGee v. Connor, 1 Utah, 92; Sylvester v. Downer, 20 Vt.

16. Jones v. Bank of Pine Bluff, 80 Ark. 285, 96 S. W. 1060; Edmonston v. Ascough, 43 Colo. 55, 95 Pac. 313 (notwithstanding the word "surety" was prefixed to his signature); Tabor v. Miles, 5 Colo. App. 127, 38 Pac. 64; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886; Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33, 105 Am. St. Rep. 381; Nashua Sav. Bank v. Sagles, 184 Mass. 520, 69 N. E. 309, 100 Am. St. Rep. 573; First Nat. Bank v. Guardian Trust Co., 187 Mo. 494, 86 S. W. 109, 70 L. R. A. 79; Heaton v. Dickson, 153 Mo. App. 312, 133 S. W. 159; Oexner v. Loehr, 117 Mo. App. 698, 93 S. W. 333; Oxner v. Loehr, 106 Mo. App. 412, 80 S. W. 690; Bank of Spartonburg v. Mahon, 75 S. C. 255, 55 S. E. 529; E. L. Welch Co. v. Gillett, 146 Wis. 61, 130 N. W. 879. And the same rule applies where the name of the payee of the note is not inserted therein. Keyser v. Warfield, 103 Md. 161, 63 Atl. 217. It has been so held though it was proved that they wrote their names on the back of the note as sureties for the maker, and without participating in the consideration for which the note was given; and the rule was applied even though the words "demand, protest, and notice of protest waived" were written over such signatures. Camp. v. First Nat. Bank of Ocala, 44 Fla. 497, 38 So. 241, 103 Am. St. Rep. 173. In Andrews v. Congar, 131 U. S. CLXXXIII, 26 L. Ed. 90, the court said that if a person, not a party to a promissory note, writes his name on the back of it when the note is made, the law in Illinois regards him as a guarantor, unless the contrary is shown (citing Stowell v. Raymond, 83 Ill. 120), but the law in Missouri regards him as *prima facie* a joint maker (citing Schneider v. Schiffman, 20 Mo. 571). An original promisor who placed his name on a note before its delivery, to subserve purposes of his own, is not entitled to the strict rights of a mere indorser or surety. Jones v. Lynch (Tex. Civ. App.), 137 S. W. 395. Where one makes a negotiable note to a payee, and others put their names on the back of it, and it is then delivered to the payee, he may treat them all as joint makers, or he may treat those putting their names on the back of the paper as indorsers or guarantors, at his election, unless he agrees before or on the delivery of the paper to treat them in a particular one of those characters. Peters v. Nolan Coal Co., 61 W. Va. 392, 56 S. E. 735, 9 L. R. A. (N. S.) 989, the court saying that the right of election by the payee in such cases is determined by the contract made before or at the time of the making and delivery of the paper to the payee, unaffected by the subsequent dealings of the payee with the paper; and such right extends to renewals of such paper by the same parties, unless a new contract is shown. See also Golding Sons Co. v. Cameron Pottery Co., 16 W. Va. 317, 55 S. E. 396. A statute (Pub. St. 1882, chap. 77, § 15), Rev. Laws, chap. 73, § 81, which requires demand and notice to hold parties signing before notes were delivered and took effect as building contracts still leaves their promise that of joint makers. National Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444.

§ 713b. View presented that such third party is presumably surety or guarantor, in the form of joint maker.—By some cases it

355; Woodsville Guaranty Sav. Bank v. Rogers (Vt.), 83 Atl. 537; National Bank v. Dorset Marble Co., 61 Vt. 106; Woodward v. Foster, 18 Gratt. 213; Orrick v. Colston, 7 Gratt. 189; Watson v. Hurt, 6 Gratt. 633; Douglass v. Scott, 8 Leigh, 43; Banking Co. v. Savings Bank, 13 Wash. 407, 43 Pac. 359, 942, 52 Am. St. Rep. 57, and references to other cases in § 714; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197, citing text; Houghton v. Ely, 26 Wis. 81. This rule obtains where the note is made payable to some one other than the maker thereof, but does not apply, however, where a note is made payable to the maker himself. Harnett v. Holdrege, 5 Nebr. (Unof.) 114, 97 N. W. 443, affirmed on rehearing 73 Nebr. 570, 103 N. W. 277, 119 Am. St. Rep. 905. Though such a person signed the note some weeks after the principal maker, yet when he did so in execution of an agreement had upon the day of its date, such person is a comaker of the note. Pearl v. Cortright, 81 Miss. 300, 33 So. 71. One who has signed a note in pursuance of a previous agreement, is a joint maker, even though the notes had taken effect before he signed. Nat. Bank of the Republic v. Delano, 185 Mass. 424, 70 N. E. 444. The fact that such persons told the payee that they would "indorse" the note, does not take the case out of the rule, for an agreement to indorse the note before delivery to the payee, in order to induce the payee to lend money on the note, is in effect an agreement to become a joint maker of the note. Lake v. Little Rock Trust Co., 77 Ark. 53, 90 S. W. 847, 3 L. R. A. (N. S.) 1199. The words "indorse" and "indorser" have a popular as well as a technical meaning, and their use in connection with the act of one, not a party to a note, in putting his name on the back of the note for the purpose of increasing its commercial value, is not inconsistent with his having signed as surety. Redden v. Lambert, 112 La. 740, 36 So. 668. Where parties whose relation to a note was that of indorsers, were notified before and at the time a renewal was made that they were to change their relation toward the holder and payee of the note, and were, as to him, all become makers, instead of indorsers or guarantors, this was a new contract and was a condition for a further extension of payment, and under the new relation such parties became makers of the note. Tinker v. Catlin, 205 Ill. 108, 68 N. E. 773. In Byers *et al* v. Tritch, 12 Colo. App. 377, 55 Pac. 622, it was held if an indorsement is made prior to its delivery to the payee, party assumes position of joint maker and is liable as such and may be sued either severally or jointly with the maker. In National Pemberton Bank v. Longee, 108 Mass. 371, the note ran, "We A. & B., as principal, and C. & P., as surety, promise to pay to the order of ourselves, etc." It was signed on the face by A. & B. only, and was indorsed by A., B., C. and D. Held, that D.'s liability was that of surety and joint promisor. In Schneider v. Schiffman, 20 Mo. 571, the note was payable to P. Burg or order, and by him indorsed to plaintiff. Schiffman's name appeared on the back before Burg's. The court said: "Negotiable paper, it is said, carries its own history upon its face, so that nothing can be alleged against it, while it continues in circulation undishonored, as against an innocent purchaser, other than what is there apparent. This defendant has placed his name upon the note in such a position as, under our law, to impose upon himself the obligation of a maker, and he is irrevocably bound as such to all who take the note for value and without notice, upon the faith of what they find

is considered that for the reason already assigned such party cannot be regarded as an indorser; that the location of the signature and the import of the note indicate that suretyship for the maker was intended; and that accordingly the party should be presumed to have undertaken to enter into the maker's contract as a comaker, in the character of surety or guarantor,[17] and especially, that if such third

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upon it, although it is otherwise with reference to those who are bound by the real transaction between the parties. It is no answer to this to say that it was the duty of the holder, when he saw the position of the defendant's name upon the note, to have inquired into the matter, and satisfied himself before he took it whether the party was to be considered chargeable as maker, or only as indorser. The policy of the law in reference to negotiable paper requires that it shall tell its own story, and have effect in the hands of innocent holders for value according to what appears upon it." In Commonwealth v. Powell, 11 Gratt. 828, Lee, J., said: "If a third party put his name in blank upon the back of a negotiable promissory note made payable to another party, and to which he is a stranger, while the same remains in the hands of the maker, he will be presumed, in the absence of controlling proof to the contrary, to have intended to give the note credit and currency; and if the indorsement was at the time of the making of the note, he may be treated by the payee as an original promisor, or joint maker of the note. If the indorsement were after the date of the note, however long, the payee may treat him as a guarantor, and may write over the signature a guaranty consistent with the nature of the case. And the fair and reasonable if not necessary inference from cases which have occurred in this court will bring us to the same result."

17. Killian v. Ashley, 24 Ark. 212; Portsmouth Sav. Bank v. Wilson, 5 App. D. C. 8; Crosby v. Woodbury, 37 Colo. 1, 89 Pac. 34 (as to a note of a corporation indorsed by a director, who was assured by the president at the time that he would protect him against the liability assumed); Booth v. Huff, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98; Ridley v. Heightower, 112 Ga. 476, 37 S. E. 733; Eppens v. Forbes, 82 Ga. 748; James v. Calder, 7 Ga. App. 707, 67 S. E. 1125; Connor v. Hodges, 7 Ga. App. 153, 66 S. E. 546; De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224; Tinker v. Catlin, 205 Ill. 108, 108 N. E. 773; Griffiths v. Herzog, 100 Ill. App. 380; Syme v. Brown, 19 La. Ann. 147; Chorm v. Merrill, 9 La. Ann. 533; McGuire v. Bosworth, 1 La. Ann. 248; Edgerly v. Lawson, 176 Mass. 551, 57 N. E. 1020, 51 L. R. A. 432; Jackson Bank v. Irons, 18 R. I. 718, 30 Atl. 420; Windhorst v. Bergendahl, 21 S. D. 218, 111 N. W. 544, 130 Am. St. Rep. 715; Harding v. Waters, 6 Lea, 324; Chandler v. Westfall, 30 Tex. 477; Carr v. Rowland, 14 Tex. 275; Cook v. Southwick, 9 Tex. 615; Levy v. Wagner, 29 Tex. Civ. App. 98, 69 S. W. 112; Roanoke G. & M. Co. v. Watkins, 41 W. Va. 787, 24 S. E. 612. Where a note is indorsed by the payee and by another person, the presumption will be that the other person is a surety, or an indorser in the technical sense, according to the order of the signatures. If his signature is above that of the payee, he will be presumed to be a surety; and if it is below, he will be presumed to be an indorser. Redden v. Lambert, 112 La. 74, 36 So. 668. See also *ante*, § 707. When a third person writes his name on the back of a negotiable instrument before delivery to the payee, and with a view to give additional credit to the maker, it is open to the original parties and as between themselves to show the intent and

party write his name on the back after delivery, he becomes bound only as a guarantor.[18]

§ 713c. View presented that such third party is prima facie only secondarily liable as guarantor.—This view rests upon the idea that such party does not participate in the consideration of the note, and that his name in its situation on the paper indicates an intention to assume a secondary responsibility of suretyship; and that as he is not a regular indorser he must be deemed a guarantor, and not a co-promisor.[19]

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exact nature of the obligation assumed, whether as joint promisor and guarantor or as first and second indorser, etc., and, in the absence of such qualifying testimony, the law will presume that such person signed his name as co-maker, and in any event as surety. Barden v. Hornthal, 151 N. C. 8, 65 S. E. 513 (1909). But whether such party be a joint principal or surety, he does not, by thus signing his name, enter into such a contract of indorsement as will cut him off from setting up against the payee the defense that the note was founded upon illegal consideration and, therefore, void. Benson v. Dublin Warehouse Co., 99 Ga. 303, 25 S. E. 645.

18. State v. Allen, 124 Mo. App. 465, 103 S. W. 1090; Lyndon Sav. Bank v. International Co., 75 Vt. 224, 54 Atl. 191. While the presumption is that signing on the back of a note to which he is a stranger makes such signer a maker, yet if he sign after the note is executed he is a guarantor. Thompson & Thompson v. Brown, 121 Mo. App. 524, 97 S. W. 242. In Lyndon Sav. Bank v. International Co., 75 Vt. 224, 54 Atl. 191, the court said that the general rule held by many courts is that where a promissory note is indorsed in blank, after its delivery, by any other person than the payee, it is a new and independent contract between the indorser and the holder, upon a new consideration moving between them and is a contract of guaranty, such courts saying that he is not liable as a joint maker, because he had no part in the consideration, and the payee accepted the note without reliance upon him, the court holding, however, that such is not the rule in Vermont, as it had been settled there that one not before a party to a note, who signs his name upon the back of it in blank after its delivery, is *prima facie* a maker, and assumes the same obligations as if he wrote his name upon the face of the instrument.

19. First Nat. Bank v. Babcock, 94 Cal. 96, 29 Pac. 415, 28 Am. St. Rep. 99; Gillespie v. Wheeler, 46 Conn. 410; Holbrook v. Camp, 38 Conn. 23; Clark v. Merriam, 25 Conn. 576; Ranson v. Sherwood, 26 Conn. 437; Rhodes v. Seymour, 36 Conn. 1; Beckwith v. Angell, 6 Conn. 315; Bradly v. Phelps, 2 Root, 325; The Kankakee Coal Co. v. Crane Bros. Mfg. Co., 138 Ill. 207, 27 N. E. 435; Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48; Lincoln v. Hinsey, 51 Ill. 437; White v. Weaver, 41 Ill. 409; Webster v. Cobb, 17 Ill. 459; Klein v. Currier, 14 Ill. 237; Carroll v. Weld, 13 Ill. 482; Cushman v. Dement, 4 Scam. 497; Camden v. McCoy, 3 Scam. 437; Glickauf v. Kaufman, 73 Ill. 378; Parkhurst v. Vail, 73 Ill. 343; Dietrich v. Mitchell, 43 Ill. 46; Bank v. Nixon, 125 Ill. 618; Wallace v. Goold, 92 Ill. 19; Stowell v. Raymond, 83 Ill. 120; Fuller v. Scott, 8 Kan. 32;

§ 713d. View presented that such third party is presumably second indorser.—This view taken in a number of cases rests upon the idea that the situation of the name indicates an intention to become indorser; that, with the payee's name before his, such party cannot be deemed a first indorser, and must be, therefore, regarded as a second indorser.[20] In Pennsylvania this view has been strongly

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Fullerton v. Hill, 48 Kan. 558, 29 Pac. 583; Corbyn v. Brokmeyer, 84 Mo. App. 649; Van Doren v. Tjader, 1 Nev. 380; Seymour v. Mickey, 15 Ohio St. 515; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344, citing text; Redfield & Bigelow's Lead. Cas. 112; Bigelow on Bills and Notes, 45; 1 Ames on Bills and Notes, 271. In Boynton v. Pierce, 79 Ill. 145, it was held that an indorsement in blank before the payee is authority to the holder to fill up the blank with a guaranty. In California there are a number of cases which hold that such party is a guarantor. Pierce v. Kennedy, 5 Cal. 138; Geiger v. Clark, 13 Cal. 579; Riggs v. Waldo, 2 Cal. 485; Crooks v. Tully, 50 Cal. 673; Jones v. Goodwin, 39 Cal. 493; Ford v. Henderson, 34 Cal. 673. These appear, however, to have been decisions made prior to the adoption of the Civil Code of that State (§ 3117), by which it is declared that "one who indorses a negotiable instrument before it is delivered to the payee, is liable to the payee thereon as an indorser." Commenting on the decisions, Ross, J., giving the opinion in Fessenden v. Summers, 62 Cal. 486, points out the conflict between them, and holds that under section 3117 of the Civil Code, a person not a party to a note, who indorses the same in blank before delivery, is to be regarded not as a guarantor, but as an indorser, and as such entitled to notice of nonpayment.

20. Perry v. Friend, 57 Ark. 437, 21 S. W. 1065, citing text; Chicago Trust, etc., Bank v. Nordgren, 157 Ill. 653, 42 N. E. 148; De Pauw v. Bank of Salem, 126 Ind. 553, 25 N. E. 705, 26 N. E. 151; Bronson v. Alexander, 43 Ind. 244; Roberts v. Masters, 40 Ind. 460; Nurre v. Chittenden, 56 Ind. 465; Dale v. Moffit, 22 Ind. 113; Drake v. Murkle, 21 Ind. 433; Earle v. Foster, 7 Blackf. 35; Browning v. Merritt, 61 Ind. 425; Wells v. Jackson, 6 Blackf. 40; Lank v. Morrison, 44 Kan. 594, 24 Pac. 1106; Needhams v. Page, 3 B. Mon. 465; Kellogg v. Dunn, 1 Metc. (Ky.) 215; Levi v. Mundell, 1 Duv. (Ky.) 77; Jennings v. Thomas, 21 Miss. 617; Thomas v. Jennings, 13 Miss. 627; Hayden v. Weldon, 43 N. J. L. 129; Arnott v. Symonds, 85 Pa. St. 99; Brinkley v. Boyd, 9 Heisk. 149; Rivers v. Thomas, 1 Lea, 649; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344, citing text; King v. Ritchie, 18 Wis. 554; Cady v. Shepard, 12 Wis. 639; Heath v. Vancott, 9 Wis. 516; Bigelow on Bills and Notes, 45; Ames on Bills and Notes, vol. I, p. 271. In Eilbert v. Finkbeimer, 68 Pa. St. 247 (1871), Sharswood, J., said: "Nobody ever doubted that when a man puts his name on the back of negotiable paper before the payee has indorsed it, he means to pledge, in some shape, his responsibility for the payment of it. Kyner v. Shower, 1 Harr. 446. This court finally settled, that in the absence of legal evidence of any different contract, he assumes the position of a second indorser; and that, to render his engagement binding as to any holder of the note, the implied condition that the payee shall indorse before him must be complied with, so as to give him recourse against such payee. Shafer v. The Farmers' & Mechanics' Bank, 9 P. F. Smith, 144. Prior to January 1, 1856, when the act of April 26, 1855 (Pamph. L. 308), went into effect,

presented by that learned jurist and author, Judge Sharswood. And in that State where the irregular indorser wrote the words "credit

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it could have been shown by parol evidence that the intention of the irregular indorser was to guarantee the payment of the note to the payee. Leech v. Hill, 4 Watts, 448; Taylor v. McCune, 1 Jones, 460. The act of 1855, by providing that no action shall be brought 'whereby to charge the defendant upon any special promise to answer for the debt for default of another, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him authorized,' made parol evidence of such a guarantee unlawful. Jack v. Morrison, 12 Wright, 113. But surely, under the statute, a memorandum in writing signed by the party is admissible to show that the agreement upon which the indorsement was made was a guaranty that the note should be paid to the payee; and not that the payee should stand between the indorser and ultimate responsibility." In Liszman v. Marx (Pa.), 9 Atl. 477, it is said that the character of the "responsibility" referred to in Eilbert v. Finkbeimer, *supra*, is to be determined by the evidence of the circumstances under which the indorsement was made. Fear v. Dunlap, 1 Greene, 335. In New York, the earlier cases of Herrick v. Carman, 12 Johns. 159; Campbell v. Butler, 14 Johns. 349, and others maintained a different doctrine, but now in that State such a party is regarded as an indorser; and in Cottrell v. Conklin, 4 Duer, 45, Campbell, J., said that they "stood upon no ground of principle, and must now be regarded as corrected and exploded." To the same effect, see Spies v. Gilmore, 1 N. Y. 321; Ellis v. Brown, 6 Barb. 282; Waterbury v. Sinclair, 26 Barb. 455; Phelps v. Vischer, 50 N. Y. 69; Edwards on Bills, 274. In Hall v. Newcomb, 7 Hill, 416, it appeared that Peter Farmer made a promissory note to Samuel Hall, the plaintiff, payable to his order, on demand, with interest, on the back of which note the defendant indorsed his name in blank, at the request of Farmer, to enable him to get the money. It was held that he was to be regarded as an indorser. The court said. "The question for our consideration is, whether a person who puts his name in blank upon the back of a negotiable note, which is drawn in a form that he may be charged as indorser in the usual mode, if a demand is made and notice given of nonpayment, can be charged as a general surety, without such demand and notice, by parol evidence merely. The courts have gone far enough in repealing the statute to prevent frauds and perjuries by introducing parol evidence to charge a mere surety for the principal debtor, by showing that his written agreement means something else than what, upon its face, it purports to mean. And I fully concur in the opinion expressed by Mr. Justice Bronson, in Seabury v. Hungerford, 2 Hill, 80, that where a man writes his name in blank upon the back of a negotiable promissory note, he only agrees that he will pay the note to the holder, on receiving due notice that the maker, upon demand made at the proper time, has neglected to pay it. Mere proof that he indorsed the paper, to enable the maker to raise money on it, does not change the nature of his legal liability as indorser, where the note is in the hands of a *bona fide* holder for a good consideration. Such was the whole effect of the parol proof in this case. And for the courts to allow proof by parol to charge a mere surety, beyond the legal effect of his written blank indorsement on such paper, would bring them in direct conflict with the provisions of the Statute of Frauds." 2 Rev. Stats. 145, § 2, subd. 2. "Here there was no difficulty in

the drawer" above his name, they were held not to imply a promise or undertaking on his part to answer for the drawer, but merely a direction to all persons dealing with the instrument to treat with the drawer as the owner, and that the person so signing was a second indorser, and the language used a mere explanation of the irregular indorsement.[21]

§ 713e. View presented that such third party is presumably first indorser; the rule in New York.—In New York the doctrine now

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charging Newcomb as indorser of the note in favor of Hall, from whom it appears the maker intended to get the $250, to enable him to take up a former note. It does not appear in this case whether the former note had been protested, so as to charge Newcomb as indorser or not or who was the holder of that note. All that appears is, that Newcomb knew that Hall would lend Farmer the $250, to enable him to take it up, and that Newcomb indorsed this note for Farmer as a mere accommodation indorser, when the name of Hall, to whose order the note was made payable, was not indorsed thereon. Where a note is made payable to an individual or his order, and is indorsed by him in blank, and in that situation is presented to another person for his accommodation indorsement, who indorses it accordingly, the legal effect of his indorsement is to make him liable in the character of second indorser merely; and he can, in no event, be made legally liable to the first indorser. And if the maker, or the first indorser, or any other person into whose hands the note might subsequently come, should, without the consent of the second indorser, fill up the first indorsement specially, without recourse, to such first indorser, so as to deprive the second indorser of his remedy over, in case he should be compelled to pay the note, it would be a gross fraud upon him, if not a forgery. But when such a note is presented to the accommodation indorser, and is indorsed by him without having been previously indorsed by the person to whose order the same is made payable, the latter may, at the time he puts his indorsement upon it, indorse it specially, without recourse, to himself, so as to leave the second indorser liable to any person into whose hands it may subsequently come for a good consideration, and without any remedy over against the first indorser. Or, if the object of the second indorser was to enable the drawer, as in this case, to obtain money from the payee of the note, upon the credit of such accommodation indorser, he may indorse it in the same way, without recourse, and by such indorsement may either make it payable to the second indorser or to the bearer. And such original payee may then, as the legal holder and owner of the note, recover thereon against such second indorser, upon a declaration stating such special indorsement by him, and subsequent indorsement of the note to him by the second indorser. Or he may recover on the common money counts, under the statute, by serving a copy of the note and of the indorsements so made thereon, with his declaration. But as the second indorser, if he has not waived notice of the demand of, and nonpayment by, the maker, cannot be made liable upon his indorsement, without proof of such demand and notice, the plaintiff, at the trial, must prove the same or he cannot recover."

21. Temple v. Baker, 125 Pa. St. 640; Neal v. Wilson, 79 Ga. 737.

obtains that when it appears that the party wrote his name on the back of the note to give the maker credit with the payee, he is to be deemed a first indorser.[22] But it is not presumed that he did this in that State, as already seen.[23] In that State it was said by Church, C. J., in delivering the opinion of the court: "In this State it has been repeatedly held, and is too strongly settled by authority to be disturbed, that a person making such an indorsement is presumed to have intended to become liable as second indorser, and that on the face of the paper without explanation he is to be regarded as second indorser, and of course not liable upon the note to the payee, who is supposed to be the first indorser. As the paper itself furnishes only *prima facie* evidence of this intention, it is competent to rebut the presumption by parol proof that the indorsement was made to give the maker credit with the payee. Such, among others, was the case of Moore v. Cross, 19 N. Y. 227, where the indorsement was made to enable the maker to purchase coal of the payee; and it was held that the person making it was liable as first indorser, and that the payee could maintain an action against him upon the note, or if the payee transferred it, he might indorse it without recourse." [24]

§ 714. Comments and conclusions.—The authorities cited show how diversified and contradictory are the views taken by different courts of this question, and only through statutory enactments can it be anticipated that any uniformity in the law of the several States will ever be attained. In Massachusetts it is now provided by statute that "all persons becoming parties to promissory notes by a signature in blank on the back thereof shall be entitled to notice of nonpayment

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22. Moore v. Cross, 19 N. Y. 227; Coulter v. Richmond, 59 N. Y. 479. The same rule exists in Wisconsin. Blakeslee v. Hewitt (Wis.), 44 N. W. 1105; Bank of Port Jefferson v. Darling, 91 Hun, 236, 36 N. Y. Supp. 153; Montgomery v. Schenck, 82 Hun, 24, 31 N. Y. Supp. 42; Jaffray v. Krauss, 79 Hun, 449, 29 N. Y. Supp. 987.

23. *Ante*, § 713*d*, and notes; Meise v. Doscher, 68 Hun, 557, 23 N. Y. Supp. 49.

24. Coulter v. Richmond, 59 N. Y. 479 (1874). See also Jaffray v. Brown, 74 N. Y. 394; Lynch v. Levy, 11 Hun, 145; Phelps v. Vischer, 50 N. Y. 71. See Paine v. Noelke, 53 How. Pr. 273. As to view taken in Alabama, Milton v. De Yamper, 3 Ala. 648; Price v. Lavender, 38 Ala. 389; Hooks v. Anderson, 58 Ala. 238; 1 Ames on Bills and Notes, 271; McPhillips v. Jones, 73 Hun, 516, 26 N. Y. Supp. 101; Hendrie v. Kinnear, 84 Hun, 141, 32 N. Y. Supp. 417; Howard v. Van Geierson, 46 App. Div. 77, 61 N. Y. Supp. 349; Cuming v. Roderick, 16 App. Div. 339, 44 N. Y. Supp. 1033; Holz v. Woodside Brewing Co., 83 Hun, 192, 31 N. Y. Supp. 397.

the same as an indorser." [25] And this is at least a step in the right direction. In California the Civil Code declares: "One who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser," which would render his liability that of first indorser.[26] Our own views are that the party who puts his name on the back of a negotiable note before it is indorsed by the payee should be presumed to be a first indorser. If he intended to be a second indorser, he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterward; and *prima facie* the facts would seem to indicate such intention. We do not perceive that there is anything insuperable to this view in the objection that there is no title in him to indorse away. Prior parties could not be sued without the payee's indorsement; but he being an indorser can be sued by any one deriving title under him, and the prior party's position on the note seems to render his liability strictly analogous to that of the drawer of a bill upon the maker in favor of the payee; and so to regard him simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult. It is almost universally admitted that evidence is admissible to show that such a party is first indorser, and it would have been far better if the courts had generally presumed such to be the intention, and established a rule that is clear, intelligible, and certain in respect to so important a relation to commercial paper. Parties often so sign their names for accommodation of the maker, and are themselves as much surprised as the holders of the paper to find that difficult questions arise as to the nature of their obligation. And the law merchant should, in its elasticity to fit all manner of commercial transactions, recognize customary transactions, and apply to them the natural and simple presumptions that render them intelligible and practical. Strained technical dissertations and conclusions have so bungled and confounded the question which we have considered, that a fresh mind investigating it is lost in labyrinths of suggestion and decision, while as we think an easy solution may be found in adopting the views above presented.[27]

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25. Mass. Stats. 1874, chap. 404; Commercial Bank v. Law, 127 Mass. 72.

26. Civil Code of Cal., § 3117; Fessenden v. Summers, 62 Cal. 486; Fisk v. Miller, 63 Cal. 368.

27. Pool v. Anderson, 116 Ind. 95, citing the text, and reversing the Indiana cases; Kealing v. Vansickle, 74 Ind. 529; Houck v. Graham, 106 Ind. 195; Knopf v. Morel, 111 Ind. 570. See Miller v. Ridgely, 22 Fed. 896; Wade v. Creighton,

Under Negotiable Instrument statute.—The conflict of authority on the effect of a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, or one, not otherwise a party to an instrument, placing thereon his signature in blank before delivery, is settled in those states which have adopted the statute.[28] Such person, under the statute, is subject to the liability of an indorser in favor of the payee and subsequent parties, in the absence of a showing that he intended to be bound in some other capacity.[29]

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25 Oreg. 455, 36 Pac. 289, quoting from and approving the text. The numerous cases on the question of the nature of the liability of a stranger who indorses commercial paper before delivery are brought together and analyzed in a note to Fullerton v. Hill (Kan.), 18 Law. Rep. Annot. 33; Donohoe Banking Co. v. Savings Bank, 13 Wash. 407, 43 Pac. 259, 942, 52 Am. St. Rep. 57, citing the text; Roanoke G. & M. Co. v. Watkins, 41 W. Va. 787, 24 S. E. 612, text cited; Atkinson v. Bennett, 103 Ga. 508, 30 S. E. 599.

28. Appendix, secs. 63, 64.

29. American Trust Co. v. Canevin, 184 Fed. 657; Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886; Bank of Montpelier v. Montpelier Lumber Co., 16 Idaho, 730, 102 Pac. 685; First Nat. Bank of Bickel, 143 Ky. 754, 137 S. W. 79; Bamford v. Boynton, 200 Mass. 560, 86 N. E. 900; Toole v. Crafts, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455; Thorpe v. White, 188 Mass. 333, 74 N. E. 592; Walker v. Dunham, 135 Mo. App. 396, 115 S. W. 1086; Perry Co. v. Taylor Bros., 148 N. C. 362, 62 S. E. 423; Rockfield v. First Nat. Bank, 77 Ohio St. 311, 83 N. E. 393, 14 L. R. A. (N. S.) 842; Gibbs v. Guaraglia, 75 N. J. L. 168, 67 Atl. 81; Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413; Roessle v. Lancaster, 114 N. Y. S. 387, 130 App. Div. 1; Farquhar & Co. v. Higham, 16 N. D. 106, 112 N. W. 557; Lumbermen's Nat. Bank of Portland v. Campbell (Or.), 121 Pac. 427; *In re* Alldred's Estate, 79 Atl. 141, 229 Pa. St. 627; Deahy v. Choquet, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847; Pharr v. Stevens (Tenn.), 139 S. W. 730. See Haddock, Blanchard & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682, holding further, under section 63 of the statute, that one who, before maturity, indorses notes and bills in blank for the accommodation of the maker of the notes and acceptor of the bills, and for the purpose of giving such maker and acceptor credit, is an indorser of such instrument within this definition. See also Kohn v. Consolidation Butter & Egg Co., 63 N. Y. S. 265, 30 Misc. 725. In Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671, it was held, as to one who signed a note in blank on the back before delivery to the payee, that section 121 of the statute does not apply; that section is intended to apply where the person secondarily liable can trace his title on the face of the note and its indorsements through the prior parties to the party whom he seeks to hold, and when such an indorser paid the note he had an action against the maker, but the action was not on the note, as he paid and extinguished it. In Corn v. Levy, 97 App. Div. 48, 89 N. Y. S. 658, the court said that before section 64 (1) was enacted, a third party could not be charged as an indorser of a promissory note before delivery unless the complaint alleged that the indorsement was made in order to give the maker credit with the payee, or that the party indorsed the note as surety for the maker; that the omission of such an allegation was held to be a fatal defect in an action to charge such an indorser,

Section 64 deals only with the liability of an irregular indorser to the payee and subsequent parties, and does not define the rights and liabilities of several such indorsers as between themselves.[30] To take advantage of the statute it must be proved that the instrument was so indorsed before its delivery, and the burden of proof as to this fact is upon the plaintiff.[31] It has been held that, as the statute fixes the status of a party to a negotiable instrument as being that of an indorser, parol evidence is not admissible to vary such status,[32] but the contrary has also been held,[33] though under the latter rule the intention to be bound otherwise than as an indorser is not to be inferred from conduct, or from language that is equivocal, much less from that which is consistent with an intent to assume only the

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and that the necessity of an averment to that effect appears no longer to exist, however, in view of the plain language of this section, which seems to require nothing more than the simple fact of the indorsement to render the defendant *prima facie* liable in such case. It is immaterial whether the signature of an indorser is actually indorsed upon the note before or after it comes to the possession of the payee, if it is a part of the agreement that the note shall be so indorsed to be acceptable. Dowvey v. O'Keefe, 26 R. I. 571, 59 Atl. 929. One who, after signing his firm name to a note and before delivery, placed his name on the back of the note, added to his liability of maker as a partner his several and distinct individual liability as an indorser, making himself liable after due notice of dishonor, and thereby also guaranteeing the signature on the face of the note. National Exch. Bank v. Lubrano, 29 R. I. 64, 68 Atl. 944.

30. Wilson v. Hendee, 74 N. J. L. 640, 66 Atl. 413 (the rights of several indorsers as between themselves are set forth in section 68 of the statute). Persons who simply indorsed a note in blank on the back before it was discounted at the bank were joint indorsers. Williams v. Paintsville Nat. Bank, 137 S. W. 535, 143 Ky. 781.

31. Bender v. Bahr Trucking Co., 129 N. Y. S. 737, 144 App. Div. 742.

32. Baumeister v. Kuntz, 53 Fla. 340, 42 So. 886; Bradley v. Brown, 149 Ill. App. 297; Neosho Milling Co. v. Farmers Co-op. Warehouse Stock Co. (La.), 58 So. 825; Far Rockaway Bank v. Morton, 186 N. Y. 484, 79 N. E. 706. In First Nat. Bank v. Bickel, 143 Ky. 754, 137 S. W. 790, the court said that it may be shown by parol evidence under section 64 whether a person is an accommodation indorser or not, and it may be shown under section 68 as between indorsers what their liability is, but this principle cannot be extended so as to impose upon the indorser a different obligation than the law ascribes to the writing which he executes.

33. Merchants' Bank v. Busby (Tenn.), 113 S. W. 390, the court saying that the real contract can be shown as fully as it could before the passage of the Negotiable Instrument Act, and, as between the immediate parties, it is not necessary that the indorsement should be accompanied by appropriate words in writing, showing an intention to be bound in some other capacity, and that as to innocent holders for value, the rule would be otherwise, and the statute would apply.

secondary liability of an indorser and not the primary liability of a maker.[34]

Under the provision of the statute that if the instrument is payable to the order of a third person the party placing thereon his signature in blank before delivery is liable as indorser, when such person has signed for the accommodation of the maker and before the payee indorsed, defenses as to legality or consideration are open to him as they would be in a suit against the maker.[35]

§ **714a. English cases.**—In England such an irregular indorsement of a bill is considered to render the party liable as a new drawer,[36] but as said by Littledale, J., "Supposing the indorser of a bill to be strictly in the situation of a drawer, it does not follow that the indorser of a note is a maker," and it was accordingly held that an irregular indorser before the payee could not be held as a maker, but must be sued on his collateral undertaking.[37] A learned writer (Prof. Ames),[38] commenting on the English cases, says: "In England it would seem that the anomalous indorser is not liable in any capacity, not as indorser,[39] nor as guarantor,[40] or as maker." [41] This result he justly styles deplorable, but considers it less open to criticism than the arbitrary presumption that such party assumed a primary liability; and we believe that confusion will continue until the views which we diffidently submit are taken and the irregular indorser is regarded in the light of a drawer and as first indorser: a view which we have seen already obtains in New York in some cases, and which deserves further extension.

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34. McDonald v. Luckenbach, 170 Fed. 434, holding that when the officer and a director of a corporation indorsed a corporate note, their liability is that of indorsers and not makers, in the absence of any evidence that it was understood that they were to be bound in some other capacity.

35. Leonard v. Draper, 187 Mass. 536, 73 N. E. 644.

36. Penny v. Innes, 1 Cromp., M. & R. 439; Miller v. Ridgely, 22 Fed. 896, citing the text.

37. Gwinnell v. Herbert, 5 Ad. & El. 436. See on this question Wilders v. Stevens, 15 M. & W. 208 (a bill); Lecaan v. Kukman, 6 Jurist (N. S.), 17 (a note); Mathews v. Bloxsome, 33 L. J. R. 209 (a bill).

38. Ames on Bills and Notes, vol. II, p. 839.

39. Lecaan v. Kukman, 6 Jurist (N. S.), 17; 1 Ames on Bills and Notes, 242.

40. Lecaan v. Kukman, 6 Jurist (N. S.), 17, Byles, J., saying: "He is not liable at common law as a surety because of the Statute of Frauds, and he is not liable by the law merchant because he has not followed the law merchant." 1 Ames on Bills and Notes, 243.

41. Gwinnell v. Herbert, 5 Ad. & El. 436; 1 Ames on Bills and Notes, 236.

§ 715. Effect of parol evidence; what determines the character of party's liability.—What parol evidence determines the liability of the person signing before the payee is also a matter upon which opinion is diverse. Many authorities take the ground that when it appears that the note was intended for the payee, or that the name was placed upon the back of the note before its delivery to the payee, that circumstance fixes the liability contracted as that of joint maker,[42] and excludes further inquiry. But this does not seem to us sufficient.[43] Others regard that circumstance as only determining that he cannot be regarded as an indorser, because he could not have had title to the note as indorsee, and as leaving it open for further inquiry whether he intended to be a joint maker or a guarantor.[44] In some cases it is held that he will be presumed to have signed for the payee's accommodation.[45] In Kentucky it has been held that

42. Good v. Martin, 95 U. S. (5 Otto) 94; Randle v. Davis Coal Co., 15 App. D. C. 357; Chandler & Taylor Co. v. Norwood, 14 App. D. C. 357; Bigelow v. Colton, 13 Gray, 309; Lake v. Stetson, 13 Gray, 310; Essex Co. v. Edmunds, 12 Gray, 273; Pearson v. Stoddard, 9 Gray, 199; Chaddock v. Van Ness, 35 N. J. L. 518; Conn. v. Powell, 11 Gratt. 828; See § 713*a*, note. In Way v. Butterworth, 108 Mass. 512, Ames, J., said: "If A. F. Butterworth signed his name upon the back of the note at the time when it was made, or at any time before it was delivered as a valid and binding contract to Manuel, he must be considered as an original promisor, and parol evidence would not be admissible to show that such was not his real contract. Union Bank v. Willis, 8 Metc. (Mass.) 504; Brown v. Butler, 99 Mass. 179. In favor of a *bona fide* holder, it is presumed that the promise of such an indorser was made at the same time with the note. This, however, is not a conclusive presumption. This defendant would have a right to show that the fact was otherwise, and that his contract was not made until after the note had taken effect as a binding contract; and if he should succeed in proving it to be so, he might either not be chargeable at all, or chargeable as surety or guarantor, according to the facts proved. Wright v. Morse, 9 Gray, 337. If he placed his name in blank upon the back of the note after it was given, he could not be held as an original promisor. Mecorney v. Stanley, 8 Cush. 85; Courtney v. Doyle, 10 Allen, 122. Upon the report, we cannot say that there was no evidence to rebut the presumption that his name was placed there as a part of the original transaction. It was wholly a question of fact, to be decided by the jury. It was, therefore, a mistake on the part of the court to rule that, as a matter of law, the defendant was liable as a joint promisor, and that the plaintiff was entitled to a verdict on that ground against this defendant. Rey v. Simpson, 22 How. 341. Under the declaration, there is no occasion to consider whether he could be held liable as a guarantor."

43. Price v. Lavender, 33 Ala. 390; Hall v. Newcomb, 7 Hill, 416; Schneider v. Schiffman, 20 Mo. 571; Irish v. Cutter, 31 Me. 536; Kealing v. Vansickle, 74 Ind. 529, citing the text.

44. Greenough v. Smead, 3 Ohio St. 415 (1854).

45. Barto v. Schenck, 4 Casey, 447; Schollenberger v. Nehf, 4 Casey, 189.

proof of intention is confined to the question whether the party designed to be guarantor or indorser.[46]

Others consider that if the note was not intended for the payee, that then such party shall be regarded as an indorser.[47]

If the name were signed subsequent to the making of the note, and as an independent transaction, the signer, it has been held, is a guarantor.[48] And this is the settled doctrine of the United States Supreme Court; but with the qualification that if the note were intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers.[49] If the note be overdue at the time the third party puts his name upon it, it has been held that he would then be held as guarantor.[50]

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46. Kellogg v. Dunn, 2 Metc. (Ky.) 215. See also Holz v. Woodside Brewing Co., 83 Hun, 192, 31 N. Y. Supp. 397; Roanoke G. & M. Co. v. Watkins, 41 W. Va. 787, 24 S. E. 612.

47. Greenough v. Smead, 3 Ohio St. 415.

48. Good v. Martin, 95 U. S. (5 Otto) 95 (1877); Benthall v. Judkins, 13 Metc. (Mass.) 265; Irish v. Cutter, 31 Me. 536. In Rey v. Simpson, 22 How. 241, the United States Supreme Court said: "When a promissory note, made payable to a particular person or order, as in this case, is first indorsed by a third person, such third person is held to be an original promisor, guarantor, or indorser, according to the nature of the transaction, and the understanding of the parties at the time the transaction took place.

"I. If he put his name at the back of the note at the time it was made, as surety for the maker and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note.

"II. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor.

"III. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would be clearly entitled to the privileges which belong to such indorsers." Adams v. Huggins, 73 Mo. App. 140; Kinsel v. Wieland, 38 Colo. 296, 88 Pac. 153.

49. Rey v. Simpson, 22 How. 241.

50. Rivers v. Thomas, 1 Lea, 649. But see Rodocanachi v. Buttrick, 125 Mass. 134, where such party was held under the circumstances an original promisor.

§ 716. When the note is sued upon by the payee it is held that the idea of the party before him being bound as an indorser is excluded.[51] But this doctrine does not seem to us correct. The indorsement, it is true, is an irregular one; but it is quite similar to a bill drawn by the indorser on the maker, and to follow that analogy in all regards seems to us the simplest and most reasonable solution of the question. And there are a number of cases which regard such a party's liability as *prima facie* that of an indorser.[52] Where a note is payable to the maker's own order, it can have no validity until it is indorsed by him, and in such a case the party signing his name on the note while it is unindorsed by the payee is presumed to contemplate that the payee is to sign before him, and that when the note takes effect he will himself appear as second indorser. All persons taking such a note are apprised of the apparent obligations of the parties, and if they rely on any other, they must ascertain and prove them.[53]

If any person whose name is upon a negotiable instrument describes himself as surety, guarantor, or indorser, he will thus notify all persons who may come into possession of it, of the character in which he binds himself, and as it is a written contract, no parol evidence will be permitted to qualify or vary it.[54]

If a note in the maker's hands payable to his own order be indorsed for his accommodation, and he substitute the indorser's name as payee, it is a material alteration.[55]

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51. Quin v. Sterne, 26 Ga. 223; Brinkley v. Boyd, 9 Heisk. 149; Carpenter v. McLaughlin, 12 R. I. 270; Mathewson v. Sprague, 1 R. I. 8; Perkins v. Barstow, 6 R. I. 595; Manufacturers' Bank v. Follett, 11 R. I. 92.

52. Price v. Lavender, 38 Ala. 390; Wells v. Jackson, 6 Blackf. 43; Vore v. Hurst, 13 Ind. 554; Sill v. Leslie, 16 Ind. 236; Dale v. Moffit, 22 Ind. 114; Roberts v. Masters, 40 Ind. 462; Comparree v. Brockway, 11 Humphr. 358; Clonston v. Barbiere, 4 Sneed, 338; Jennings v. Thomas, 13 Smedes & M. 617; Kamm v. Holland, 2 Oreg. 59; Cornett v. Hafer (Kan.), 22 Pac. 1015.

53. Kayser v. Hull, 85 Ill. 513; Blatchford v. Milliken, 35 Ill. 434. See *ante*, § 707*a*.

54. Tinker v. McCauley, 3 Mich. 188 (overruling Higgins v. Watson, 1 Mich. 428); Whitehouse v. Hanson, 42 N. H. 9.

55. Stoddard v. Penniman, 108 Mass. 366.

SECTION V

HOW FAR PAROL EVIDENCE IS APPLICABLE TO ASCERTAINED INDORSEMENTS

§ 717. It is a general principle of law that parol evidence is inadmissible to contradict or vary the terms of a valid written contract,[56] but while it is conceded on all sides to be applicable to all contracts written out in full, it has been considered by some authorities not to extend to those which are raised from implication by operation of law—such as indorsements in blank.[57] And this latter view has been

56. Greenleaf on Evidence, §§ 277, 281, 282; Armour Bros. v. Riley County Bank, 30 Kan. 165, citing the text.

57. Doom *et al.* v. Sherwin, 20 Colo. 234, 38 Pac. 56; McCallum v. Driggs, 35 Fla. 285, 17 So. 470, approving text; Patten v. Pearson, 57 Me. 428; Patten v. Pearson, 55 Me. 39; Kling v. Kehoe, 58 N. J. L. 529, 33 Atl. 946; Johnson v. Martinus, 4 Halst. 144 (but see Chaddock v. Van Ness, 35 N. J. L. 521, and Johnson v. Ramsey, 42 N. J. L. (14 Vroom) where Johnson v. Martinus is criticised and overruled); Jaster v. Currie, 69 Nebr. 4, 94 N. W. 995, reversed on other grounds 198 U. S. 144, 25 Sup. Ct. 614, 49 L. Ed. 988; United States Nat. Bank v. Geer, 55 Nebr. 462, 75 N. W. 1088, 70 Am. St. Rep. 390; Smith v. Morrill, 54 Me. 48; Corbett v. Fetzer, 47 Nebr. 269, 66 N. W. 417; True v. Bullard, 45 Nebr. 409, 63 N. W. 824; Commissioners of Iredell v. Wasson, 82 N. C. 308; Hill v. Shields, 81 N. C. 250 (but as between remote parties, see *ante*, S. 699); Mendenhall v. Davis, 72 N. C. 150; Davis v. Morgan, 64 N. C. 381; Breneman v. Furness, 90 Pa. St. 186; Susquehanna Bank v. Evans, 4 Wash. C. C. 480; 2 Parsons on Notes and Bills, 519. In Roads v. Webb, 91 Me. 414, 40 Atl. 128, the Supreme Court said: "Where a note negotiable on its face is indorsed in blank by the payee, the law implies an agreement by the payee, in case the note is not paid at maturity, on proper demand and notice that the indorser will pay it to the holder. But the implied contract is only *prima facie*. It may be rebutted. In a suit by the indorsee against the indorser, the latter may show that the understanding and agreement between the parties was that the indorser should not be holden. The law does not imply a contract where an express one has been made. He may prove the express contract by parol evidence, or it may satisfactorily appear from the transaction itself." In Ross v. Espy, 66 Pa. St. 487, Agnew, J., said: "The contract of indorsement is one implied by law for the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes proof to alter or vary the terms of an express agreement." In Goodrich v. Stanton, 71 Conn. 418, 42 Atl. 47, the defendant first indorsed a note over to Goodrich "without recourse"— Goodrich refused to accept the note with such an indorsement, and thereupon Stanton wrote his name again, immediately under his first indorsement, and it was held in a suit by Goodrich against Stanton that parol evidence was admissible to explain the exact nature of Stanton's undertaking. In the case of Fisk v. Reser,

adopted by Byles, in his treatise on Bills, upon the authority of an English case, which does not fully bear out his interpretation of it.[58] It is true that there are some ambiguous positions in which parties' names appear on the back of negotiable instruments, which justify the introduction of parol evidence to ascertain whether or not they are indorsers. But when it appears from an inspection of the paper that the party is an indorser, there seems to us no just ground for the distinction taken between the implied contract arising from his mere name thereon written and contracts written out *in extenso*. The indorsement seldom consists of anything more than the indorser's signature; but if the agreement imported by that signature were written over it in full, the undertaking of the indorser would not be more clearly defined than it is by the signature itself. Its presence and position upon the instrument are as plain a manifestation of the

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19 Colo. 88, 34 Pac. 572, it was held: "Parol proof is admissible to show the circumstances under which persons *other than the payee*, and apparently not otherwise connected with a promissory note, have indorsed the same." In the following cases it was held that parol evidence is admissible to show that an indorsement was made simply to pass title and not to create liability in the indorser. Bryan v. Windsor, 99 Ga. 176, 25 S. E. 268. Mendenhall v. Davis, 72 N. C. 150. See *post*, § 720*a*, note 18. In Utica City Nat. Bank v. Tallman, 71 N. Y. S. 861, 63 App. Div. 480, affirmed 172 N. Y. 642, 65 N. E. 1123, it was held that parol evidence may be received to show a conditional indorsement and delivery of a note, as that the indorsee will not be held personally liable, on the principle that, as between the original parties, a conditional delivery, as well as a want of consideration may be proved by parol. It was so held in True v. Bullard, 45 Nebr. 409, 63 N. W. 824, as between the parties. But in Franklin v. Browning, 117 Fed. 226, it was held that the indorser cannot show a parol agreement that he should not be liable upon his indorsements unless plaintiff had diligently protected an alleged lien and neglected no means of collecting the notes through such lien.

58. Pike v. Street, 1 Moody & M. 226 (22 Eng. C. L.). In Byles on Bills (Sharswood's ed.) [*147], 267, it is said: "The contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser, and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place, or of the trade from the course of dealing between the parties or from their relative situation." Kidson v. Dilworth, 5 Price, 564; Castrique v. Battigieg, 10 Moore P. C. C. 94. See Bruce v. Wright, 3 Hun, 548, where it is held that an agreement of an indorsee not to sue his indorser is admissible in evidence, and is a good defense, and that the contract between indorser and indorsee consists partly in the written indorsement, partly in the delivery of the paper to the indorsee, and partly of the actual understanding and intention with which delivery was made.

intention of the party as if it were set forth in express words, and parol evidence should not be admitted to vary or contradict it.[59]

§ 718. For, in fact, though there be nothing but the indorser's signature, the indorser's contract is as fully expressed as that of the drawer of a bill payable to bearer. He is a new drawer on the drawee, if it be a bill; a drawer on the maker, if it be a note; and the instrument itself, with his name signed as indorser, constitutes his written contract, from which he can only be absolved by failure of demand or notice, or other delinquency of the holder. The following general view may, therefore, be stated, to wit: that in an action by immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer against him.[60] We have never seen this rule laid down in these words, and the cases exhibit a painful contrariety of opinion.

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59. Citizens' Bank v. Jones, 121 Cal. 30, 53 Pac. 354; Torbert v. Montague, 38 Colo. 325, 87 Pac. 1145; Hately v. Pike, 162 Ill. 241, 44 N. E. 441, 53 Am. St. Rep. 304, quoting text; Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48; Johnson v. Glover, 121 Ill. 286; Moorman v. Wood, 117 Ind. 148; Aurora Nat. Bank v. Dils, 18 Ind. App. 319, 48 N. E. 19; Cross v. Hollister, 47 Kan. 652, 28 Pac. 693; Doolittle v. Ferry, 20 Kan. 230; Holmes v. First Nat. Bank, 38 Nebr. 326, 56 N. W. 1011, 41 Am. St. Rep. 733; Washington Sav. Bank v. Ferguson, 43 App. Div. 74, 59 N. Y. S. 295; Farr v. Ricker, 46 Ohio, 265; Smith v. Caro, 9 Oreg. 280; Barringer v. Wilson, 97 Tex. 583, 80 S. W. 994. The contract created by indorsement and delivery is a contract in writing, and is not open to contradiction or susceptible of annulment, by a separate contemporaneous agreement, though likewise in writing unless, at least, the terms of the latter plainly disclose that the parties so intended. Crilly v. Gallice, 148 Fed. 835. In an action against the indorser of a note, the indorser cannot show that when he indorsed the note he did so because a third person had told him that the plaintiff had requested his indorsement as an accommodation to them, when there is nothing to show that such third person was acting for the plaintiff. Ott v. Seward, 221 Pa. St. 630, 70 Atl. 882. In United States Wringer Co. v. Cooney, 214 Ill. 520, 73 N. E. 803, it was held that the fact that the payee of a note indorsed a check in blank which recited, as drawn, that it was in payment of such note, the payee may testify to the facts and conditions under which the check was received by him and indorsed. In Randle v. Davis Coal Co., 15 App. D. C. 357, the court said that there is a well drawn distinction between the case where an instrument has been made or indorsed and delivered on condition which has not been fulfilled, and the case where such instrument has been delivered without such condition. The admission of parol evidence is not to show any modification, contradiction, or alteration of the written agreement, but that it never became operative, and that its obligation never commenced.

60. Approved in Doolittle v. Ferry, 20 Kan. 230, Brewer, J.; McPherson v. Weston (Cal.), 24 Pac. 734, citing the text.

But it goes toward reconciling many which have been deemed at variance, and embodies the true principle, as we conceive, of the subject. Many cases speak of an indorsement in blank as only an implied contract. This misconception often gives rise to error. It is expressed in the body of the instrument, and in the case of a bill the only difference between drawer and indorser, as a general rule, is that the drawer is an originating drawer, signing usually on the face, and the indorser, a transferring drawer, signing on the back.

§ 719. Instances of exclusion of parol evidence between indorser and indorsee.—Accordingly, the indorser cannot show by parol evidence against his indorsee that it was agreed that he should not be liable, and that his indorsement was "without recourse" on him.[61] If so intended, it should be so expressed, and a drawer might as well offer evidence that the holder agreed to look only to the drawee. Nor could he show that his liability, according to agreement, was to be that of a guarantor,[62] or a surety,[63] or a maker,[64] or that his signature

61. Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647; affirming Martin v. Cole, 3 Colo. 113, and approving text; Brown v. Spofford, 95 U. S. (5 Otto) 483; Bank of the United States v. Dunn, 6 Pet. 51; Randle v. Davis Coal Co., 15 App. D. C. 357; Preston v. Ellington, 74 Ala. 133; Day v. Thompson, 65 Ala. 269; Charles v. Denis, 42 Wis. 56; Dunn v. Ghost, 5 Colo. 134, citing the text; Dale v. Gear, 38 Conn. 15, 39 Conn. 89; Courtney v. Hogan, 93 Ill. 101; Skelton v. Dustin, 92 Ill. 49; Jones v. Albee, 70 Ill. 37; Lee v. Pile, 37 Ind. 107; Campbell v. Robins, 29 Ind. 271; Wilson v. Black, 6 Blackf. 509; Odam v. Beard, 1 Black. 191; Geneser v. Winser, 69 Iowa, 119; Harrison v. McKim, 18 Iowa, 485; Doolittle v. Ferry, 20 Kan. 230; Crocker v. Getchell, 23 Me. 392; Knoblauch v. Foglesong, 38 Minn. 352; Collom v. Bixby, 33 Minn. 50; Lewis v. Dunlap, 72 Mo. 178; Rodney v. Wilson, 67 Mo. 123; Barry v. Morse, 3 N. H. 132; Bank of Albion v. Smith, 27

62. Hamburger v. Miller, 48 Md. 327 (*semble*); Howe v. Merrill, 5 Cush. 80; Dibble v. Duncan, 2 McLean, 353; Fuller v. McDonald, 8 Greenl. 213. *Contra*, Taylor v. French, 2 Lea, 257; Newell v. Williams, 5 Sneed, 209, McKinney, J.: "There is no question but that an indorser in blank may by his agreement enlarge or vary the liability created by law." Kingsland v. Koeppe, 137 Ill. 344, 28 N. E. 48. In Bradley v. Brown, 146 Ill. App. 297, the court said that while parol evidence may be competent to show that an indorsement was not intended as a contract of guaranty, yet such evidence is not competent to show that the contract in question was not absolute but conditional.

63. Hauer v. Patterson, 84 Pa. St. 275; Barnard v. Guslin, 23 Minn. 194.

64. Finley v. Green, 85 Ill. 536. In Culberton v. Wilcox, 11 Wash. 522, 39 Pac. 954, held, that parol evidence is admissible for the purpose of showing that one who appears upon the face of a note as a maker is in fact a surety, and also for the purpose of showing knowledge of the holder that such signer was merely a surety. Tacoma Mill Co. v. Sherwood, 11 Wash. 492, 39 Pac. 977.

was written under that of the payee, merely in order to identify him;[65] nor that it was stipulated that he was to be liable only when certain estates were sold;[66] nor that the paper was only to be negotiated at a certain bank;[67] nor that it was to be renewed for two months;[68] nor that the liability was otherwise conditional or different from what the indorsement imported.[69]

Under Negotiable Instrument statute.—Under the provision as to the warranty of an indorsement,[70] it has been held that upon an unqualified indorsement, the indorser cannot be allowed to prove by parol an agreement that he should be fully advised by the plaintiff as to the conduct of the maker of the note regarding payment of instalments, and as affecting the value of the mortgage security,[71] but under another section of the statute it has been held that where a note was signed as an indorser in the name of a trustee of a religious congregation, parol evidence may be received to show whether the indorsement was understood between him and the payee to be an indorsement in his representative capacity pledging only the credit of the property which he held in trust, and if so whether an indorsee of the payee accepted the note with notice of that fact.[72]

Barb. 489; Cresap v. Manor, 63 Tex. 488, citing the text; Wizig v. Beisert (Tex. Civ. App.), 120 S. W. 954; Woodward v. Foster, 18 Gratt. 205; Eaton v. McMahon, 42 Wis. 487 (disapproving *obiter dictum* in Murdock v. Aradt, 1 Pin. 70); Hoare v. Graham, 3 Campb. 57; Fuller v. McDonald, 8 Greenl. 213; Benjamin's Chalmers' Digest, 63; Abbott's Trial Evidence, 415. See *ante*, §§ 699, 717. In Skinner v. Church, 36 Iowa, 91, held such evidence is admissible between immediate parties, but not others. In Georgia, held under the Code admissible as between immediate parties: Lynch v. Goldsmith, 64 Ga. 42. Held admissible in Pennsylvania. Cake v. Pottsville Bank, 116 Pa. St. 264. An indorser of a note may show that the holder agreed that he would release the indorser from liability if the indorser would surrender to the maker certain security held by the indorser. Hirsch v. Kaufman (R. I.), 81 Atl. 66.

65. Prescott Bank v. Caverly, 7 Gray, 217; Stack v. Beach, 74 Ind. 571; Thompson v. McKee, 5 Dak. Ter. 175.

66. Free v. Hawkins, 8 Taunt. 92, Holt's Rep. 550, 1 Moore, 535.

67. Stubbs v. Goodall, 4 Ga. 106.

68. Hoare v. Graham, 3 Campb. 57; United States Nat. Bank v. Geer, 55 Nebr. 462, 75 N. W. 1088, 70 Am. St. Rep. 390.

69. Smythe v. Scott, 106 Ind. 248, citing the text; Finley v. Green, 85 Ill. 535; Brewer v. Boynton, 71 Mich. 255; Kulenkamp v. Groff, 71 Mich. 676; United States Wind Engine & Pump Co. v. Simonton, 84 Wis. 545, 54 N. W. 1021.

70. Appendix, sec. 66.

71. Hopkins v. Merrill, 79 Conn. 626, 66 Atl. 174.

72. American Trust Co. v. Canevin, 184 Fed. 657, the court saying that it appeared that the trustee had authority to bind the property.

§ 719a. Whether contemporaneous waiver of demand and notice may be shown by parol evidence.—It has also been held that it cannot be shown that the indorser agreed at the time of indorsement to be absolutely liable without demand and notice; [73] but we concur with the authorities which sustain his freedom to waive his right to demand and notice at any time.[74] He merely relieves the indorsee of the ordinary duties of diligence; of the necessity of certain acts to be done in future, which only impliedly are required, and which cease to be exacted by diligence when waived in advance. A written agreement making the indorsement "without recourse" might be shown, as between the parties; [75] and also a written agreement to exhaust the mortgage before proceeding against the indorser.[76]

§ 720. What parol evidence is admissible between indorser and indorsee.—The language of the rule implies its limitation, for it does not extend to exclude evidence offered to show want or failure of consideration, or to impeach the original or present validity of the indorsement on the ground of fraud.[77] There are three classes of cases in which evidence for this purpose is admissible, and it will be seen that it does not contradict or vary the contract imported by the indorsement, but impeaches it as a valid indorsement to the extent claimed by the indorsee.

§ 720a. Evidence as to consideration.—Thus, *firstly*, it may be shown that the indorsement was without consideration, as for instance that it was for the indorsee's accommodation,[78] or merely to

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73. Bank of Albion v. Smith, 27 Barb. 489; Barry v. Morse, 3 N. H. 132. See Free v. Hawkins, 3 Campb. 57, which is quoted for this doctrine, but is not clearly in support of it, by any means. Story on Notes, § 148; 2 Parsons on Notes and Bills, 520, note. See § 1093.

74. See chapter on Excuses for Want of Presentment and Notice, vol. II, § 1903.

75. Davis v. Brown, 94 U. S. (4 Otto) 423.

76. Planters' Bank v. Houser, 57 Ga. 140.

77. Kirkham v. Boston, 67 Ill. 599; Kulenkamp v. Groff, 71 Mich. 676.

78. Breneman v. Furniss, 90 Pa. St. 186; Hamburger v. Miller, 48 Md. 325; Martin v. Marshall (Vt.), 13 Atl. 420. In Lovejoy v. Citizens' Bank, 23 Kan. 331, the president of a bank was payee of note held officially in transaction for the bank; and he, in accordance with custom of the business, indorsed it, without any understanding, agreement, or design to be bound. Held, that facts might be shown, and that indorsement was without consideration. Woodward v. Foster, 18 Gratt. 205, Joynes, J., saying: "When the legal import of a contract is clear and definite, the intention of the parties is for all substantial purposes as distinctly and as fully expressed as if they had written out in words what the law

transfer the legal title to the indorsee, he being in fact the owner of the paper;[79] or that it was indorsed for collection, where the form of indorsement does not show that fact,[80] or that it was indorsed

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implies. It is immaterial how much or how little is expressed in words if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an indorsement in blank, yet, where the law attaches to it a clear, unequivocal, and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same, in such cases, as if the terms implied by law had been expressed. * * * In Pike v. Street, 1 Moody & M. 226 (22 Eng. C. L. 299), tried before Lord Tenterden at *Nisi Prius*, the action was brought by the indorsee of a bill of exchange against his immediate indorser. The defense was, that though the plaintiff gave value to the defendant, it was upon a verbal agreement that he should sue the acceptor only, and that he should not sue the defendant as indorser. Lord Tenterden held that such an agreement, if proved, would be a good bar to the action. This case was cited by counsel in Foster v. Jolly, 1 Cromp., M. & R. 703, as an authority to show that evidence of a contemporaneous parol agreement might be given to vary the written contract of an indorser. But Parke, B., said that that case fell within the cases in which the consideration is contradicted; the evidence went to show that there was no consideration as between the plaintiff and the defendant. Whether this observation was or was not justified by the facts of the case, it indicates the ground upon which alone, in the opinion of a judge of the greatest learning and eminence, the opinion of Lord Tenterden can be sustained." Case v. Spaulding, 24 Conn. 578; Dale v. Gear, 38 Conn. 15; Smith v. Carter, 25 Wis. 283; Denton v. Peters, L. R., 5 Q. B. 475; Chaddock v. Van Ness, 35 N. J. L. 520; Lewis v. Dunlap, 72 Mo. 178, Sheedy v. Streeter, 70 Mo. 679.

79. Johnston v. Schnabaum, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838, 126 Am. St. Rep. 1082; Abrahams v. Mitchell, 112 Pa. St. 232; Galceran v. Noble, 66 Ga. 367. See *ante*, § 717, note 98. Where a cashier of a bank, acting as the agent of a depositor in making a loan of money, took a note from the borrower payable to the order of the bank and forthwith indorsed and delivered it to the depositor, such indorsement was only a means of transferring the legal title to the lender, was only for the accommodation of the lender, and can afford no right of recovery against the bank. First Nat. Bank of Duncan v. Anderson, 141 Fed. 926, reversing 5 Ind. Ter. 115, 82 S. W. 692. In an action against an indorser, he may be allowed to testify that the indorsement was not made to transfer title to the note but for the surrender and cancellation of the note, as such evidence does not contradict or vary the terms nor add new terms. Bradley v. Bush. 11 Cal. App. 287, 104 Pac. 845. An indorser may show that he indorsed under an understanding, made at the time, that this was done merely to pass title to the indorsee and not as a sale of the note and a guaranty of its payment, when the indorser was not interested in the note and *there was an element of fraud in procuring the indorsement*. First Nat. Bank v. Remman, 93 Ark. 376, 125 S. W. 443.

80. Goette v. Sutton, 128 Ga. 179, 57 S. E. 308; Hudson v. Wolcott, 39 Ohio St. 618; McGuire v. Allen, 108 Mo. 403, 18 S. W. 282.

merely to perfect an arrangement between the maker and indorsee.[81] And where several and successive indorsers agreed to be liable as joint indorsers, and cosureties, an extension of this principle would admit the facts to be shown, as they reveal the extent and nature of the consideration.[82]

§ 721. **Evidence of special trust.**—*Secondly,* it might be shown that the indorsement was upon trust for some special purpose,[83] as from a principal to an agent, to enable him to use the instrument or the money in a particular way;[84] or for collection merely;[85] or as an escrow upon an express condition that has not been complied with.[86] In such cases the indorsement is really without a legal consideration; and the evidence does not vary its effect as to a third person, but only discloses relations of trust which might be shown against the drawer of a bill, or other party with whom the holder is in privity. Indeed, such evidence is competent even between parties to deeds absolute on their face. In Louisiana, where a creditor at

81. National Bank v. Brush, 10 Biss. (C. Ct.) 188.

82. *Ante,* § 703; Wharton on Evidence, §§ 1059, 1060; Mansfield v. Edwards, 136 Mass. 15; Sloan v. Gibbes, 56 S. C. 480, 35 S. E. 408, 76 Am. St. Rep. 559, citing text.

83. Titcomb v. Powers (Me.), 80 Atl. 851.

84. Pollock v. Bradbury, 8 Moore P. C. 227; Dale v. Gear, 38 Conn. 15; Chaddock v. Van Ness, 35 N. J. L. 520; Scammon v. Adams, 11 Ill. 578; Bell v. Lord Ingestre, 12 Q. B. 317 (64 Eng. C. L.); Adams v. Jones, 12 Ad. & El. 455; Hamburger v. Miller, 48 Md. 325. (As to rule in Georgia under Code, see Hardy v. White, 60 Ga. 455.) Avery v. Miller, 86 Ala. 499, citing the text; McCathern v. Bell, 93 Ga. 290, 20 S. E. 315; McGuire v. Allen, 108 Mo. 403, 18 S. W. 282, citing the text.

85. Johnson v. Schnabaum, 86 Ark. 82, 109 S. W. 1163, 17 L. R. A. (N. S.) 838, 126 Am. St. Rep. 1082, quoting text; Lawrence v. Stonington Bank, 6 Conn. 521; Dale v. Gear, 38 Conn. 15, 39 Conn. 89; Smith v. Childress, 27 Ark. 328; Ricketts v. Pendleton, 14 Md. 320; Hill v. Ely, 5 Serg. & R. 363; Manley v. Boycot, 2 El. & Bl. 46 (75 Eng. C. L.). See also McWhirt v. McKee, 6 Kan. 412; Hamburger v. Miller, 48 Md. 325; Lewis v. Dunlap, 72 Mo. 178. See Martin v. Cole, 3 Colo. 114, Stone, J., saying that the offer to prove an indorsement in blank was "for collection," for the indorser's benefit, was "an attempt to make a general indorsement a restrictive indorsement." This is to be distinguished from an indorsement for collection for benefit of indorser; and in the last edition of this work the purport of this case seems to have been misunderstood by the author. See *ante,* § 719, and note; Whitney v. Spearman, 50 Nebr. 617, 70 N. W. 240.

86. Chaddock v. Van Ness, 35 N. J. L. 520; Ricketts v. Pendleton, 14 Md. 320; Goggerty v. Cuthbert, 2 B. & P. N. R. 170; Wallis v. Little, 14 C. B. 369; Bell v. Lord Ingestre, 12 Q. B. 317 (64 Eng. C. L.); Robinson v. Little, 9 Q. B. 202 (*semble*).

maturity of a note wrote his name upon it as a receipt, it was held admissible to show the fact as between immediate parties;[87] and the apparent indorsement being without consideration, this decision is within the views of the text. It might also be shown that the indorsement was made as collateral security for a debt, the evidence going to show the nature and extent of the consideration.[88] It has been held that it cannot be shown by parol evidence that an indorsement "for collection" was absolute, its very terms importing the restriction.[89]

§ 722. Evidence of fraudulent representation.—*Thirdly*, it may be shown that there were representations made at the time of the indorsement, which were relied on by the indorser, and which, if his liability were enforced, would operate as a fraud upon him.[90] In Pennsylvania, where defendant purchased coffee of plaintiff, upon an agreement that the latter should receive certain notes in payment, without defendant assuming any responsibility, the latter handed plaintiff the notes, when he said, "Hill, you must indorse those notes." Defendant replied, "That is not our understanding." The plaintiff rejoined, "They are made payable to you; how will you convey them to me? You must indorse them, in order that I may collect them." Defendant then said, "I indorse them; but, remember, I am not to be held responsible for their payment." The court said: "The evidence went to prove a direct fraud in obtaining the indorsements, or their perversion to a use never intended—a fraudulent purpose." [91]

87. Cole v. Smith, 29 La. Ann. 551; Corbett v. Fetzer, 47 Nebr. 269, 66 N. W. 417.

88. Hazzard v. Duke, 64 Ind. 220. See § 820 *et seq.*

89. Smith v. Bayer, 46 Oreg. 143, 79 Pac. 497, 114 Am. St. Rep. 858; Third Nat. Bank v. Clark, 23 Minn. 263; Rock County Nat. Bank v. Hollister, 21 Minn. 385.

90. Kirkham v. Boston, 67 Ill. 599; Hamburger v. Miller, 48 Md. 325; Lewis v. Dunlap, 72 Mo. 178; McPherson v. Weston (Cal.), 24 Pac. 734, citing the text. In an action brought against an indorser of a note, the indorsee may show that his indorsement and sale of the note were procured for part only of its value by the indorsee under fraudulent representations that the maker was insolvent and that the defendant would not be liable on his indorsement. Nethercutt v. Hopkins, 38 Wash. 577, 80 Pac. 798.

91. Hill v. Ely, 5 Serg. & R. 363; Breneman v. Furniss, 90 Pa. St. 186; Kirkham v. Boston, 67 Ill. 599; Hudson v. Wolcott, 39 Ohio St. 618; Shaw v. Stein, 44 N. W. 419. In New York it has been held that if there be a written or verbal agreement not to sue the indorser, it may be shown. Bruce v. Wright, 3 Hun, 548; Benton v. Martin, 52 N. Y. 570; Wilcox v. Tenant, 13 Tex. Civ. App. 220, 35 S. W. 865; Allin v. Williams, 97 Cal. 403, 32 Pac. 441.

This case is distinguished from those in which a mere agreement that the indorser shall not be responsible is offered to be shown, no circumstances which would otherwise render the transactions fraudulent or showing a secret trust, appearing.[92] So, evidence has been held admissible to show that the indorsement was made on the indorsee's assurance that it was merely as a receipt.[93] And in a case (going too far, as we think) it has been held that one of two accommodation indorsers might show that only one was to be liable, and his own indorsement was required merely for formal compliance with a rule of the bank.[94]

§ **723.** The cases prohibiting the introduction of parol evidence to vary the contract implied in an indorsement are in direct conflict with others; but there is no conflict between them and the cases which permit such evidence in order to ascertain the circumstances under which the indorsement was made, and whether or not it was accompanied by a transfer in the usual course of business. It would be useless to attempt to reconcile the authorities on the subject; but the true line of distinction which should be observed is this: when it appears that the indorsement was accompanied by a transfer for value, and is unimpeached by fraud, it imports a distinct liability, which cannot be varied; but when several indorse for accommodation, or the indorsement was made for any of the peculiar purposes which we have already described, extrinsic evidence is admissible to show them.

A parol agreement between the first and second indorser of a note by which the latter undertakes to pay the note, provided the former would deliver him goods to the amount so paid, would be valid; and is not within the Statute of Frauds as an undertaking to answer the debt, default, or miscarriage of another.[95]

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92. Dale v. Gear, 38 Conn. 15, is a very able and instructive case on this question, and takes this distinction. In a note in the Law Register, Judge Redfield criticises it as "thin" and untenable (Law Reg., Jan., 1873, p. 21). It is nice, undoubtedly, and difficult, perhaps, in some cases to apply; but, if not recognized, the departure should be in ruling out such evidence altogether (see s. c., 39 Conn. 30).

93. Morris v. Faurot, 21 Ohio (N. S.), 155; Keeler v. Commercial Printing Co., 16 Wash. 526, 48 Pac. 239.

94. Rockhill v. Moore, 1 Pa. L. J. 392.

95. Sanders v. Gillespie, 59 N. Y. 250 (1874).

SECTION VI

THE TIME AND DATE OF TRANSFER

§ **724. As to time of transfer.**—Negotiable paper, whether made for accommodation or otherwise, may be transferred by indorsement or by delivery (as the case may be) either before it has fallen due or afterward.[96] Negotiable paper does not lose its negotiable character in the sense of assignability by being dishonored for nonpayment or nonacceptance.[97]

§ **724a. After maturity negotiable paper circulates, but transferee only acquires the right and title of the transferrer.**—After maturity negotiable paper still passes from hand to hand *ad infinitum* until paid. Moreover, the indorser, after maturity, writes in the same form, and is bound only upon the same condition of demand upon the drawer and notice of nonpayment as any other indorser. The paper retains its commercial attributes, and circulates as such in the community; but there is this vital distinction between the rights of a transferee who received the paper before, and of one who received it after maturity. The transferee of negotiable paper to whom it is transferred after maturity, acquires nothing but the actual right and title of the transferrer;[98] and takes it charged with notice

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96. Gardner v. Beacon Trust Co., 190 Mass. 27, 76 N. E. 455, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303; Capwell v. Machon, 21 R. I. 520, 45 Atl. 259; Dehers v. Harriott, 1 Show. 163; Mitford v. Walcott, Ld. Raym. 575; Charles v. Mursden, 1 Taunt. 224; Graves v. Kay, 3 B. & Ad. 313; Stein v. Yglesias, 3 Dowl. 252. The fact of its being an accommodation bill does not prevent its being negotiable when overdue. 2 Rob. Pr. (new ed.) 252; Thompson on Bills (Wilson's ed.), 178; Cooper v. The German Nat. Bank of Denver *et al.*, 9 Colo. App. 169, 47 Pac. 1041, citing text. If the paper thus indorsed be nonnegotiable, the purchaser should at once notify the maker of the change of ownership, otherwise he will not be protected from defenses afterward acquired by the maker. See Cox v. Bank of Westfield, 18 Ind. App. 248, 47 N. E. 841.

97. Davis v. Miller, 14 Gratt. 1; Brown v. Hull, 33 Gratt. 28; Baxter v. Little, 6 Metc. (Mass.) 7; Britton v. Bishop, 11 Vt. 70; Leavitt v. Putnam, 3 N. Y. 494; Powers v. Neeson, 19 Mo. 190; Long v. Crawford, 18 Md. 320; McSherry v. Brooks, 46 Md. 118; Morgner v. Bigelow, 3 Mo. App. 592; National Bank v. Texas, 20 Wall. 72; Thompson v. Perrine, 106 U. S. 589.

98. Ames on Bills and Notes, vol. I, p. 773; Morgan v. United States, 113 U. S. 500; Texas v. Hardenburg, 10 Wall. 68; Smith v. Foley, 6 Wall. 492; Murray v. Lardener, 2 Wall. 110; The John W. Cannon, 24 Fed. 392; Williamson v. Doby, 36

of and subject to any defenses which could have been urged against it had it remained in the hands of the payee;[99] and the like rule

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Ark. 689; Eames v. Roiser, 101 Cal. 260, 35 Pac. 873; Graves v. Mining Co., 81 Cal. 327; Chase v. Whitmore, 63 Cal. 545; Templeton v. Poole, 59 Cal. 286; Simpson v. Hall, 47 Conn. 418; King v. Mecklenburg, 43 Colo. 316, 95 Pac. 951; Thomas v. Kinsey, 8 Ga. 421; Scott v. First Nat. Bank, 71 Ind. 319; Aultman & Co. v. Teeple, 98 Iowa, 186, 67 N. W. 236; Carlton v. Smith (Ky.), 110 S. W. 873; Power v. Hambrick (Ky.), 74 S. W. 660; Wade v. Foster (Ky.), 71 S. W. 443; Clark v. Deaderick, 31 Md. 148; Barker v. Valentine, 10 Gray, 341; Flint v. Flint, 6 Allen, 34; Merrick v. Butler, 2 Lans. 103; Booher v. Allen, 153 Mo. 613, 55 S. W. 238; Turner v. Hoyle, 95 Mo. 345, citing the text; Julian v. Calkins, 85 Mo. 202; Ford v. Phillips, 83 Mo. 530, citing the text; Livermore v. Blood, 40 Mo. 48; Langford v. Varner, 65 Mo. App. 370; Griffith v. Conway, 45 Mo. App. 574; Henley v. Holzer, 19 Mo. App. 248, citing the text; Brainard v. Reavis, 2 Mo. App. 490; Koehler v. Dodge, 31 Nebr. 328, 47 N. W. 913; Owen v. Evans, 134 N. Y. 514, 31 N. E. 999; Griffin v. Hasty, 94 N. C. 440; Fields v. Tunston, 1 Coldw. 40; Texas Banking Co. v. Turnley, 61 Tex. 372, citing the text; Diamond v. Harris, 33 Tex. 634; Darling v. Osborne, 51 Vt. 130; Noyes v. Landon (Vt.), 10 Atl. 342; Arents v. Commonwealth, 18 Gratt. 750; Davis v. Miller, 14 Gratt. 1; Murray v. Reed, 17 Wash. 1, 48 Pac. 343; Ashurst v. Royal Bank, 27 Law Times, 168. This rule applies to all forms of negotiable instruments, including municipal bonds payable at a designated time, but redeemable at an earlier period at the pleasure of the obligor. Such instruments (*e. g.*, what are known as United States 5-20 coupon bonds) will be deemed to have matured upon the day fixed for this payment in the "*call*" made by the proper official in pursuance of legislative authority. After that date they are subject to all defenses which may be set up against overdue commercial paper. Van Hoffman v. United States, 18 Ct. of Claims, 386. A purchaser of a note after maturity takes no better title than his transferrer had, and when the payee of a note indorsed it in blank and delivered it to a certain person for collection, a purchaser from such a holder after maturity took it subject to the equity or right the payee and indorser had in it. Mayfield Grocer Co. v. Andrew Price & Co., 43 Tex. Civ. App. 391, 95 S. W. 31 (1906). In California it has been held that the contract of one who indorses a promissory note after it falls due, and, as additional security to prevent legal proceedings from being taken against the payee and indorser, is that of a guarantor, and even if based on a valid consideration, is defective, unless the writing express the consideration. Crooks v. Tully, 50 Cal. 254. But the case is very different where the owner of an overdue note transfers it, under circumstances which enable his transferee to deal with it, though obtained by fraud, as if he were the true owner, and when an innocent purchaser for value takes it from such transferee before the transfer has been avoided; in such case no equity attaches to the note in favor of the true owner as against the innocent purchaser for value, since it was by his own act that the perpetrator of the fraud was enabled to commit it. Gardner v. Beacon Trust Co., 190 Mass. 27, 76 N. E. 455, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303.

99. Morgan v. Bean, 100 Ill. App. 114; Brown v. Smedley, 136 Mich. 65, 98 N. W. 856; Williams v. Baker, 100 Mo. App. 284, 73 S. W. 339; May v. First

applies to the transferee who takes the paper after a refusal to accept by the drawee, provided he had notice of such refusal.[1] In other words, the transferee of negotiable paper refused acceptance (with notice thereof), or overdue, takes it subject to all the equities with which it was incumbered in the hands of the party from whom he received it; for it comes, to use Lord Ellenborough's words, "disgraced to him." Thus, if he took it from a thief, or finder,[2] or from a bankrupt incapacitated by law to make the transfer,[3] he could not recover on it, inasmuch as the thief, finder, or bankrupt could not. So, if it were without consideration in the hands of the transferee,[4] or had been paid, he could not recover.[5] It is competent against the transferee after maturity to show any equities attaching to the paper itself, but not to show by parol evidence that it was not to be negotiated, or not sued on until a certain event, for this would be to contradict the written contract by mere parol.[6]

Where several notes are secured by mortgage, and the indorsee receives one overdue, he is not thereby affected with equities as to the other.[7]

§ 725. Defenses to which the indorsee of overdue paper is not subjected; (1) not subject to set-off; nor to (2) subsequent equity.—The modern English doctrine is that the indorsee of an overdue bill or note takes it subject to equities arising out of the transaction in which the instrument was executed, and existing at the time of the transfer, and not to a set-off arising out of collateral matters; in other words, he takes the paper subject to its existing equities. This doctrine was settled in England by the case of Bur-

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Nat. Bank, 74 Nebr. 251, 104 N. W. 184; Linsday v. Dutton, 217 Pa. 148, 66 Atl. 250; Edwards v. White, (Tex. Civ. App.) 120 S. W. 914.

1. O'Keefe v. Dunn, 6 Taunt. 305 (1 Eng. C. L.), 5 Maule & S. 282; Whitehead v. Walker, 11 L. & J. Exch. 168, 9 M. & W. 506; Bartlett v. Benson, 14 M. & W. 733.

2. Byles on Bills (Sharswood's ed.) [*161, 162], 284; Averill v. Second Nat. Bank, 19 D. C. 246; Seay v. Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181; Reed v. Stapp, 3 C. C. A. 244, 52 Fed. 641.

3. Ashurst v. Royal Bank, 27 Law Times, 168 (1856).

4. McSherry v. Brooks, 46 Md. 118.

5. Halsey v. Lange, 28 La. Ann. 248.

6. McSherry v. Brooks, 46 Md. 118; Rockwell v. Wilder, 4 Metc. (Mass.) 562.

7. Boss v. Hewitt, 15 Wis. 260; Kelly v. Staed, 136 Mo. 430, 37 S. W. 1110, 58 Am. St. Rep. 648, citing text.

rough v. Moss,[8] and has been uniformly followed,[9] and has been held to apply even though the indorsee had notice, gave no consideration, and took the paper on purpose to defeat the set-off.[10] As an indorsee takes subject only to equities which existed between the maker and the payee of the note, or as to any inherent disqualifications in the note, he does not take subject to such equities as existed between the maker and any intermediate holder,[11] as between intermediate parties,[12] or to such as may arise after the transfer.[13]

The doctrine of Burrough v. Moss has been followed in most of the United States in which the question has been presented, as remarked in Virginia, and may be considered a fixed principle of commercial law.[14]

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8. 10 B. & C. 558 (21 Eng. C. L. 128) (1830); Chitty, Jr., 1481.

9. Stein v. Yglesias, 1 Cromp., M. & R. 565, 3 Dowl. 252 (1834); Whitehead v. Walker, 9 M. & W. 506 (1842); Oulds v. Harrison, 10 Exch. 572 (1854), 34 L. J. Exch. 66; Holmes v. Kidd, 3 Hurlst. & N. 891 (1858); Edwards on Bills, 259; Chitty on Bills (13th Am. ed.) [*220], 251; Ames on Bills and Notes, vol. I, p. 775; Benjamin's Chalmers' Digest, 139; First Nat. Bank v. Wood, 128 N. Y. 35, 27 N. E. 1020; First Nat. Bank v. The Security Nat. Bank, 34 Nebr. 71, 51 N. W. 305, 33 Am. St. Rep. 618; Hyde v. Hazel, 43 Mo. App. 668; Crawford v. Johnson, 87 Mo. App. 478, citing text; Murchison v. Nies (Kan.), 123 Pac. 750.

10. Byles on Bills (Sharswood's ed.) [*283], 286; Oulds v. Harrison, 10 Exch. 572, 24 L. J. Exch. 66; Ames on Bills and Notes, vol. I, p. 766; Hauessler v. Greene, 8 Mo. App. 454. A purchaser of a note after maturity, given for the purchase price of land, takes it subject to the right the maker would have had to set off an amount he has had to pay to relieve his purchase of the land from a preexisting lien. Wolf v. Shelton, 159 Ind. 531, 65 N. E. 582. Where a note was long past due when it was purchased from the assignee of an insolvent bank, the maker is entitled to off-set so much of his deposit account as would have been sufficient to constitute payment. Little v. Sturgis, 127 Iowa, 298, 103 N. W. 205. In Butler v. Mitchell, 128 Ga. 432, 57 S. E. 654, it was held that, as against a holder who has received the note after dishonor, the maker may set off, to the extent of the amount due on the note, any sum which may be due from the payee to the maker which is in any way connected with the debt sued on or the transaction out of which it sprung.

11. Reardan v. Cockrell, 54 Wash. 400, 103 Pac. 457. The drawer of a check cannot defend on the ground that the check was stale and dishonored at the time it was assigned. Caldwell v. Dismuskes, 111 Mo. App. 570, 86 S. W. 270.

12. Wolford v. Rusk, 145 Ill. App. 405.

13. Fields v. Tanston, 1 Coldw. 40; Baxter v. Little, 6 Metc. (Mass.) 7; Heywood v. Stearns, 39 Cal. 58; Gutwillig v. Stumes, 47 Wis. 428; Davis v. Noll, 38 W. Va. 66, 17 S. E. 791, 45 Am. St. Rep. 841, note, citing text.

14. Eversole v. Maull, 50 Md. 96; Hauessler v. Greene, 8 Mo. App. 451; Simpson v. Hall, 47 Conn. 418; Davis v. Miller, 14 Gratt. 8; also 1 Rob. Pr. (new ed.) 252; Annon v. Houck, 4 Gill, 332; Hughes v. Large, 2 Barr, 103; Epler v. Frank, 8 Barr, 468; Clay v. Cottrell, 6 Harris, 413; Britton v. Bishop, 11 Vt.

§ 725a. Defenses to which the indorsee of overdue paper is subjected.—The indorsee of overdue paper takes it as a holder with notice that it is subject to some defense, for he takes it at a time when in due course it should have been paid. He is, therefore, subject to the defense—(1) That it was affected in its inception with some inherent vice, as, for instance, fraud, illegality, or duress; [15] or (2) that the consideration failed, or that payment had been made, or that there had been accord and satisfaction at the time of the indorsement, or that there was some equitable defense arising out of the transaction, in which the paper was given, which disabled his indorser in whole or in part to recover.[16] Any of these defenses is called an equity attaching to the instrument.[17]

70; Armstrong v. Noble, 55 Vt. 429; Haley v. Congdon, 56 Vt. 67; Noyes v. Landon, 59 Vt. 569; Barlow v. Scott, 12 Iowa, 63; Bates v. Kemp, 12 Iowa, 99; Way v. Lamb, 15 Iowa, 79; Whittaker v. Kuhn, 52 Iowa, 315; Richards v. Daily, 34 Iowa, 427; Arnot v. Woodburn, 35 Mo. 99; Gullett v. Hoy, 15 Mo. 399; Byles on Bills (Sharswood's ed.) [*263], 286; Flint v. Flint, 6 Allen, 34; Trafford v. Hall, 7 R. I. 104; Wilkinson v. Jeffers, 30 Ga. 153; Elliott v. Deason, 64 Ga. 63; Barker v. Valentine, 10 Gray, 341; Baxter v. Little, 6 Metc. (Mass.) 7; Woods v. Viozca, 26 La. Ann. 716. In New York, the doctrine of the text does not obtain. See Edwards on Bills, 260; Driggs v. Rockwell, 11 Wend. 504. And there are other States in which offsets stand on the same footing as equities. Odiorne v. Woodman, 39 N. H. 544; Davis v. Neligh, 7 Nebr. 78. Now in Iowa, by statute, a set-off or counterclaim arising out of independent matters, is admissible, if existing before notice of transfer. Denning v. Gibson, 53 Iowa, 517. In Minnesota an overdue note or bill is put on the same footing as any other *chose in action*, and if assigned after due a set-off to the amount of the bill or note may be pleaded. La Duc v. First Nat. Bank, 31 Minn. 33; Tuttle v. Wilson, 33 Minn. 423; Edney v. Willis, 23 Nebr. 56; Hunleth v. Leahy, 146 Mo. 408, 48 S. W. 459.

15. Renwick v. Williams, 2 Md. 356; Eversole v. Maull, 50 Md. 103; Bissell v. Gowdy, 31 Conn. 47; Coghlan v. May, 17 Cal. 515; Cavenah v. Somerville, Dallam's Decisions (Texas), 534; McLain v. Lohr, 25 Ill. 507; Capps v. Gorham, 14 Ill. 198; Green v. Lonthain, 49 Ind. 139; Thomas v. Kinsey, 8 Ga. 421; Kurtz v. Holbrook, 13 Iowa, 562; Schuster v. Marden, 34 Iowa, 181; Bates v. Kemp, 12 Iowa, 99; Barlow v. Scott, 12 Iowa, 63; Southard v. Porter, 43 N. H. 379.

16. Boehm v. Sterling, 7 T. R. 423; Brown v. Turner, 7 T. R. 630; Taylor v. Mather, 3 T. R. 83; Lazarus v. Cowie, 3 Q. B. 359 (43 Eng. C. L.); Snyder v. Riley, 6 Barr. 164; Wroxon v. Macoboy, 6 Victorian R. 350; Elgin v. Hill, 27 Cal. 372; Gordon v. Wansey, 21 Cal. 77; Stafford v. Fargo, 35 Ill. 481; Bryan v. Promm, 1 Ill. 33; Stoy v. Bledsoe, 31 Ind. App. 643, 68 N. E. 907; Freittenberg v. Rubel, 123 Iowa, 154, 98 N. W. 624; Stern v. Germania Nat. Bank, 34 La. Ann. 1120; Davis v. Bradley, 26 La. Ann. 555; Butler v. Munson, 18 La. Ann. 363;

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17. Sturtevant v. Ford, 4 M. & G. 101; Deuters v. Townsend, 5 Best & S. 613; Fox v. Hartford R. Co., 70 Conn. 1, 38 Atl. 871, quoting text; Hunleth v. Leahy, 146 Mo. 408, 48 S. W. 459.

§ 726. Whether accommodation character of instrument is an equity attaching to it after maturity.—The general rule, that the purchaser of overdue paper can stand in no better position than his transferrer, does not apply so far as to invalidate bills and notes drawn, indorsed, or accepted for accommodation, overdue at the time they are negotiated or transferred, it being considered that parties to accommodation paper hold themselves out to the public, by their signatures, to be bound to every person who shall take the same for value, the same as if it were paid to themselves.[18] And the fact that the purchaser knew that the paper was so drawn, indorsed, or accepted for accommodation, does not weaken his position. [19] This principle is well established in England,[20] and it is to be regretted

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Whitwell v. Crehore, 8 La. 540; Sawyer v. Hoovey, 5 La. Ann. 153; Stevens v. Hannan, 88 Mich. 13, 49 N. W. 874; Kellogg v. Schnaake, 56 Mo. 136; Shipp v. Stacker, 8 Mo. 145; Griffith v. Conway, 45 Mo. App. 574; Quimby v. Stoddard, 67 N. H. 287, 35 Atl. 1106; Tucker v. Michaels, 112 N. Y. S. 1044; McElwee Mfg. Co. v. Trowbridge, 62 Hun. 471, 17 N. Y. S. 3; Freeman v. Bailey, 50 S. C. 241, 27 S. E. 686; Diamond v. Harris, 33 Tex. 634. A person who purchases from an attorney at law holding in his possession a past due mortgage note, executed by the maker, to his own order, and by him indorsed, which has been paid by the maker, without ascertaining what right the attorney has in respect to the note, does so at his risk; and, if he had no right to extend payment of the note or to sell it, the purchaser takes it subject to the equities. State *ex rel.* Legier v. Sutherland, 111 La. 381, 35 So. 608. See also Thiel v. Butker, 125 La. 473, 51 So. 500, 28 L. R. A. (N. S.) 1065, wherein the court said that the principle that one must suffer the loss who places it in the power of the wrongdoer to commit a wrong has no application, and that the strict rule of the commercial law must be adopted. A purchaser of a note past due takes it subject to an agreement made by the payee to accept an amount less than the face value of the note in full payment thereof, and a previous tender of such amount to the payee. Hall v. Coats, 2 Ga. App. 202, 58 S. E. 365.

18. Charles v. Marsden, 1 Taunt. 224; Carruthers v. West, 11 Q. B. 143 (63 Eng. C. L.); Stein v. Yglesias, 3 Dowl. 252; Byles on Bills (Sharswood's ed.) [*262], 285; Sturtevant v. Ford, 4 M. & G. 101, Tindal, C. J.: "I do not see much force in the argument that the circumstance of the bill being overdue when it is indorsed puts the indorsee in the same position as the indorser, who in the case of a bill drawn for his accommodation cannot sue at all." Black v. Tarbell, 89 Wis. 390, 61 N. W. 1106.

19. Charles v. Marsden, 1 Taunt. 224, Lawrence, J.: "Would there be any objection if, with the knowledge of the circumstance that this is an accommodation bill, some person should advance money upon it before it was due? Then what is the objection to his furnishing the money on it after it was due? For there is no reason why a bill may not be negotiated after it is due, *unless there was an agreement for the purpose of restraining it.*" Hodges v. Nash, 141 Ill. 391, 31 N. E. 151.

20. See cases cited in preceding notes.

that the decisions in the United States do not uniformly follow the English rule.

In the United States a number of cases follow the English rule,[21] but in others it is presumed that the accommodating party intended to lend his credit only until the maturity of the paper, and did not contemplate its subsequent negotiation; and it is accordingly held that *prima facie* he is entitled to defend against an indorsee after maturity.[22] If there was an agreement, express or implied, not to negotiate an accommodation bill after maturity, the weight of authority is justly to the effect that such agreement would constitute an equity attaching to it upon its transfer after maturity; [23] but in an English case, demurrer was sustained to a plea that it was agreed by the parties that the paper should not be negotiated after ma-

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21. Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109. Naef v. Potter, 226 Ill. 628, 80 N. E. 1084, 11 L. R. A. (N. S.) 1034; Miller v. Larned, 103 Ill. 562; Breyfogle v. Addison, 120 Ill. App. 520; First Nat. Bank v. Grant, 71 Me. 374; Dunn v. Weston, 71 Me. 270; Brown v. Mott, 7 Johns. (N. Y.) 361 (subsequently overruled); Powell v. Waters, 17 Johns. 176; Grandon v. Leroy, 2 Paige, 509; Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. Harrington v. Dorr, 3 Rob. 275, the court saying: "A party who lends his note without limitation as to the time of its use, cannot, therefore, be presumed in law to have limited such time to that before maturity." Unless it is shown to have been misappropriated or diverted. Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109. See *post*, § 792. In Redfield and Bigelow's Leading Cases, 217, it is said: "The indorser (for accommodation) is equally bound, whether the transfer is made before or after the paper falls due, or whether the purchaser knew the indorsement was made for accommodation or not. To hold otherwise would be to encourage fraud, and to relieve the party from the very responsibility which he expected to meet, and which, upon every principle of justice and fair dealing, he should be compelled to abide by." Story on Bills, § 191. The law recognizes the right of the accommodation party to impose any restrictions, conditions, or limitations upon the paper that he sees proper; unless such restrictions are written into the note or otherwise brought to the knowledge of the transferee at the time or before the paper is passed to him, such restrictions, limitations, or conditions will be no defense, and the fact that the paper may be past due at the time will not charge the transferee with notice of mere parol restrictions. Naef v. Potter, 226 Ill. 628, 80 N. E. 1084, 11 L. R. A. (N. S.) 1034, affirming 127 Ill. App. 106.

22. Chester v. Dorr, 41 N. Y. 279 (overruling Brown v. Mott, 7 Johns. 361); Cominsky v. Coleman, 114 N. Y. S. 875; Battle v. Weems, 44 Ala. 105. Carrol v. Peters, 1 McGloin, 88; Hoffman v. Foster, 43 Pa. St. 137; Bowery v. Hastings, 12 Casey, 285; Bacon v. Harris, 10 Atl. 649, citing the text. See Sears v. Moore, 171 Mass. 514, 50 N. E. 1027.

23. Charles v. Marsden, 1 Taunt. 224 (*semble*); Parr v. Jewell, 16 C. B. 684; Benjamin's Chalmers' Digest, 139.

turity, knowledge of the purchaser of such agreement not being averred.[24]

If an accommodation bill has been paid at maturity, it is like the payment of any other bill—a discharge. It is then spent, and the indorsee after maturity cannot recover against any accommodating party, a defense being established which goes to the merits of the case.[25]

Under Negotiable Instrument statute.—Notwithstanding the provision that in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were nonnegotiable,[26] it has been held that the mere fact that an accommodation note was transferred by the party accommodated after maturity to a holder for value does not permit the accommodation maker to defeat recovery at the suit of the holder for value merely upon the ground that the note was an accommodation note and without consideration moving to the accommodation maker.[27]

§ 726a. Indorsee of overdue paper may recover if his indorser could.—A transferee can generally get as good a title as his trans-

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24. Carruthers v. West, 11 Q. B. 143 (63 Eng. C. L.). See remarks on this case in Benjamin's Chalmers' Digest, 139, note.

25. Lazarus v. Cowie, 3 Q. B. 459 (43 Eng. C. L.); Parr v. Jewell, 16 C. B. 684 (81 Eng. C. L.); Wroxon v. Macoboy, 6 Vict. 350; Blenn v. Lyford, 70 Me. 149; Wait v. McKee (Ark.), 128 S. W. 1028. Where an accommodation note has returned to the hands of the accommodation payee and indorser, one who takes the note with knowledge of this condition, stands in no better position. Baker v. Union Trust Co., 129 Mich. 581, 89 N. W. 345.

26. Appendix, sec. 58.

27. Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109; Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996. It is to be noticed, however, that the decisions in these cases are limited to holding that the defense of want of consideration cannot be shown by the accommodation maker when the instrument was negotiable after maturity. This would seen to be a sound rule in view of the fact that the want of consideration is the peculiar incident to the relation of the accommodation maker to the paper, but there is no decision as to the right of such party to set up other defenses when the paper has been negotiable for the first time after maturity. In the Marling v. Jones case, *supra*, the court said: "No doubt there exists a class of defenses in favor of the accommodation maker of negotiable paper which may not be urged in cases where the note is fair on its face and negotiable in due course before due to a purchaser for value, without notice of knowledge of any infirmity, but which might be urged in favor of the accommodation maker if the note were overdue when negotiated, but the fact that the accommodation maker received no consideration is not one of these defenses, so long as the note was negotiated by his express or implied authority."

ferrer possesses, and it is, therefore, a settled principle that if the party who transferred the instrument to the holder acquired the note before maturity, and was himself unaffected by any infirmity in it, the holder acquires as good a title as he held, although it were overdue and dishonored at the time of transfer.[28] Thus, it has been held that in an action by a second indorsee of a bill given for a smuggling debt, he could recover against the acceptor, although he took it overdue, his indorser having acquired it *bona fide*, without notice before it fell due.[29]

§ 726b. Equities of third persons.—The indorsee of overdue negotiable paper is not subject, it has been held, to equities which may have intervened between remote indorsers and indorsees, but only to those which exist, at the time of indorsement to him, between the principal parties and the original holder, and between himself and his own indorser.[30] But if there be an equity attaching directly to the bill or note itself, it has been held in England that it may be asserted against an indorsee after maturity by a third party who claimed the right to follow the bill.[31] And if the equity be a claim of some right to the instrument directly attached to it, we perceive no

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28. Woodman v. Churchill, 52 Me. 58; Roberts v. Lane, 64 Me. 108; Riege v. Cunningham, 9 Phila. (Pa.) 177; Bissell v. Gowdy, 31 Conn. 48; Wilson v. Mechanics' Sav. Bank, 45 Pa. St. 494; Bassett v. Avery, 15 Ohio St. 299; Peabody v. Rees, 18 Iowa, 171; Richert v. Koerner, 54 Ill. 306; Bradley v. Marshall, 54 Ill. 173; Lock v. Tulford, 52 Ill. 166; Howell v. Crane, 12 La. Ann. 126; Smith v. Hiscock, 14 Me. 449; Thompson v. Shepherd, 12 Metc. (Mass.) 311; Bank of Sonoma Co. v. Gove, 63 Cal. 355, citing the text; Eckhert v. Ellis, 26 Hun, 663, citing the text; Lewis v. Long (N. C.), 9 S. E. 637, citing the text; Chitty on Bills (13th Am. ed.), 250; Fairclough v. Pavia, 9 Exch. 690; Weems v. Shaughnessy, 70 Hun. 175, 24 N. Y. Supp. 271; Koehler v. Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518; Langford v. Varner, 65 Mo. App. 370; Crawford v. Johnson, 87 Mo. App. 478, citing text; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254, citing the text. Where the second indorsee, suing on a note, had notice of fraud in the inception of the note, the burden is upon him to show that his indorser was a good-faith holder, and that the defense could not be made against him. Hill v. Ward, 45 Ind. App. 458, 91 N. E. 38, quoting text.

29. Chalmers v. Lanion, 1 Campb. 383. See §§ 782, 786, 803.

30. Hill v. Shields, 81 N. C. 250; Hunleth v. Leahy, 146 Mo. 408, 48 S. W. 459; Y. M. C. A. Gymnasium Co. v. Bank, 179 Ill. 599, 54 N. E. 297, 70 Am. St. Rep. 135, citing text.

31. *In re* European Bank, *Ex parte* Oriental Commercial Bank, L. R., 5 Chan. App. 358; Ames on Bills and Notes, vol. I, 891; Benjamin's Chalmers' Digest, 140.

good reason why it may not be asserted against an indorsee after maturity by any party whatsoever.[32]

§ **727.** If a party indorses a bill or note "without recourse," and should reacquire it after maturity, his ownership not arising out of, or being referable to, his previous indorsement, would stand on no higher ground than that of any other party acquiring after maturity, and equities could be pleaded against him.[33] In the absence of special circumstances equity will not compel the surrender of a past-due note, on the ground that it was paid, but not taken up, the maker having an available defense, that of payment, as against any one who might thereafter acquire it.[34] But special circumstances might exist authorizing its interference to compel surrender of the paper.[35]

§ **728. Presumption as to the date and place of indorsement.**— If the indorsement of a bill or note be undated, it will be presumed, when the paper is in the hands of a third party, to have been made at the time of execution, or at least before maturity and dishonor.[36]

32. But see *contra*, Crosby v. Tanner, 40 Iowa, 136; Hibernian Bank v. Everman, 52 Miss. 500; Duke v. Clark, 58 Miss. 466. Compare Warren v. Haight, 65 N. Y. 171; Kernohan v. Durham, 48 Ohio St. 1, 26 N. E. 982, quoting with approval the text; Bishop v. Chase, 156 Mo. 158, 56 S. W. 1080, citing text; Zeis v. Potter, 44 C. C. A. 665, 105 Fed. 671, quoting text.

33. Calhoun v. Albin, 48 Mo. 304; Koehler v. Dodge, 31 Nebr. 328, 47 N. W. 913, 28 Am. St. Rep. 518.

34. Fowler v. Palmer, 62 N. Y. 533. See Allerton v. Belden, 49 N. Y. 373.

35. McHenry v. Hazard, 45 N. Y. 583.

36. See § 784 *et seq.*; Good v. Martin, 95 U. S. (5 Otto) 94; New Orleans, etc., v. Montgomery, 95 U. S. (5 Otto) 18; Collins v. Gilbert, 94 U. S. (4 Otto) 763; Bank of British North America v. Ellis, 6 Sawy. 98, citing the text; Cropley v. Eyster, 9 App. D. C. 373; Murto v. Lemon, 19 Colo. App. 314, 75 Pac. 160; Mining Co. v. Bank, 10 Colo. App. 351; Parr v. Erickson, 115 Ga. 873, 42 S. E. 840; Dickerson v. Burke, 25 Ga. 225; Nagle v. Schnadt, 239 Ill. 595, 88 N. E. 178; Cook v. Norwood, 106 Ill. 558; Smith v. Nevlin, 89 Ill. 193; Depuy v. Schuyler, 45 Ill. 506; Stewart v. Smith, 28 Ill. 307; Freehold Bank v. Kennedy & Wright Co., 148 Ill. App. 310; Mann v. Merchants' Loan & Trust Co., 100 Ill. App. 224; Johnston v. Loar, 145 Ill. App. 443; Rodriguez v. Merriam, 133 Ill. App. 372; White v. Weaver, 41 Ill. 409; Mobley v. Ryan, 14 Ill. 51; Snyder v. Oatman, 16 Ind. 265; Rosenthal v. Rambo, 28 Ind. App. 265, 62 N. E. 637; Alexander Springfield, 2 Metc. (Ky.) 534; Frazer's Admr. v. Frazer, 13 Bush, 400; New Orleans Canal v. Templeton, 20 La. Ann. 75; Webster v. Calden, 56 Me. 204; Hopkins v. Kent, 17 Md. 387; McDowell v. Goldsmith, 6 Md. 319; Webster v. Lee, 5 Mass. 334; Noxon v. De Wolf, 10 Gray, 346; New Albany Woolen Mills v. Myers, 43 Mo. App. 124, citing text; Haslach v. Wolf, 73 Nebr. 658, 103 N. W. 317; Pinkerton v. Bailey, 8 Wend. 600; Hendericks v. Judah, 1 Johns. 319; Bar-

It is difficult to see how a more definite presumption than that the indorsement was before maturity can be sustained, and this seems to be all that is necessary to the protection of commercial paper.[37] As said in Ranger v. Carey, 1 Metc. (Mass.) 369, "A negotiable note being offered in evidence duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defense that would be open to him only in case the note were negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue."

If any question should arise, however, in which the date of the indorsement during some period of the currency of the instrument was put in issue, the presumption, according to the authorities, would fix the date at the time of the execution, there being no evidence to the contrary.

An indorsement will also be presumed to have been made at the place where the bill or note is dated.[38] When the date of the indorsement is shown to have been subsequent to the execution of the paper, it cannot relate back thereto. It can only take effect from the time it is made, and must be governed by the laws then in force.[39]

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rick v. Austin, 21 Barb. 241; Burnham v. Wood, 8 N. H. 334; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Johnson v. Josey, 34 Tex. 533; Rhode v. Alley, 27 Tex. 443; Watson v. Flannagan, 14 Tex. 354; Smith v. Clopton, 4 Tex. 109; Leland v. Farnham, 25 Vt. 553; Mason v. Noonan, 7 Wis. 609; Cripps v. Davis, 12 M. & W. 165; Lewis v. Lady Parker, 4 Ad. & El. 838 (31 Eng. C. L.); Parkin v. Moon, 7 Car. & P. 408 (32 Eng. C. L.); In Arkansas it is held otherwise. Ruddell v. Landers, 25 Ark. 238; Clendennin v. Southerland, 31 Ark. 20. Such presumption obtains when the note has been introduced under the common counts as though it had been introduced in evidence under a special count declaring upon the note. Newton v. Clarke, 235 Ill. 530, 85 N. E. 747. When a person's name appears first and above all other names indorsed on a note, this fact, while not conclusive, is strong presumptive evidence that he indorsed before the others and before the note was delivered. De Clerque v. Campbell, 231 Ill. 442, 83 N. E. 224. Where notes and trust deeds were executed and a quitclaim deed was executed a year and a half thereafter, the notes being payable to the order of the maker, it must be presumed that the notes were negotiated and in the hands of an innocent holder prior to the execution of the quitclaim deed. Roach v. Sanborn Land Co., 135 Wis. 354, 115 N. W. 1102 (1908).

37. 2 Parsons on Notes and Bills, 9, 10; Burnham v. Wood, 8 N. H. 334; Parkin v. Moon, 7 Car. & P. 408; Lewis v. Parker, 4 Ad. & El. 838; Smith v. Nevlin, 89 Ill. 193.

38. Maxwell v. Vansant, 56 Ill. 58.

39. Brown v. Hull, 33 Gratt. 30. See *ante*, § 728; Eyermann v. Piron, 151 Mo. 107, 52 S. W. 229.

A bill or note becomes merged in a judgment, and cannot be indorsed or assigned afterward,[40] but it may be transferred, as we think, pending suit.[41] It has been held, upon the same principle, that the assignment of a note after it has been allowed as a claim against an estate, transfers nothing to the assignee.[42] In chapter XXIV, section IV, the rights of the holder who acquires overdue paper, and when it is deemed overdue, are more fully treated.[43]

Under Negotiable Instrument statute.—The statute declares that except where the contrary appears, every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated,[44] and it has been held thereunder that where a note was executed by a husband and made payable in New York, and was indorsed in New Jersey by the wife of the maker, in which state indorsement by a married woman is invalid, the indorsement would be governed by the law of New York when there was nothing on the note to show that it was indorsed in New Jersey and the indorsee had no notice of the fact.[45]

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40. Wooten v. Maullsby, 69 N. C. 462.

41. See § 1199; Ober v. Goodridge, 27 Gratt. 888.

42. Brown v. Darrah, 95 Ind. 86, citing the text.

43. § 782 *et seq.*

44. Appendix, sec. 46.

45. Chemical Nat. Bank of New York v. Kellogg, 183 N. Y. 92, 75 N. E. 1103, 2 L. R. A. (N. S.) 299, 111 Am. St. Rep. 717.

CHAPTER XXII

TRANSFER OF BILLS AND NOTES BY ASSIGNMENT

§ 729. As to transfer of negotiable instruments by assignment.— The term "assignment" is usually applied to denote the transfer of bonds and notes not negotiable, and also the transfer of instruments which are negotiable, without indorsement. If the bill or note be payable to bearer in express terms upon its face, or has become in legal effect payable to bearer by being indorsed in blank, it is then transferable by delivery; and the assignment by mere delivery is in accordance with the custom of merchants.[1] If the bill

1. See *ante*, § 10*a* and § 663. "A note," says Judge Story, in Bullard v. Bell, 1 Mason, 243, "payable to bearer, is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery, and the holder never makes title by or through any assignment, but claims merely as bearer. The note is an original promise by the maker to pay any person who shall become the bearer; it is, therefore, payable to any person who successively holds the note *bona fide*, not by virtue of an assignment of the promise, but by an original and direct promise moving from the maker to the bearer." Thompson v. Perrine, 106 U. S. 593; Bank of Kentucky v. Wister, 2 Pet. 318; Thompson v. Lee Co., 3 Wall. 327; Bushnell v. Kennedy, 9 Wall. 387; City of Lexington v. Butler, 14 Wall. 282; Cooper v. Town of Thompson, 13 Blatchf. 434; Coe v. Cayuga Lake R. Co., 19 Blatchf. 522. The courts treat notes payable to bearer as if there were a direct line of contract between the maker and the holder, by whatever successive stages of transfer he may have derived it. And it is correct to hold that the maker is in direct contract with him, provided he has become the bearer *bona fide*. He need not trace title through his predecessors, as possession is presumptive evidence of his right. But, nevertheless, the remote bearer is not in privity with the maker so as to open equities, and it is because he is in fact an assignee that equities are excluded, and that his assignor in certain cases, though not a party to the paper, may be liable to refund the consideration paid for it. It is, therefore, accurate and correct to speak of assignment by delivery of instruments payable to bearer. Bressee v. Crumpton, 121 N. C. 122, 28 S. C. 351, citing text; Bank of Paris v. Pearson, 66 Ark. 310, 50 S. W. 692; Buehler v. McCormick, 169 Ill. 269, 48 N. E. 287; May v. Dyer, 57 Ark. 441, 21 S. W. 1064; Haug v. Riley, 101 Ga. 372, 29 S. E. 44, quoting and approving text; South & Lane v. People's Nat. Bank, 4 Ga. App. 92, 60 S. E. 1987; Harper v. Peoples, (Ga. App.) 74 S. E. 1008; Phoenix Nat. Bank v. Saucier (Miss.), 59 So. 91. A statute requiring "grants, assignments, or transfers of any trust or confidence"

or note be payable to the order of a particular person, it may be transferred by him without indorsement.[2] But in such case the assignment is not in the usual course of business, in accordance with mercantile custom, only the equitable title passing to the assignee. We shall, therefore, distinguish the two classes of assignors by the terms: I. Assignors of the legal title; and, II. Assignors of the equitable title.

SECTION I

LIABILITY OF THE ASSIGNOR OF THE LEGAL TITLE TO BILLS AND NOTES

§ 730. **As to the liability of the assignor of the legal title to negotiable instruments.**—Although not a party to the bill or note, the assignor of the legal title to bills and notes payable in terms to bearer, or indorsed in blank, incurs certain responsibilities, not so numerous, but equally as binding as the responsibilities of an indorser. He warrants by implication, unless otherwise agreed, that its face is a true description of its character, both in respect (1) to its genuineness; (2) to its validity and legal operation; (3) to the competency of the parties; and also (4) that he is a lawful holder, having a valid title and a right to transfer it, and (5) that he had no knowledge of any facts which prove the paper, if originally valid, to be worthless, either by the insolvency of the principal, or by having been paid, or otherwise by having become void and defunct.[3]

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to be in writing does not include the assignment of a promissory note and the security for its payment. Klaus v. Moore, 77 Miss. 701, 27 So. 612.

2. First Nat. Bank v. Moore, 137 Fed. 505; Barnard State Bank v. Fesler, 89 Mo. App. 217. Under a statute of Texas, though the transfer be not evidenced by a writing, it is placed upon the same footing as a transfer by indorsement. National Bank of Commerce v. Kenney, 98 Tex. 293, 83 S. W. 368; Singletary v. Goeman (Tex. Civ. App.), 123 S. W. 436; Third Nat. Bank of Springfield, Mass. v. Nat. Bank of Commerce (Tex. Civ. App.), 139 S. W. 665; Hall v. Tyson & First Nat. Bank (Tex. Civ. App.), 115 S. W. 293.

3. Brown v. Summers, 91 Ind. 152, citing the text; Binford v. Binford, 105 Ind. 45, citing the text; McCurdy v. Bowes, 88 Ind. 583, citing the text; Davidson v. Powell, 114 N. C. 575, 19 S. E. 601, citing text; Gordon v. Irvine, 105 Ga. 144, 32 S. E. 151; Earnest v. Barrett, 6 Ind. App. 371, 33 N. E. 635. The assignment of a promissory note to one who knew that it has passed into judgment indorsed "assigned with recourse" does not make the assignor a guarantor of the payment of the note; the words "with recourse," read into the assignment of the judgment, create no liability other or different from that of an assignor. Redden v. First Nat. Bank, 66 Kan. 747, 71 Pac. 578. In Clusseau v. Wagner, 126 La. 375, 52

§ 731. In the first place, as to the genuineness of the bill or note.—It is well settled that the transferrer by delivery of the bill or note is liable for failure of consideration, if it turn out that it was fictitious, or originally forged or subsequently altered either in the signatures, or in the amount.[4] As said in Rhode Island by Ames, C. J.:[5] "If the signatures or either of them be forged, what he sells is not what upon its face it purports to be, and what, therefore, he affirms and thus warrants it to be; and he is liable to the vendee for what he has received from him for it, on the ground of failure of consideration." And again, as said in Kansas: "If one buys bread he does not expect a stone; if he bargains for fish he is not satisfied with a serpent."[6]

§ 731a. English cases.—The view taken in the English cases accords with the prevailing doctrine in the United States. Where the defendant sold the plaintiff a navy bill purporting to be for £1,800, and it turned out that it had been altered to that amount from £800, which real sum the British Government paid, it was held that the plaintiff could recover the balance for which it was altered from his vendor.[7] And when there has been a forgery in the signatures, it

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So. 547, it was held that the action of a transferee of a promissory note in accepting interest at the date of the maturity of the note and extending it for a year, did not prejudice his right to recover judgment against his transferrer on his warranty, the transferrer holding no rights against which he should have been safeguarded.

4. Bell v. Dagg, 60 N. Y. 530; Whitney v. National Bank, 45 N. Y. 305; Ross v. Terry, 63 N. Y. 613; People's Bank v. Bogart, 81 N. Y. 101; Challiss v. McCrum, 22 Kan. 157; Bankhead v. Owen, 60 Ala. 475; Hussey v. Sibley, 66 Me. 192; Hurst v. Chambers, 12 Bush, 155; Allen v. Clark, 49 Vt. 390; Giffert v. West, 37 Wis. 116; Bartsch v. Attwater, 4 Conn. 419; Lyons v. Miller, 6 Gratt. 439 (1849); Merriam v. Wolcott, 3 Allen, 258; Bell v. Cafferty, 21 Ind. 411; Cabot Bank v. Morton, 4 Gray, 158; Worthington v. Cowles, 112 Mass. 30; Coolidge v. Brigham, 1 Metc. (Mass.) 547, 5 Metc. (Mass.) 68; Barton v. Trent, 3 Head, 167; Snyder v. Reno, 36 Iowa, 329; Markle v. Hatfield, 2 Johns. 455; Swanzey v. Parker, 50 Pa. St. 441; Edwards on Bills and Notes, 291; Redfield & Bigelow's Lead. Cas. 669; Bigelow on Bills and Notes, 168; Benjamin's Chalmers' Digest, 223; Bigelow on Estoppel, 446; Chitty on Bills (13th Am. ed.), [*245], 279; Byles on Bills (Sharswood's ed.) [*157], 278; Story on Notes, § 118; Bayley, 179; Story on Bills, § 111; Strauss v. Hensey, 7 App. D. C. 289, citing with approval the text; Jordan v. Harrison, 46 Mo. App. 172.

5. Aldrich v. Jackson, 5 R. I. 218. See Lyons v. Miller, 6 Gratt. 440; *ante*, § 284.

6. Smith v. McNair, 19 Kan. 330, Horton, C. J.

7. Jones v. Ryde, 1 Marsh. 157, 5 Taunt. 488 (1814); Chitty, Jr., 906.

matters not that some are genuine. Where the bill was sold on which all the signatures were forged but that of the last indorser, it was sought to distinguish the case from the one just quoted, on the ground that as the last indorser was bound, the bill was of some value. But it was held that the seller of a bill offers it as an instrument drawn, accepted, and indorsed according to its purport.[8]

§ 731b. Distinction taken in some cases between assignment by delivery for debt due or then created and mere sale by delivery.— It is generally conceded that when an innocent holder of negotiable paper parts with it by delivery, without indorsement, in payment of a debt due, or then created, as, for example, in payment for goods then purchased, or by way of discount for money then loaned by a bank, banker, or individual, and the paper proves to have been forged, the debt or loan, not being paid by it, may be recovered, and that in such cases there is a warranty implied by law that the paper is genuine, as there is that coin or bank notes, used for like purposes, are genuine.[9] But it is maintained by some authorities that when no debt is due or created at the time, and the paper is sold as other goods and effects are, the purchaser cannot recover from the seller the purchase money, if the paper turn out to be forged; that there is in such case no implied warranty of the genuineness of the paper; that the law respecting the sale of goods is applicable; and that the only implied warranty is that the seller owns or is lawfully entitled to dispose of the paper or goods.[10] But this distinction has been justly deemed unsound, and in Massachusetts, where it once obtained, it has been overruled.[11] And in Maine, where it also at one time obtained, it has been said that it is, "to say the least, somewhat shadowy." [12] In Maryland it yet remains an isolated judicial

8. Gurney v. Womersley, 4 El. & Bl. 133, 24 L. J. Q. B. 46. In accord see Hurst v. Chambers, 12 Bush, 155; Merriam v. Wolcott, 3 Allen, 258; Allen v. Clark, 49 Vt. 390.

9. Baxter v. Duren, 29 Me. 434; Fisher v. Rieman, 12 Md. 511; Fuller v. Smith, 1 Car. & P. 197; Jones v. Ryde, 5 Taunt. 488; Coolidge v. Brigham, 1 Metc. (Mass.) 547; Cabot Bank v. Morton, 4 Gray, 156 (1855); Camidge v. Allenby, 6 B & C. 373 (1827), Littledale, J.: "If they (bills) were forged, then they were not what they purported to be."

10. Baxter v. Duren, 29 Me. 434 (1849); Milliken v. Chalmers, 76 Me. 293; Ellis v. Wild, 6 Mass. 321 (1809).

11. Merriam v. Wolcott, 3 Allen, 258 (1861); Worthington v. Cowles, 112 Mass. 30 (1873).

12. Hussey v. Sibley, 66 Me. 192 (1866), Danforth, J., saying: "Thus, from

error.[13] The result of such a distinction would be this: if a broker discounted a bill or note transferable by delivery for the holder, such holder would be bound to refund to him the money if it turned out to be forged; but if such broker sold the bill or note to a third party without indorsing it, such third party would have no recourse against him. This distinction would indeed seem shadowy, and rather a play upon terms than a regard for the substance of things. And the better and prevailing opinion is that if any party sells paper purporting to bear certain names, and it turns out that one or more of such names is forged, the purchaser does not get the thing he contracted for, and the seller is bound to refund the money paid him.[14] And it matters not as to this principle that the paper is not negotiable,[15] for it is a principle applicable to all sales of personal property that the goods delivered shall answer to the description by which they are sold.[16]

In Wisconsin it is considered that unless the negotiation upon the sale or transfer of the paper by assignment is so framed as to exclude such warranty—and especially where it is so sold or transferred for a full and fair price—the transferrer will be deemed to warrant the genuineness of the preceding indorsement upon it.[17] "But it is equally certain that the contract of sale may be made in such form as to exclude the warranty of genuineness, which would be implied by law in case of a contract silent upon that subject." [18]

§ 732. In the second place, as to the validity and legal operation. —If the bill or note is not a valid subsisting obligation, binding in

the weight of authority it would appear that the distinction noticed in Ellis v. Wild, 6 Mass. 321, and Baxter v. Duren, 29 Me. 434, is, to say the least, somewhat shadowy, and that whether the plaintiff took the order as payment or as a purchaser, the defendant must be held to some responsibility as to its validity; in short, that he, as seller, warrants the order to be what it purports, a genuine order, and whether that want of genuineness results from forgery or an absence of authority on the part of the drawers or acceptors, or, as in this case, both, must be immaterial."

13. Fisher v. Rieman, 12 Md. 511 (cited in Redfield & Bigelow's Lead. Cas. 669), overruling Rieman v. Fisher, as decided by the Superior Court at Baltimore, and reported in 4 Am. Law Reg. 433, which took the correct and prevailing view. The cases cited in 12 Md., in support of the decisions, are misapplied, not being cases of forgeries.

14. *Ante*, §§ 731, 731*a*.

15. Hussey v. Sibley, 66 Me. 192.

16. Benjamin's Chalmers' Digest, 224; Benjamin on Sales, 442, 447.

17. Giffert v. West, 37 Wis. 115.

18. Bell v. Dagg, 60 N. Y. 530; Ross v. Terry, 63 N. Y. 615; Huston v. Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795.

law according to its purport, the transferrer is liable, because the article is not that which it was held out to be.[19] Thus where a bill dated as at Sierra Leone, and drawn upon London, was sold without indorsement; and it turned out afterward that it was really drawn within the kingdom of Great Britain, and was, therefore, an inland bill, and void because without a stamp, which a foreign bill did not require—it was held that the assignee could recover back the price paid of the assignor, the consideration having failed. Lord Campbell, C. J., and Coleridge and Wightman, JJ., agreed, and Coleridge, J., said: [20] "The vendor was not bound to see that he sold a bill of good quality, or to answer for the insolvency of the parties" (who had become bankrupt); "but the vendee is still entitled to have an article answering the description of that which he bought. Here he bought as a foreign bill what turns out not to be a foreign bill, and, therefore, valueless. Common justice requires that he should have back the price." Lord Campbell, C. J., said: "This is not a case in which an article answering the description by which it is sold has a latent defect, but one in which the article is not of the kind which was sold. I think, therefore, that the money paid for it may be recovered, as paid in mistake of facts."

§ **733.** So, where the defendant sold as Guatemala bonds, in 1836, bonds which had been repudiated by the Government of that State in 1829, because unstamped, and which were valueless, it was held that the price should be refunded, Tindal, C. J., saying, that the contract was for real Guatemala bonds, and that the case was just as if the contract had been to sell foreign coin, and the defendant had delivered counters instead. And that "it is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value." [21]

So where the holder of a note transferred it without indorsement, and it was void for usury as between original parties.[22] "In this case," said Comstock, J., "the defendant held a promissory note which was

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19. Bell v. Dagg, 60 N. Y. 530; Littauer v. Goldman, 8 Hun, 231; Fuke v. Smith, 7 Abb. (N. S.) 106; Ross v. Terry, 63 N. Y. 614; Hurd v. Hall, 12 Wis. 112. But see Littauer v. Goldman, 72 N. Y. 506, and § 733*a*. In Wisconsin this warranty is held to include the fact of nonpayment of the note. Daskam v. Ullman, 74 Wis. 476, citing Giffert v. West, *supra*.

20. Gompertz v. Bartlett, 2 El. & Bl. 854 (1853).

21. Young v. Cole, 3 Bing. N. C. 724.

22. Delaware Bank v. Jervis, 20 N. Y. 228; Webb v. Odell, 49 N. Y. 583; Littauer v. Goldman, 9 Hun, 232 (1876); Challiss v. McCrum, 22 Kan. 157.

void, which he had himself taken in violation of the Statutes of Usury. When he sold the note to the plaintiffs, and received the cash therefor, by that very act he affirmed, in judgment of law, that the instrument was sustained, so far at least as he had been connected with its origin." [23] In another case, Davis, P. J., says: "There is an implied warranty that the note is what it purports to be,—a legal, valid instrument. It is nothing unless it be this." [24] So, though a certificate of deposit be void as between the original parties, because constituting a transaction between alien enemies, yet the assignor thereof is bound.[25] In Wisconsin, where a note was held void for usury, and the indorsement also void for usury, a transferee by delivery sued a prior transferee by delivery, who had transferred it to the seller; and the court held that the implied warranty of the seller by delivery extended to "the capacity of the contracting parties to make the contract, and their liability upon it as valid and binding in law according to the purport of the instrument on its face, and as the same is presented by the seller to the purchaser." [26] In such cases the transferee can recover not only the amount paid for the paper, with interest, but also his costs of suit against prior parties, if the defendant was notified of the pendency of suit, and the defense made.[27]

§ **733a.** In New York the Court of Appeals, overruling decisions of the lower courts, has held, in opposition to the text, that the transferrer by mere delivery of a note void for usury is not bound to the transferee, unless at the time of transfer he knew of the illegality affecting its validity, or unless there was some engagement rendering him responsible, other than that alleged to be implied by the transfer itself.[28] In the opinion of the court a *scienter* is necessary to establish an implied warranty; and where the article sold has some latent defect unknown to the seller, the doctrine of *caveat emptor* applies; and the fault is with the person who fails to exact a warranty, and makes a bad bargain. The law of commercial paper as laid down for a century or more, as the court considered, excepts two cases only as coming within the doctrine of implied warranty, viz.: a warranty of

23. Delaware Bank v. Jervis, 20 N. Y. 228.

24. Littauer v. Goldman, 9 Hun, 231 (1876), overruled in 72 N. Y. 506 (1878).

25. Morrison v. Lovell, 4 W. Va. 350 (1870).

26. Giffert v. West, 33 Wis. 618 (1873). See also Giffert v. West, 37 Wis. 115; Hurd v. Hall, 12 Wis. 112; Costigan v. Hawkins, 22 Wis. 81; Lawton v. Howe, 14 Wis. 241.

27. Littauer v. Goldman, 9 Hun, 231.

28. Littauer v. Goldman, 72 N. Y. 506 (1878).

title and a warranty of genuineness. And there is not, said Miller, J., "a single case reported in the books in favor of the doctrine that where a promissory note is infected with usury, and that fact is unknown to the party who transferred it, that it is an implied warranty of the validity of the note." [29]

It is undoubtedly true that nearly all of the cases cited in support of the text were cases in which the transferrer was himself in privity with the illegality impeaching the paper; but this act was not generally made the *ratio decidendi,* and there is at least one case directly in point,[30] and numerous opinions of law writers and judges.

The error in the theory adopted by the Court of Appeals of New York we think is this: It likens the unknown illegality of the paper sold, to a latent defect in an article sold to which the doctrine of *caveat emptor* applies. The analogy does not hold. Unknown insolvency of a party to the instrument is the correlative to the defect in an article sold—a latent vice affecting its quality and value. But when the instrument is null and void—in fact, no instrument at all in legal existence—it does not respond to the description which its face imports. It is the mere semblance of a bill or note, not one in truth—and no one can acquire any legal title to it. We speak, of course, of those instruments which are void by statute in all hands whatsoever. The doctrine in regard to personal property is generally stated to be, that there is "an implied warranty in every sale that the thing sold is that for which it is sold," [31] and the term "warranty" is generally used by the courts in describing the engagement of the transferrer of negotiable paper as to its genuineness, validity, and title. But Mr. Benjamin, in his work on Sales, has pointed out that when the vendor sells an article by description it is a condition precedent to his right of action (for the price), that the thing which he offers to deliver, or has delivered, should answer the description; and not a case in which the term "warranty" is accurately used.[32] And quoting Lord Abinger, he says: "As if a man offers to buy peas of another, and he sends him beans, he does not perform his contract, but that is not a warranty; there is no *warranty* that he should sell him peas; the contract is to sell peas, and if he sell him anything else in their stead, it is a nonperformance of the contract." [33] This is clear

29. Littauer v. Goldman, 72 N. Y. 506 (1878).

30. See Giffert v. West, 33 Wis. 618; *ante,* § 733.

31. Thrall v. Newell, 19 Vt. 206.

32. Benjamin on Sales (1st ed.), 442, 447, book IV, part 1, title Conditions; Myer v. Jacobs, 163 U. S. 410, where the text is approvingly cited.

33. Chantor v. Hopkins, 4 M. & W. 399. See *ante,* §§ 732, 733.

reasoning; and while we have followed the current expression of the courts in the text, we are convinced that the correct view is that which regards all sales of forged and void paper as sales by misdescription on the part of the vendor and through mistake on the part of the vendee. And in all such cases the article not corresponding to the description advertised by the terms of its face, the transferee, we think, is entitled to recover back the consideration paid.[34] Forged paper is void; and any paper so denounced as void by statute is equally so. The vendee gets nothing on sales of either class of paper; and every reason that authorizes his recovery when it is void for forgery, applies when it is void for any other cause which disables him from enforcing it against those apparently bound.

§ 734. In the third place, as to competency of parties.—If a prior party be not competent to contract, the paper is not in fact his bill, note, or indorsement, as the case may be, and the transferrer, for reasons already stated, is bound. Thus, if the drawer, or acceptor or prior indorser, be an infant, lunatic, married woman, or otherwise be under incapacity to contract, the transaction lacks the consideration agreed upon as existing, and the transferee may recover back the money paid.[35] In Massachusetts, where the defendant, knowing that one Swan was an infant, put in circulation a note with his blank indorsement upon it, he was held bound, and Shaw, C. J., said: "Whoever takes a negotiable note is understood to ascertain for himself the ability of the contracting parties; but he has then got to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports. It is an averment to that effect on the part of him who procures such an indorsement and puts the note bearing it into circulation."[36] On the principle stated in the text, it was held in Maine that the transferrer was bound where a town order was transferred in payment of a debt, and it turned out

34. *Ante*, § 731 *et seq.*

35. 2 Parsons on Notes and Bills, 39, where it is said: "There is an implied warranty that the parties to the paper are under no incapacity to contract, as from infancy, marriage, or other disability," citing Lobdell v. Baker, 3 Metc. (Mass.) 472, and Thrall v. Newell, 19 Vt. 202. See also Giffert v. West, 37 Wis. 115; Baldwin v. Van Deusen, 37 N. Y. 487.

36. Lobdell v. Baker, 3 Metc. (Mass.) 472 (1842), 1 Metc. (Mass.) 547.

to be worthless on account of the incapacity of the drawers and acceptors to draw or accept for the town.[37] And so in Vermont, where there was a written assignment apart from the note, it was considered that the assignor warranted the surety of the maker, on the ground that "there is an implied warranty in every sale that the thing sold is that for which it is sold." [38]

§ **734a.** In the Supreme Court of the United States the following case recently arose. The Legislature of Kansas passed two acts under which the city of Topeka was authorized to issue bonds for certain purposes, which were afterward held to be private purposes, and the bonds were consequently invalid.[39] Some of these coupon bonds were sold by the First National Bank of Topeka, and default being made in payment of interest, suit was brought against the receiver of the bank to recover back the amount paid for the invalid bonds, on the ground of failure of consideration. The Supreme Court held that the seller was not bound by any implied warranty of the bonds,[40] and

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37. Hussey v. Sebley, 66 Me. 192 (1876).

38. Thrall v. Newell, 19 Vt. 208 (1847).

39. See Loan Association v. Topeka, 20 Wall. 655.

40. Otis v. Cullum, 92 U. S. (2 Otto) 448 (1875), Swayne, J., saying: "In Lambert v. Heath, 15 M. & W. 486, the defendant bought for the plaintiff certain 'certificates of Kentish-Coast Railway scrip,'—and received from him the money for them. Subsequently the directors repudiated the scrip upon the ground that it had been issued by the secretary without authority. The enterprise to which it related was abandoned. The action, which was for money had and received, was thereupon brought to recover back what had been paid for the scrip. The court put it to the jury to say whether the scrip bought was 'real Kentish Railway scrip.' A verdict was found for the plaintiff upon this issue. A new trial was moved for, the defendant insisting the court had misdirected the jury. After hearing the argument, the court said: 'The question is simply this:—was what the parties bought in the market Kentish-Coast Railway scrip? It appears that it was signed by the secretary of the company, and if this was the only Kentish-Coast Railway scrip in the market, as appears to have been the case, and one person chooses to sell and another to buy, that then the latter has got all that he has contracted to buy. That was the question for the jury; but it was not so left to them. The rule must, therefore, be absolute for a new trial.' The judges were unanimous. Here also the plaintiffs in error got exactly what they intended to buy and did buy. They took no guaranty. They are seeking to recover as it were upon one while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume. Such securities throng the channels of commerce which they are made to seek, and where they find their market. They pass from hand to hand like bank notes. The seller is liable *ex delicto* for bad faith; and *ex contractu*, there is an implied

maintained doctrines in conflict with those which had been conceived applicable to the question. It is quite clear from the decisions quoted in the text that the transferrer of a bill or note by delivery is bound, if it be invalid by reason of the incompetency of anterior parties, or by reason of any contract between them which prevents the transferee from enforcing it against them. The court, without commenting on that doctrine, evidently regards it as not to be extended to public securities, in so far as the competency of the corporation to issue them is concerned.

In a more recent case that tribunal, considering a Louisiana contract of sale where both parties contemplated the purchase and delivery of lawful obligations of the State, and both regarded bonds delivered as such, it was held that warranty under the civil law which controlled in Louisiana was liable in the contract; and further that under the given law the obligation of the State is not restricted to mere questions of forgery, but depends upon whether he has delivered what he contracted to sell. Accordingly, the seller was required to refund the consideration paid him for bonds which had never been lawfully put in circulation and were absolutely void.[41]

In a recent Nebraska case the seller of supposed York county warrants was held liable to refund the consideration, such warrants having been issued without authority of law; and the case was distinguished from Otis v. Cullum, on the ground that certain other real York county warrants were supposed to be the subject of sale.[42] The

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warranty on his part that they belong to him, and that they are not forgeries. When there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate his terms and refuse to buy unless it be given. If not taken he cannot occupy the vantage-ground upon which it would have placed him. It would be unreasonably harsh to hold all those through whose hands such instruments may have passed, liable according to the principles which the plaintiff in error insists shall be applied in this case. Judgment affirmed." Sutro v. Rhodes, 92 Cal. 117, 28 Pac. 98; Meyer v. Richards, 46 Fed. 727.

41. Meyer v. Richards, 163 U. S. 386, 16 Sup. Ct. Rep. 1148, White, J., dissenting; Otis v. Cullum, 92 U. S. 448.

42. Rogers v. Walsh, 12 Nebr. 28, Lake, J., saying: "From the facts alleged, there can be no doubt that the purchase was made with the full belief on her part, and probably on the part of the defendants, that what was obtained by it were the genuine warrants of York county. Such being the case, but for the seeming confidence of defendants' counsel in the strength of their position, we would not suppose a doubt could have existed that there was an entire want of consideration for the payment of the money, and that the plaintiff was entitled to a return of the price paid for what had proved to be wholly worthless. The defense here made rests chiefly upon the authority of two cases cited, one English and the other

distinction is a clear one, and the decisions of the Supreme Court limited to the facts of the case before it, is not irreconcilable with the general principles stated in the text.

§ 735. In the fourth place, as to title and right to transfer.—If the transferrer had no lawful title to the instrument, the transfer of it as his property is a fraud both upon the owner and upon the transferee.[43] And the transferee, if unable to recover against the owner, might sue the transferrer for the consideration paid.

And, indeed, we preceive no good reason why the transferee might not, on discovering the fraud, return the bill or note to the true owner, and recover back the consideration from the transferrer, for no man can take advantage of his own wrong.

But in most cases he would likely be indisposed to do this, as he would, if himself a *bona fide* transferee without notice, acquire a better title than his transferrer, and be thus enabled to hold the paper against the true owner.

§ 736. In the fifth place, as to knowledge respecting the bill or note.—If the transferrer knew that there was a defense to the recovery upon the bill or note, or that the amount could not be realized because of insolvency of the parties to it, his suppression of such knowledge would be a fraud upon the transferee, and the

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American, viz.: Lambert v. Heath, 15 M. & W. 484, and Otis v. Cullum, 92 U. S. (2 Otto) 447. But the facts of those cases were so different in character from the one at bar that the governing principle in them is inapplicable here. In those cases the purchasers actually obtained just what they had contracted to buy, and the decisions were put upon that ground alone, there being no express warranty. Here, however, the purchase was of the warrants of York county, while in fact what were received as such were not the warrants of that county at all, but only things in their similitude. Having been issued by the commissioners without authority of law, they can no more be considered the obligations of that county than if signed by any other of her citizens. They are merely valueless pieces of paper resembling York county warrants, nothing more. The principle that should govern here was applied in the case of Young v. Cole, 32 Eng. C. L. 334, and cited in Benjamin on Sales, § 607."

43. Baxter v. Duren, 29 Me. 434. See Story on Notes, § 118. In 2 Parsons on Notes and Bills, 187, this doctrine is denied. "Why," says the learned author, "should this be so (that is, a warranty of title), when an honest transferee need give no such warranty? For, as we have seen, property follows possession; and the mere possession of the transferrer is enough to give a perfect title to the honest taker of the paper, negotiable by delivery only. We hold that the doctrine of implied warranty in sales is applicable to the sale of bills and notes only to the extent that one who sells indorsed notes warrants the indorsement genuine."

latter may hold him responsible.[44] A plain case illustrating this doctrine would arise where the assignor after maturity had received payment before making the assignment.[45] And if, knowing the paper to be worthless, he represents it to be good, his fraud is all the greater, and the transferee may recover against him.[46]

In Massachusetts, where the notes of a third person were passed off by a purchaser of goods to the vendor in payment, with fraudulent assurance that they were valid, and that the maker was solvent, and they were made by an insolvent without consideration, it was held that the vendor might disregard them altogether, and sue the purchaser for the value of the goods.[47]

§ 736a. No implied warranty that paper was not made for accommodation.—There is no implied warranty or representation on the part of the transferrer of a bill or note, valid in the hands of the indorsee, that it was drawn against funds, or that it is not accommodation paper, for accommodation notes and acceptances are not unusual commercial transactions, and this must be well understood among commercial men.[48]

§ 737. Whether or not he warrants solvency of the principal.—The transferrer of a bill or note without indorsement is clearly not liable on the bill or note; but there is conflict of authority upon the question whether or not he is bound to refund the consideration, if it should happen without his knowledge that at the time of the transfer the maker or principal party to the bill or note was insolvent, and the instrument in fact worthless.

It is contended by some of the text-writers, and has been decided in a number of cases, that the loss under such circumstances should

44. People's Bank v. Bogart, 81 N. Y. 106; Littauer v. Goldman, 72 N. Y. 506; Fenn v. Harrison, 3 T. R. 759; Popley v. Ashley, 6 Mod. 147, Holt, 121; Camidge v. Allenby, 6 B. & C. 373; Story on Bills, § 225; 2 Parsons on Notes and Bills, 41; Story on Notes, § 118. See *post*, §§ 739, 1269; Gordon v. Irvine, 105 Ga. 144, 31 S. E. 151.

45. Maupin v. Compton, 3 Bibb, 215; Howell v. Wilson, 2. Blackf. 418.

46. Kennedy v. O'Conner, 35 Ga. 199. See *post*, § 1269.

47. Bridge v. Batchelder, 9 Allen, 394.

48. People's Bank v. Bogart, 81 N. Y. 107 (1880); *In re* Hammond, 6 De Gex, M. & G. 699, Lord Justice Knight-Bruce saying: "Now I do not think that the mere circumstance of a man parting with a bill, without saying this is an accommodation bill, amounts to an implied representation that it is not an accommodation bill." See §§ 165, 187, 790, 794.

fall upon the party who held the bill or note at the time the insolvency occurred; [49] while others maintain, and, as we think, with correctness, that the loss should fall upon the party holding the bill or note at the time when the insolvency was made known to him.[50] After acquiring knowledge of the insolvency of the principal party, it would be a fraud to conceal it when transferring the bill or note; but until it is known to them the transferrer and transferee mutually take the chances as to its value.[51]

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49. Roberts v. Fisher, 43 N. Y. 159; Lightbody v. Ontario Bank, 11 Wend. 1, 13 Wend. 107; Harley v. Thornton, 2 Hill (S. C.), 509; Fogg v. Sawyer, 9 N. H. 365; Wainwright v. Webster, 11 Vt. 576; Thomas v. Todd, 6 Hill (N. Y.), 340; Townsends v. Bank of Racine, 7 Wis. 185; Westfall v. Braley, 10 Ohio St. 188; Story on Notes, § 119; Story on Bills (Bennett's ed.), § 225. See chapter L, on Bank Notes, section III, vol. II.

50. Edmonds v. Diggers, 1 Gratt. 359; Young v. Adams, 6 Mass. 182; Scruggs v. Cass, 8 Yerg. 175; Lowry v. Murrell, 2 Port. 282; Bayard v. Shunk, 1 Watts & S. 92; Corbet v. Bank of Smyrna, 2 Harr. (Del.) 235; Ware v. Street, 2 Head, 609; Barton v. Trent, 3 Head, 167; Hecht v. Batcheller, 147 Mass. 339; Milliken v. Chapman, 75 Me. 306, 46 Am. Rep. 394, citing the text. See Story on Bills, § 225; Thompson on Bills (Wilson's ed.) 187, 188. In Chitty on Bills [*247], 281, it is said: "When a transfer by delivery without indorsement is made, merely by way of sale of the bill, as sometimes occurs, or exchange of it for other bills, or by way of discount, and not as security for money lent, or where the assignee expressly agrees to take it in payment, and to run all risks, he has in general no right of action whatever against the assignor in case the bill turns out to be of no value. But there can be no doubt that if a man assign a bill for any sufficient consideration, knowing it to be of no value, and the assignee be not aware of the fact, the former would, in all cases, be compellable to repay the money he had received." In Byles on Bills (Sharswood's ed.) [*154], 275, it is said: "It is conceived to be the general rule of the English law and the fair result of the English authorities, that the transferrer is not even liable to refund the consideration, if the bill or note so transferred by delivery without indorsement turn out to be of no value, by reason of the failure of other parties to it. For the taking to market of a bill or note payable to bearer without indorsing it, is *prima facie*, a sale of the bill. And there is no implied guarantee of the solvency of the maker, or of any other party." Judge Sharswood, concurring with the text of Byles on Bills, says in his note (5th Am. ed.), p. 275, "It is conceived that the confusion has arisen from neglecting to distinguish between the abstract question of law and question of fact in the particular case." See Redfield & Bigelow's Lead. Cas. 634; and chapter L, on Bank Notes, section III, vol. II; Roads v. Webb, 91 Me. 414, 40 Atl. 128, 64 Am. St. Rep. 246.

51. *Ante*, § 736; *post*, § 739. A transaction, by which a person purchased a note of another, and gave his note for the purchase price, his own note being simply the evidence of his promise to pay his own debt, is not within the rule. German Nat. Bank of Ripon v. Princeton State Bank, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556.

The transferrer declines to bind himself as a party by declining to indorse. The transferee impliedly relies on the bill or note itself, by not requiring an indorsement. And if thus, both being innocent, a loss by insolvency arises, there seems to us no more reasonable rule than to let it rest where it falls. These, at least, would be the presumptions of law, whether the transfer was by way of sale of the bill or note, or an exchange, or discount; but there being no written contract, any special agreement might be given in evidence to rebut them.[52] And it has been said that there is an exception of the general rule when the bill or note is transferred in payment of a precedent debt, of which we shall presently speak.

There is no fraud in the transferrer when he assigns the bill or note without being aware that the principal is insolvent, and there is no failure of consideration, for the consideration is the principal's promise to pay. The value of that promise must be judged of by the transferee when he acquires it.

§ **738.** The doctrine of the text was well expressed, in Rhode Island, in a case arising out of the barter of cotton for the notes of third persons, which were taken without indorsement, Ames, C. J., saying:[53] "The well-known common-law principle, applicable alike to sales and exchanges of personal things, is, that fraud or warranty is necessary to render the exchanger or vendor liable, in any form, for a defect in the quality of the thing sold or exchanged. Applying this principle to the sale or exchange of the note of a third person, transferred by indorsement without recourse, or by delivery merely, the vendee or person taking it in exchange takes the risk of the past or future insolvency of the maker or other party to it; unless, indeed, in case of past insolvency, the vendor or exchanger is guilty of the fraud of passing it off with knowledge of that fact."

§ **739. English doctrine.**—In England the doctrine to this effect is well settled, and when the transfer is without indorsement, whether it be a sale of the bill or note, or an exchange or by way of discount, or where the assignee agrees expressly to take it in payment, he can neither recover against the assignor upon the bill, or recover back the amount given for it, on account of failure in the consideration;

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52. Monroe v. Hoff, 5 Den. 360.

53. Bicknall v. Waterman, 5 R. I. 43. See also Burgess v. Chapin, 5 R. I. 225; Beckwith v. Farnum, 5 R. I. 230; Aldrich v. Jackson, 5 R. I. 218; Roads v. Webb, 91 Me. 414, 40 Atl. 128, 64 Am. St. Rep. 246.

unless, indeed, the assignor knew the bill or note to be that of an insolvent when he assigned it. Thus, it has been said by Lord Kenyon:[54] "It is extremely clear that if the holder of a bill sent it to market without indorsing his name upon it, neither morality nor the laws of this country will compel him to refund the money for which he sold it, if he did not know at the time he sold it that it was not a good bill. If he knew the bill to be bad, it would be like sending out a counter into circulation to impose upon the world, instead of the current coin." And, in another case, where the party discounted bills with a banker and received in part of the discount other bills, without the banker's indorsement, and they turned out to be bad, the same high authority said:[55] "Having taken them without indorsement, he has taken the risk on himself. The bankers were the holders of the bills, and by not indorsing them, have refused to pledge their credit to their validity, and the transferee must be taken to have received them on their own credit only."

§ 739a. Oral warranty of solvency and guaranty of payment.—But where the transfer by delivery is for a valuable consideration the transferrer may orally warrant the solvency of the parties and guarantee the payment of the paper.[56] If he promises orally that the paper is good and will be paid at maturity, the promise is not within the Statute of Frauds, and the promisor is liable thereon in case of nonpayment. The promise is regarded as that of the transferrer to pay for the consideration had, if parties to the paper do not pay, and not as a promise to answer for the default of another.[57]

§ 740. Assignment of bill or note for antecedent debt.—When the bill or note of a third party is transferred without indorsement, in payment of an antecedent debt, it has been held that, if dishonored, the prior debt revives, because the instrument was given as money,

54. Fenn v. Harrison, 3 T. R. 759.

55. Fydell v. Clark, 1 Esp. 447. See also Emly v. Lye, 15 East, 7; Bank of England v. Newman, 1 Ld. Raym. 442; Gordon v. Irvine, 105 Ga. 144, 31 S. E. 151.

56. Smith v. Corege, 14 S. W. 93, citing the text.

57. Milks v. Rich, 80 N. Y. 268; Johnson v. Gilbert, 4 Hill (N. Y.), 178; Dabner v. Blackney, 38 Barb. 432; Cardell v. McNiel, 21 N. Y. 336; Bruce v. Burr, 67 N. Y. 237. See *post*, § 1763. King v. Summitt, 73 Ind. 312. See Union Nat. Bank v. First Nat. Bank, 45 Ohio St. 236; Evans v. Stuhrberg, 6 Law. Rep. Annot., § 501; Brookline Nat. Bank v. Moers, 19 App. Div. 155, 45 N. Y. Supp. 997.

and did not produce it.[58] But this distinction does not seem to us tenable. The transferrer, by not indorsing, has declined to warrant that it will produce money, and the transferee has consented to take the security instead of money, and without such warranty.[59] Still, this is to be observed: The law presumes, in the absence of proof, that the instrument was passed as conditional payment only, in which case the pre-existing debt is only suspended during its currency, and revives on its dishonor; [60] but if there was an express contract, or circumstances implying a contract, on the part of the creditor, to accept the stranger's paper in absolute payment, then he would be held to his bargain, although it threw upon him an entire loss—the burden of proof to this effect being upon the transferrer.[61] The transferrer by delivery is not entitled in such cases to notice of dishonor; but if there is unreasonable delay in informing him of it, he may show in defense any injury he has sustained by the actual laches of the creditor.[62]

§ 740a. Liability of a broker or other agent transferring negotiable paper by delivery; whether he warrants its genuineness.— It is quite clear that if a broker or other agent transfer paper by delivery without disclosing who his principal is, he is himself to be regarded as a principal in the transaction, although the party dealing with him may have known that he was the broker and agent for some person.[63] And this doctrine has been applied to compel a broker to refund money paid for a note sold by him to the plaintiff, atlhough he had paid over the money to his principal, and although he sold the

58. Camidge v. Allenby, 6 B. & C. 373. See chapter L, on Bank Notes, section III, vol II; 2 Parsons on Notes and Bills, 104, note, 156, note *m*; also chapter XXXIX, vol. II.

59. In Timmins v. Gibbins, 18 Q. P. 722 (14 Eng. L. & Eq. 64), Lord Campbell said: "I feel great difficulty in seeing any distinction between payment for goods sold at the time, and payment for them at a future day. In both cases it is a transaction of buying and selling; and even where the money is paid over the counter, there must be some interval during which the buyer was debtor." Dennis v. Williams, 40 Ala. 633. See chapter XXXIX, vol. II.

60. Marsh v. Pedder, 4 Campb. 257; Taylor v. Briggs, Moody & M. 28; Robinson v. Read, 9 B. & C. 449. See chapter XXXIX, vol. II.

61. Eagle Bank v. Smith, 5 Conn. 71; Frederick Institute v. Michael, 81 Md. 487, 32 Atl. 189, 340.

62. 2 Parsons on Notes and Bills, 184.

63. Cabot Bank v. Morton, 4 Gray, 156, Shaw, C. J.; Hamlin v. Abell, 120 Mo. 88, 25 S. W. 516.

note for a sum less than its face.[64] There is no doubt also that an express warranty that a note is genuine will bind the agent of the seller personally, if it appears that such was his intention;[65] and that if there be an express exclusion or exemption from liability for genuineness he will not be bound.[66]

When a broker or other agent sells negotiable paper, and is known to be the agent of a certain principal, and it turns out that such paper is forged as to one or more of the ostensible parties, a more difficult question arises as to the agent's liability. But its solution is to be found in the inquiry: did the buyer understand that he was buying from the agent or from the principal—was the transaction intended to be between the principal and the buyer, or between the agent and the buyer?[67] If the agent sells in his own name it is immaterial

64. Merriam v. Walcott, 3 Allen, 258.

65. Wilder v. Cowles, 100 Mass. 487; Story on Agency, § 269; Bailey v. Talbreath Bros., 100 Tenn. 599, 47 S. W. 84, holds that the agent assumes no personal liability in the absence of an express warranty of the genuineness of the note. Hamlin v. Abell, 120 Mo. 88, 25 S. W. 516.

66. Bell v. Dagg, 60 N. Y. 530; *ante*, § 731*b*.

67. Worthington v. Cowles, 112 Mass. 30 (1873). Action of contract upon the implied warranty of the genuineness of the signature to a note sold by defendant to plaintiff, Morton, J.: "The plaintiff claimed that in the purchase of the note he dealt solely with the defendants, and upon their credit. The defendants claimed that they were acting as agents of Hanson in the transaction, and that their principal was disclosed to the plaintiff. Upon those points the evidence was conflicting. The defendants ask the court to rule 'that if the defendants were in fact agents for Hanson, and disclosed their agency to the plaintiff, or the plaintiff knew it, or had reasonable cause to know it, the defendants would not be liable.' Considered as an abstract proposition of law, this is too broad. It omits the necessary element that, in the dealing or transaction in question, they were acting as such agents. It may be true that the defendants were agents of Hanson, and known to be such by the plaintiff, and yet, if in the purchase of this note, it was understood by the parties that the plaintiff was dealing with and upon the credit of the defendants, they would be liable. An agent may deal so as to bind himself personally; it is always a question of the intention and understanding of the parties. The presiding judge properly refused to give the instructions in the form requested by the defendants. Instead thereof, he ruled in substance that the question was: From whom did the plaintiff understand that he was buying the note— from the brokers or from Hanson? and that if such a state of facts occurred, that the plaintiff understood, or ought to have understood, as a man of reasonable intelligence, that he was dealing with Hanson, the defendants would not be liable. These instructions were correct as applied to the facts of the case * * * Unless from their (defendants') disclosures or other sources the plaintiff understood, or ought, as a reasonable man, to have understood, that he was dealing with Hanson, he had a right to assume that he was dealing with the defendants as principals." Huston v. Tyler, 140 Mo. 252, 36 S. W. 654, 41 S. W. 795.

whether he discloses his principal or not, in so far as his own liability is affected; for it is a general principle that evidence is inadmissible to discharge a party contracting in his own name (unless it be by adoption the name used by another), although it is admissible to charge an undisclosed principal.[68] And if the contract of sale be in writing, and in the name of the agent, he will be liable as a principal in the transaction, and parol evidence will be inadmissible to discharge him, although it would be admissible to charge his principal if he were in fact an agent.[69]

SECTION II

LIABILITY OF THE MAKER ON ASSIGNMENT OF THE EQUITABLE TITLE BY DELIVERY

§ **741.** We have already seen that where a bill or note payable "to order" is transferred without indorsement, the transferee does not acquire the legal, but only the equitable, title.[70] The holder under

68. Ewell's Evans' Agency, 410 [* 305]; Smith's Lead. Cas., vol. II, 369 [*224]; Lyons v. Miller, 6 Gratt. 439, Baldwin, J. (*semble*). See as to Exceptions Ewell's Evans' Agency, 416 [*309]; Equitable Marine Ins. Co. v. Adams, 173 Mass. 436, 53 N. E. 883; Shuey v. Adair, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879.

69. Story on Agency, §§ 155, 160, 269, 270; Smith's Lead. Cas., vol. II, 369 [*224]; Benjamin on Sales, 164. See Magee v. Atkinson, 2 M. & W. 440; Jones v. Littledale, 6 Ad. & El. 486; Trueman v. Loder, 11 Ad. & El. 587; Higgins v. Senior, 8 M. & W. 834. "The distinction to be kept in mind is, that while parol evidence cannot be received to discharge a party, it may be received when its effect is to show that another party, namely, the principal, is also bound," Wharton on Evidence, vol. II, § 951.

70. *Ante*, chapter XXI, § 664*a*; First Nat. Bank v. Moore, 137 Fed. 505; May v. Dyer, 57 Ark. 441, 21 S. W. 1064; citing text; Haug v. Riley, Admr., 101 Ga. 372, 29 S. E. 44, quoting and approving text; Haines v. Thompson, 129 Ill. App. 436; Schoepfer v. Tommack, 97 Ill App. 562; Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537. When the transfer of a note is for a valuable consideration, and the indorsement is omitted through mistake or fraud, a good title will pass, in equity, by mere delivery. Union Brewing Co. v. Interstate Bank & Trust Co., 240 Ill. 454, 88 N. E. 997. Where a note, after maturity, is delivered by the owner to a person for the purpose of securing a loan thereon, with no intention to pass title to the note except upon condition that a loan thereon should be secured, upon failure to secure a loan title to the note failed to pass. Pierpont v. Johnson, 104 Ill. App. 27. A check can be transferred without a written assignment thereof so as to make the transferee the true owner thereof. Maloney v. State, 91 Ark. 485, 121 S. W. 728, 134 Am. St. Rep. 83.

such a transfer must aver and prove the assignment, for the mere possession of the instrument unindorsed is not evidence of ownership, and its exhibition in a suit not sufficient ground of recovery.[71] And he can only stand in the shoes of his assignor, and recover subject to such defenses as were available against him, although he took it in good faith for value.[72] Therefore, if the party who transfers a note

71. Hull v. Conover, 35 Ind. 372; Prescott v. Hull, 17 Johns. 284; Van Eman v. Stanchfield, 10 Minn. 255; Beard v. First Nat. Bank, 39 Minn. 546; Gano v. McCarthy, 79 Ky. 409; Currie v. Boroman, 25 Oreg. 365, 35 Pac. 848; Bank v. Durfee, 118 Mo. 431, 24 S. W. 133, 40 Am. St. Rep. 396; Hair v. Edwards, 104 Mo. App. 213, 77 S. W. 1089; Horner v. Amick, 64 W. Va. 172, 61 S. E. 40. See chapter XX, on Presentment for Payment, section 1, § 573 *et seq.*, and also §§ 812, 1181*s*. In an action by an assignee of a note, the maker cannot raise the question whether the plaintiff is the owner and holder of the note, outside of any right of set-off or counterclaim which maker may have. Lodge v. Lewis, 32 Wash. 191, 72 Pac. 1009. The measure of the maker's right to enforce proof of assignment or to question the validity of the assignment of a nonnegotiable promissory note is whether he is protected from further litigation or liability in connection with it. Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 Pac. 130.

72. Webster v. Carter (Ark.), 138 S. W. 1006; Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1103; Simpson v. Hall, 47 Conn. 418; Foreman v. Beckwith, 73 Ind. 515; Hecker v. Boylan, 126 Iowa, 162, 101 N. W. 755; Calvin v. Sterrett, 41 Kan. 218; Gilbert v. Nelson, 5 Kan. App. 528, 48 Pac. 207; Warren v. Gruwell, 5 Kan. App. 523, 48 Pac. 205; Harrigan v. Advance Thresher Co. (Ky.), 81 S. W. 261; Gray Tie & Lumber Co. v. Farmers' Bank, 109 Ky. 694, 60 S. W. 537; Allum v. Perry, 68 Me. 232; Haskell v. Mitchell, 53 Me. 468; Lancaster Nat. Bank v. Taylor, 100 Mass. 18; Spining v. Sullivan, 48 Mich. 8; Matteson v. Morris, 40 Mich. 55; Weber v. Orten, 91 Mo. 677; Boeka v. Nuella, 28 Mo. 181; Sells v. Tootle, 160 Mo. 593, 61 S. W. 579; Cornish v. Woolverton, 32 Mont. 456, 81 Pac. 4, 108 Am. St. Rep. 598; Hedges v. Sealy, 9 Barb. 218; Pitkin v. Clayton, 41 App. Div. 363, 58 N. Y. Supp. 483; Fitch v. McDowell, 80 Hun, 207, 30 N. Y. Supp. 31; Johnson County Savings Bank v. Scoggin Drug Co., 152 N. C. 142, 67 N. E. 253; Davis v. Sitting, 65 Tex. 5; State v. McClellan, 82 Vt. 361, 73 Atl. 993, 23 L. R. A. (N. S.) 1063; Gross v. Bennington, 52 Wash. 417, 100 Pac. 846; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414; Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812; Terry v. Allis, 6 Wis. 478; Bank of Chadron v. Anderson, 6 Wyo. 520, 48 Pac. 197. See § 781*a*. In Osgood v. Artt, 17 Fed. 575, the transferee attempted to cut out the maker's defenses by procuring an indorsement from his transferrer after notice of the defenses, but without success. Also in Goshen Nat. Bank v. Bingham (N. Y.), 23 N. E. 180, although the failure to indorse was by mistake. The assignee of purchase-money notes given by the vendee takes subject to judgments of record against the vendor at the time of the assignment. First Nat. Bank of Falls City, 65 Nebr. 340, 91 N. W. 404. Where reliance is placed upon the apparent authority of an agent to bind the principal by giving notes, the assignee of such notes, even though they were received before maturity, would occupy no better position than the payee, for if the payee was not authorized to take the notes, he could not confer authority upon his assignee to collect them. Alton Mfg. Co. v. Garrett Biblical Inst., 243 Ill. 298, 90 N. E. 704.

payable to the order of another, but unindorsed by him to whose order it is payable, and it turn out that the transferrer had no title, the transferee could not recover, there being no equitable right to which he can claim succession.[73] In such a case in Indiana it was said by Blackford, J.: "Whether the property in this note could pass without indorsement under any circumstances need not be considered. Supposing it could, the transfer in such case must be governed, not by commercial law, but by the rules which govern the sale of ordinary goods out of market overt." [74] It is quite well settled that delivery of such an instrument may operate as an assignment,[75] but the assignee would have to sue in the name of the assignor, unless permitted by statute to sue in his own.[76] The *bona fide* holder by assignment, while not protected against existing defenses, is protected against all defenses subsequently arising,[77] and after notice to the maker of the assignment; [78] and an express promise of the maker to pay the assurances to the assignee that the notes were all right would destroy even such prior equities, much more any arising after notice of the assignment.[79]

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73. Myers v. Friend, 1 Rand. 13. See *ante*, § 441.

74. Elliott v. Armstrong, 2 Blackf. 212.

75. Jones v. Witter, 13 Mass. 304; Blesse v. Blackburn, 31 Mo. App. 267.

76. Pease v. Hirst, 10 B. & C. 125, 5 Man. & R. 88; Edwards v. Wagner, 121 Cal. 376; 53 Pac. 821, text cited; Gumaer v. Sowers, 31 Colo. 164, 71 Pac. 1104, Smalley v. Wight, 44 Me. 442; Amherst Academy v. Cowls, 6 Pick. 427; Grand Gulf Bank v. Wood, 12 Smedes & M. 482; Wheeler v. Wheeler, 9 Cow. 34; Johnson County Savings Bank v. Scoggin Drug Co., 152 N. C. 142, 67 N. E. 253; Elmore v. Rugely (Tex. Civ. App.), 107 S. W. 151. The holder of a paper transferred by assignment can enforce his right by a suit in equity in his own name or by a suit at law in the name of the payee. State of McClellan, 82 Vt. 361, 73 Atl. 993, 23 L. R. A. (N. S.) 1063.

77. Beard v. Dedolph, 29 Wis. 142 (1871); State v. Stebbins, 132 Mo. 332, 33 S. W. 1147, citing text; Sackett v. Montgomery, 57 Nebr. 424, 77 N. W. 1083, 73 Am. St. Rep. 522; Gaylord v. Nebraska Sav., etc., Bank, 54 Nebr. 104, 74 N. W. 415, 69 Am. St. Rep. 705. But compare Kampmann v. McCormick, 24 Tex. Civ. App. 462, 59 S. W. 832.

78. Huber v. Egner (Ky.), 61 S. W. 353, holding that the maker of a note may set up a counterclaim or set-off against the payee, as against the assignee of the note, where the right to the counterclaim arose before notice of the maker of the assignment. It is no defense to an action by an assignee of a note given for the purchase of land that the payee removed timber from and committed trespass upon the land, unless it is shown that these acts were committed before the assignment of the note and that the payee was insolvent, or before the maker had notice of the assignment. Carlton v. Smith (Ky.), 110 S. W. 873.

79. Isaac Eberly Co. v. Gibson, 107 Va. 315, 58 S. E. 591.

§ 742. Transfer by assignment of nonnegotiable instruments; notice of assignment to debtor.—These principles apply to bills and notes which are not drawn payable to bearer, or to order, and are not negotiable. The party who becomes transferee of such instruments takes only the right and title of his transferrer—can sue only in the name of such transferrer—and is subject to all offsets, equities, and other defenses,[80] which might have been pleaded against him up to the time when the debtor first receives notice of the assignment.[81] It is binding upon the maker after notice,[82] and as soon as a

80. Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164; Rosenthal v. Rambo, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; First Nat. Bank of Petersburg v. Beach, 34 Ind. App. 80, 72 N. E. 287; Kimpton v. Studebaker Bros. Co., 14 Idaho, 552, 94 Pac. 1039, 125 Am. St. Rep. 185; Union Bank v. Trust Co. of Henderson v. Ford (Ky.), 101 S. W. 347; Johnson v. Acme Harvesting Mach. Co., 24 Okl. 468, 103 Pac. 638; Citizens' Bank of Wakita v. Garnett, 21 Okl. 200, 95 Pac. 755; Dickerson v. Higgins, 15 Okla. 588, 82 Pac. 649; Cotton v. John Deere Plow Co., 14 Okl. 605, 78 Pac. 321; Gilley v. Harrell, 118 Tenn. 115, 101 S. W. 424. Under section 3442, Comp. Laws, providing that "a nonnegotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee subject to all equities and defenses existing in favor of the maker at the time of the indorsement," the maker of such a note cannot set up a right of action for a breach of a contract against the payee occurring three years after the execution of the note and of its assignment. State Bank of Fillmore v. Hayes, 16 S. D. 365, 92 N. W. 1068. While Civ. Code 1895, § 3682, declares that any contract in writing for the payment of money is negotiable by indorsement or written assignment in the same manner as bills of exchange and promissory notes, its effect is not to render such paper a negotiable instrument so as to come within the operation of § 3694, prescribing defenses that may be set up by the maker of a negotiable note against a holder who received the same before due. Mackin v. Ballock, 133 Ga. 555, 66 S. E. 265.

81. Peyton v. Planters' Compress Co., 63 Miss. 410; Shufeldt v. Gillilan, 124 Ill. 461; Bank of Stockton v. Jones, 65 Cal. 437; Etheredge v. Parker, 76 Va. 247; Merrell v. Springer, 24 N. E. 258; Fitch v. McDowell, 80 Hun, 207, 30 N. Y. Supp. 31. A transfer of a nonnegotiable note may be by oral assignment followed by delivery. See Hill v. Alexander, 2 Kan. App. 251, 41 Pac. 1066; Emley v. Perrine, 56 N. J. L. 474, 33 Atl. 951, citing text; Ablowich v. Greenville Nat. Bank, 22 Tex. Civ. App. 272, 54 S. W. 794; Billingsley v. Clelland, 41 W. Va. 234, 23 S. E. 812; Prim v. McIntosh, 43 W. Va. 790, 28 S. E. 742; Emley v. Perrine, 58 N. J. L. 472, 33 Atl. 951, citing text; Union Nat. Bank v. Hines, 177 Ill. 417, 53 N. E. 83; Randall Co. v. Glendenning, 19 Okl. 475, 92 Pac. 158; Lowry v. Danforth, 95 Mo. App. 441, 69 S. W. 39; Barker v. Barth, 192 Ill. 460, 61 N. E. 388.

82. Rosenthal v. Rambo, 28 Ind. App. 265, 62 N. E. 637; Johnson v. Hibbard, 27 Utah, 342, 75 Pac. 737.

transferee receives such an instrument, he should, therefore, notify the debtor, in order to protect himself.[83] He need not, however, exhibit the security to the debtor or offer him other evidence than his own information of the assignment: for, although the debtor may require evidence of the assignment before he makes payment to the assignee, the notice is a mere measure of precaution to put him upon inquiry.[84] If the debtor finds the original creditor still retaining the evidence of the debt, he may still make payment to him; but if he cannot produce it, there would be the best reason to believe the notice of the assignment.[85] Where the assignee sues in the assignor's name, the defendant may set off a debt due from the assignee to him, in like manner as if the suit had been brought in his own name.[86]

§ **743.** Bills and notes which are not payable to bearer, or to order, cannot be so transferred, either by indorsement or delivery, so as to substitute the transferee for the transferrer, and enable the former to sue in his own name, unless he be empowered to do so by statute.[87] Anciently, transfers of all choses in action, which term includes bills and notes, were forbidden by the common law, but courts of equity have long since disregarded the rule, and in that forum all assignees of choses in action are permitted to enforce their rights in their own name.[88] It is otherwise in courts of law, where the assignee (unless permitted by statute) can only sue in the name of the assignor, or of his executor or administrator, according to the ancient rule, when the assignor is dead.[89] But the doctrine of equitable assignments has

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83. After such notice the debtor will not be protected in any payment he may make to the transferrer (Goldstein v. Winkleson, 28 Mo. App. 437); or in any set-off he may acquire against him. Wood v. Brush, 72 Cal. 224; Banister v. Kenton, 46 Mo. App. 462.

84. Davenport v. Woodbridge, 8 Greenl. 17.

85. Ibid.; Bartlett v. Eddy, 49 Mo. App. 32.

86. Corser v. Craig, 1 Wash. C. C. 424.

87. Tassell v. Lewis, 1 Ld. Raym. 743; Hill v. Lewis, 1 Salk. 132; Backus v. Danforth, 10 Conn. 297; White v. Heylman, 34 Pa. St. 142; *ante*, § 741.

88. Coles v. Jones, 2 Vern. 692; Wright v. Wright, 1 Ves. Sr. 411; Hughes v. Nelson, 29 N. J. Eq. 549 (1878). In this case the transferrer contracted to indorse, but omitted to do so. Defeated in suit at law, the transferee sued in equity. Judgment against him at law was held no bar to the suit in equity, and Vice-Chancellor Van Fleet said: "The delivery of the note under the circumstances stated, constituted the complainant an indorsee in equity, with all the rights of a *bona fide* holder for value before maturity. * * * Equity looks upon that as done which ought to have been done."

89. Skinner v. Somes, 14 Mass. 107; Amherst Academy v. Cowls, 6 Pick. 427.

been constantly extending to meet the conveniences of trade and business; and it has long been settled that the assignee of a chose in action may sue in a court of law in the name of his assignors, and recover, subject, however, to such defenses as were available against the assignor at the time the debtor received notice of the assignment.[90]

§ 744. Assignment by delivery, and failure to execute an agreed indorsement.—If the transferee delivers a bill without indorsing it, where it was upon good consideration, agreed or understood that it should be indorsed by him, and afterward he refused to indorse, he may be sued for damages for breach of contract.[91] And he, or his personal representative, may be compelled by bill in equity to indorse.[92] But the transferee, by delivery under such circumstances, has no right to sign his transferrer's name as indorser.[93]

Under Negotiable Instrument statute.—While the statute states how negotiation may be completed,[94] yet it expressly declares that mere delivery of an instrument payable to order vests title in the transferee and also carries with it the right to compel the indorsement of the transferrer.[95]

§ 745. Whether indorsement when made relates back to time when it was agreed to be made.—It has been thought that where an assignment of a note or bill payable to order has been made for a valuable consideration, an indorsement thereof, whenever made, will relate back to the time of assignment, and operate as if then made.[96] This doctrine may be, and doubtless is, true when the indorsement at the time of the assignment was agreed upon and intended to be made, but omitted by mistake, accident, negligence, or fraud.[97] But beyond this it cannot go. If the instrument be pay-

90. Gibson v. Cooke, 20 Pick. 15.

91. Rose v. Sims, 1 B. & Ad. 521 (20 Eng. C. L.).

92. Watkins v. Maule, 2 Jac. & Walk. 242; Rolleston v. Hibbert, 3 T. R. 411; *Ex parte* Greening, 13 Ves. 206; Byles [*150], 270; 1 Parsons on Notes and Bills, 279; Hughes v. Nelson, 29 N. J. Eq. 549; Story on Notes, § 120; 1 Story's Eq. Jur., §§ 99, 729; McCann v. Randall (Mass.), 17 N. E. 477, citing the text.

93. Rose v. Sims, *supra;* Harrop v. Fisher, 30 L. J. C. P. 283; Byles [*150], 270; Story on Bills, § 201.

94. Appendix, secs. 30, 31.

95. Appendix, secs. 30, 31. Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999.

96. Baker v. Arnold, 3 Cai. 283 (1805), Livingston, J.; 1 Parsons on Notes and Bills, 279.

97. Southard v. Porter, 43 N. H. 380 (1861). The party had notice of the

able to order, an assignment is not in the usual course of business. It transfers the equitable, but not the legal, title; and an indorsement after maturity, or after notice of a defense, cannot effectuate an anterior imperfect transaction, and exclude equitable defenses which had become available.[98] In Wisconsin it is held that a post indorsement relates back to delivery in respect to any equity outside of the note itself.[99]

In Maine it has been held that where an assignment is made before maturity, a contemporaneous promise of the payee to indorse, if not complied with until after maturity, will not avoid the defense of want of consideration, made by the maker against the indorsee.[1]

§ **746.** In respect to set-off a different principle applies. An indorsement at any time before suit brought, whether before or after

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defense at the time of the indorsement, but not at time of assignment. But see Haskell v. Mitchell, 53 Me. 468. In Watkins v. Maule, 2 Jac. & Walk. 237, it is said by Lord Eldon: "When a note is handed over for a valuable consideration the indorsement is a mere form, the transfer for consideration is the substance; it creates an equitable right and entitles the party to call for the form." Hughes v. Nelson, 29 N. J. Eq. 549. Quoting the text, the court, in Schoepfer v. Tommack, 97 Ill App. 562, said: "We are inclined, however, to the opinion that the doctrine should not be so limited, unless it be said that there is an implied agreement and intention to indorse the paper where, as here, nothing was said, and there was a *bona fide* sale for a valuable consideration."

98. McCormick v. Sawyer, 108 Me. 405, 81 Atl. 482; Lancaster Nat. Bank v. Taylor, 100 Mass. 24 (1868); Clark v. Whitaker, 50 N. H. 474; Southard v. Porter, 43 N. H. 380; Whistler v. Forster, 14 J. Scott (N. S.) (108 Eng. C. L.) 254 (1863). Erle, C. J.: "Griffiths, at the time he so handed the bill over to the plaintiff, omitted to indorse it. Under these circumstances the condition of things was this, that the plaintiff had at that time the same rights as if an ordinary chattel had passed to him by an equitable assignment; he would have all the rights which Griffiths could convey to him. Now, Griffiths having defrauded the defendant of the bill, he could pass no right by merely handing over the bill to another. According to the law merchant the title to a negotiable instrument passes by indorsement and delivery. A title so acquired is good against all the world, provided the instrument is taken for value and without notice of any fraud. The plaintiff's title, under the equitable assignment here, therefore, was to be rendered valid by indorsement; but, at the time he obtained the indorsement, he had notice that the bill had been fraudulently obtained by Griffiths from the defendant, and that Griffiths had no right to make the indorsement. Assuming, therefore, that there may be conflicting equities between the plaintiff and the defendant, I think the right should prevail according to the rules of law, and that the plaintiff had no title as transferee of the bill at all." Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512.

99. Beard v. Dedolph, 29 Wis. 136.

1. Haskell v. Mitchell, 53 Me. 468 (1866)

maturity, cuts out the right of the maker or acceptor to plead it, for a set-off is not an equity.[2]

§ 747. A second assignee who gives immediate notice of his assignment will be protected against a prior one who failed to give notice,[3] or who is guilty of any neglect or fraud which enables the assignor to make a second assignment to a *bona fide* assignee.[4]

The assignee may sue the debtor in his own name, when the assignor has discharged him, and the debtor, in consideration thereof and of the assignment, has promised the assignee to pay the debt to him.[5] And the debtor, after making such promise to pay the assignee, could not make defenses available against the assignor which he did not reserve in his promise to the assignee.[6]

§ 748. Equitable assignment.—There is a peculiar kind of assignment which remains yet to be noticed. It is an assignment which arises not from the direct act of the person from whom the beneficial interest in the thing assigned passes; but is effected by operation of law, and is called equitable assignment.

The assignment of any particular claim is considered an equitable assignment of all securities held by the assignor to assure it. Thus the assignment of a debt by whatever form of transfer, carries with it any bill or note by which it is secured;[7] and the converse of the proposition is equally true, that the transfer by indorsement or assignment of a bill or note carries with it all securities for its payment,[8]

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2. Ranger v. Carey, 1 Metc. (Mass.) 369 (1840). *Contra*, Odiorne v. Woodman, 39 N. H. 544 (1859). The case of Ranger v. Carey is often quoted in support of the doctrine that indorsement relates back to the assignment; but the contrary is expressly decided in Lancaster Nat. Bank v. Taylor, 100 Mass. 24, and that case is there explained.

3. Judson v. Corcoran, 17 How. 612.

4. Maykin v. Kirby, 4 Rich. Eq. 105.

5. Tatlock v. Harris, 3 T. R. 174; Weston v. Barker, 12 Johns. 276; Doty v. Wilson; 14 Johns. 378; Murry v. Todd, 12 Mass. 281; Currier v. Hodgdon, 3 N. H. 82; Myers v. York, etc., R. Co., 43 Me. 232; McGahan & Co. v. Lockett, 54 S. C. 364, 32 S. E. 429, 71 Am. St. Rep. 796.

6. Wiggin v. Damrell, 4 N. H. 69; Thompson v. Emery, 7 Fost. 269.

7. Marston v. Allen, 8 M. & W. 494; Adams v. Jones, 12 Ad. & El. 455; Hayes v. Caulfield, 5 Q. B. 81; Smith v. Brunk, 14 Colo. 75, 23 Pac. 325; Ross-Meehan Brake, Shoe Foundry Co. v. Pascagoula Ice Co. *et al.*, 72 Miss. 608, 18 So. 364.

8. Freeman's Bank v. Ruckman, 16 Gratt. 129. See *post*, § 834; Mechanics' Building Assn., 29 La. Ann. 549; Cross v. Moffat, 11 Colo. 210; Kernohan v. Manss, 53 Ohio St. 118, 41 N. E. 258; Hussey v. Hill, 120 N. C. 312, 26 S. E. 919,

whether they exist by way of mortgage, deed of trust, or otherwise.[9] A renewal note has the benefit of any security for the payment of the original, whether by way of mortgage, deed of trust, or otherwise, and the holder may enforce it,[10] whether the renewal be for the whole or for part of the original in the absence of any agreement to the contrary.[11]

§ **748a. Assignment by separate paper.**—Negotiable instruments may also be assigned by a separate and distinct paper, although not delivered, as by deed or mortgage, conveying them specifically, or all "choses in action;" [12] but it has been held that such an assign-

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58 Am. St. Rep. 789. Held in this case, that the assignment of a note with mortgage securing it, does not carry with it the power of sale contained in the mortgage.

9. See *post*, §§ 834, 1282; De Bruhl v. Maas, 54 Tex. 464; Martin v. O'Bannon, 35 Ark. 68; Garrett v. Williams, 31 Ark. 240; Citizens' Bank v. Ferry, 32 La. Ann. 120; Kerhane v. Smith, 97 Ill. 159; Dunn v. Snell, 15 Mass. 485; Titcomb v. Thomas, 5 Greenl. 282; Jones v. Witter, 13 Mass. 282; Waller v. Tate, 4 B. Mon. 529; Miller v. Ord, 2 Binn. 382; Fox v. Foster, 4 Pa. St. 119; Croft v. Bunster, 9 Wis. 503; Potter v. Stransky, 48 Wis. 244; Johnson v. Carpenter, 7 Minn. 183; Holmes v. McGintry, 44 Miss. 94; Kelley v. Whitney, 45 Wis. 110; Walker v. Kee, 14 S. C. 144; Hall v. Mobile & M. R. Co., 58 Ala. 10; Murray v. Jones, 50 Ga. 118; Fisher v. Otis, 3 Chand. 83; Dodge v. Bank, 1 McArthur, 420; Robinson v. Campbell, 60 Ka. 60, 55 Pac. 276.

10. Gleason v. Wright, 55 Miss. 247; Union Nat. Bank v. Slocomb, 34 La. Ann. 927; Williams v. National Bank of Baltimore, 72 Md. 441, 20 Atl. 191. See § 835*a*. The acceptance of a renewal note will not discharge a lien accompanying the renewal note unless it clearly appears that discharge was intended. Beall v. Hudson County Water Co., 185 Fed. 179. The rights of the assignee of purchase money notes given by the vendee under a bond for a deed, as against a mortgagee or purchaser in good faith, are to be determined by the recording acts of the State rather than by the law of negotiable instruments; and if the assignee fails to procure from the vendor, and record, an assignment of the notes to him, a subsequent purchaser or incumbrancer of the vendor, without notice of the assignee's rights, will be protected. First Nat. Bank of Fall City v. Edgar, 65 Nebr. 340, 91 N. W. 404.

11. Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 217; Commercial Bank v. Davy, 81 Hun, 200, 30 N. Y. Supp. 718; Hawkins, Receiver, v. Fourth Nat. Bank of New York, 150 Ind. 117, 49 N. E. 957, citing the text; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 Pac. 922, citing text.

12. McGee v. Riddlesgarber, 39 Mo. 365; Grand Gulf Bank v. Wood, 12 Smedes & M. 482; Ducarse v. Keyser, 28 La. 419; Adams v. Robinson, 69 Ga. 627; Planters,' etc., Ins. Co. v. Tunstall, 72 Ala. 142; Hays v. Plumber, 126 Cal. 107, 58 Pac. 447, 77 Am. St. Rep. 153; Brannock v. Magoon, 141 Mo. App. 316, 125 S. W. 535. A letter, containing nothing more than a promise to turn notes over to the person addressed at some future time, and with nothing in it

ment carries only the equitable and not the legal title.[13] For such mode of transfer separates the evidence of ownership from the paper itself.[14] The deed, or other instrument by which the assignment is made, operates as a constructive delivery of the paper, and the transferrer holds it as agent of the transferee.[15] Where a person who has made a voluntary assignment for the benefit of creditors, retains certain promissory notes which passed by the assignment, he may be sued by the assignee in trover for their conversion.[16] If a party, to induce another to discount a note of a third party, gives a written obligation, "to be holden precisely the same as if I had indorsed said note," he is entitled to it upon making payment, and has the same rights as an indorser would have on taking it up.[17]

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to indicate that an assignment of the notes was by its terms then and there intended, is not sufficient to show an assignment. Strickland & Co. v. Lesesne & Ladd, 160 Ala. 213, 49 So. 233.

13. Franklin v. Twogood, 18 Iowa, 517; French v. Turner, 15 Ind. 62; Grand Gulf Bank v. Wood, 12 Smedes & M. 482; Barrett v. Hinckley, 124 Ill. 40; Condon v. Barnum (Iowa), 106 N. W. 514; Sathre v. Rolfe, 31 Mont. 85, 77 Pac. 431; Huntington v. Lombard, 22 Wash. 202, 60 Pac. 414.

14. Hopkirk v. Page, 2 Brock. 41, Marshall, C. J.; Milenoy v. Keen, 89 Ill. 395. See *ante*, § 689.

15. Byles on Bills (Sharswood's ed.) [*143], 260, note 1.

16. Burrows v. Keays, 37 Mich. 431.

17. Bishop v. Rowe, 71 Me. 263.

CHAPTER XXIII

THE SALE AND DISCOUNT OF BILLS AND NOTES, AND THE AMOUNT OF RECOVERY

SECTION I

THE VALIDITY OF THE ORIGINAL NEGOTIATION

§ **749.** When suit is brought upon a negotiable instrument by the payee, or indorsee, or by an assignee without indorsement where it is payable to bearer, he is presumed to have paid therefor its full face value, and is, therefore, *prima facie* entitled to recover the whole amount of all the parties bound to him for its payment.[1] But suppose the indorsee, where such an instrument is payable to order, or the assignee by delivery, where it is payable to bearer, has paid his immediate transferrer less than its face value, there are then several important questions presented. The *first* is, is the transaction of such a character as to constitute the instrument usurious in its inception? *Second,* if there be no usury, what is the amount of recovery as against the maker or acceptor? *Third,* is the contract of transfer usurious as between the parties thereto? And *fourth,* what is the amount of recovery against the indorser?

§ **750. Is transaction usurious?**—In the first place, is the transaction of such a character as to render the instrument usurious in its inception? There is no doubt that if a note be executed by A. to B. for a valuable consideration, that B. may sell it to C. for any amount, and that C., regardless of the amount he pays for it, may recover its full face value of the maker.[2] And where B. transfers the

1. Lee v. Pile, 37 Ind. 107; Youse v. McCreary, 2 Blackf. 246; Duncan & Sherman v. Gilbert, 20 N. J. L. (5 Dutch.) 521; Allaire v. Hartshorne, 1 Zabr. 673; Barmby v. Wolfe, 44 Nebr. 77, 62 N. W. 318.

2. Nichols v. Pearson, 7 Pet. 109; Corning v. Pond, 29 Hun, 129, distinguishing Powell v. Waters, Sweet v. Chapman, and Hall v. Wilson, *infra*; Freeman v. Britton, 2 Harr. 209; Newman v. Williams, 29 Miss. 222; Cowles v. McVickar, 3 Wis. (Smith) 731.

note without indorsement (or by indorsement without recourse), the transaction is clearly the mere sale or assignment of a debt due to him, which he has as much right to sell as he has to dispose of any other species of property.[3] But if A. had made his note to B. for B.'s accommodation, and C., knowing the fact, were to purchase it from B., the transaction would wear a different complexion. In such a case B. does not sell an article of which he himself possesses full ownership. And if the amount paid for it by C. is at a greater rate of discount than allowed by law, the contract is usurious, as it is really a loan of money by C. upon the undertaking of A. to pay him back a sum so far greater that it exceeds the rate of interest which C. may legally receive upon his advancement.[4]

§ 751. General rule as to usury in negotiation of the instrument.—Hence this rule may be laid down: if no party prior to the holder could himself bring an action upon the note, and the holder knew that fact at the time he received it, then no prior party owned, or seemed to own it, and the holder who is the first owner must be taken to have loaned the money to the maker. And consequently, if the consideration paid for it amounts to usury, such holder cannot recover at all.[5] Many authorities go further than this, and declare that although the holder when he took the note did not know that no prior party could sue upon it, that, nevertheless, if such were the fact, he must be held to have loaned the money to the maker; and that if the sum to be paid amount to more than the legal rate of interest on the amount paid, the holder can have no recovery against the maker.[6]

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3. Ibid.

4. Whitworth v. Adams, 5 Rand. 333 (1827); Overton v. Hardin, 6 Coldw. 378; Freeport Bank v. Hagemeyer, 91 Hun, 194, 36 N. Y. Supp. 214; Joy v. Diefendorf, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484.

5. Whitworth v. Adams, 5 Rand. 333 (1829); Veazie Bank v. Paulk, 40 Me. 109 (1855); Richardson v. Scobee, 10 B. Mon. 12 (1849); May v. Campbell, 7 Humphr. 450 (1846); Capital City Ins. Co. v. Quinn, 73 Ala. 562, citing the text; Central Trust Co. v. Burton, 74 Wis. 332. Payee can abandon the usurious note and maintain suit against the maker upon the original consideration, but mere indorsee of the usurious note cannot maintain suit upon the original consideration. Stewart v. Lathrop Mfg. Co., 95 Tenn. 497, 32 S. W. 464; Haffner v. Brownell, 82 Iowa, 104, 47 N. E. 979; Planters' & Merchants' Bank v. Goetter, Weil & Co., 108 Ala. 408, 19 So. 54.

6. Sweet v. Chapman, 7 Hun, 576 (1876); Munn v. Commission Co., 15 Johns. 53 (1818), bill of exchange; Powell v. Waters, 17 Johns. 177 (1819); affd. in 8 Cow. 669 (1826), promissory note; Williams v. Storms, 2 Duer, 52 (1853), a note; Catlin v. Gunter, 11 N. Y. 368 (1854), a note; Hall v. Wilson, 16 Barb. 548 (1853),

§ 752. View taken in New York.—In New York this view has been taken in numerous cases, it being said that the note, "to be the subject of such sale, must have a pre-existing vitality. Its breath of life cannot be imparted through a usurious transaction."[7] But it is there also held that usury in the inception of a note is no defense to the maker against the accommodation payor and indorser who takes up the note after protest with no notice of the usury.[8] The question of the inception of the paper and the time it took place is a question of fact, and, if evidence be conflicting, should be submitted to the jury.[9]

It has been also held in New York that the principle does not apply where a note has been obtained by fraud by the payee from the maker, and has been actually delivered to him as and for a valid security,[10]

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a note; Bossange v. Ross, 29 Barb. 576 (1859), a note; Clark v. Loomis, 5 Duer, 468 (1858), a note; Eastman v. Shaw, 65 N. Y. 522; Belden v. Lamb, 17 Conn. 452 (1846), a note; Holeman v. Hobson, 8 Humphr. 129, 130 (1847), a note; Overton v. Hardin, 6 Coldw. 378, a note; Corcoran v. Powers, 6 Ohio St. 19 (1856), bill of exchange; Bock v. Lauman, 24 Pa. St. 448 (1855), bill of exchange; Van Schaack v. Stafford, 12 Pick. 565 (1832), a note; Saltmarsh v. Planters, etc., Bank, 14 Ala. 668 (1848), bill of exchange; Simpson v. Fullenwider, 12 Ired. Law, 335 (1851), a note; Fleming v. Mulligan, 2 McCord, 173 (1822), a note. See § 758; Union Bank v. Gilbert, 83 Hun, 417, 31 N. Y. Supp. 945, citing Swartwout v. Payne, 19 Johns. 294, 10 Am. Dec. 228; Freeport Bank v. Hagemeyer, 91 Hun, 194, 36 N. Y. Supp. 214; The Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 S. W. 504. In Nebraska, held, that where usury appears in a transaction, the burden is on the holder of the instrument to show that he is a *bona fide* holder for value and acquired same before maturity. Suiter v. National Nank, 35 Nebr. 373, 53 N. W. 205.

7. Powell v. Waters, 8 Cow. 669, affirming same case in 17 Johns. 176; Cassebeer v. Kalbfleisch, 11 Hun, 120; Zabriskie v. Spielman, 46 N. J. L. 34. But it has been held in Georgia, that where the lender of money neither charges nor receives any more than the legal rate of interest, the fact that the money was, with his knowledge, borrowed for the purpose of paying a debt infected with usury due by the borrower to a third person, does not make the loan usurious. See Thompson v. First Nat. Bank of Dawson, 99 Ga. 651, 26 S. E. 79.

8. Cassebeer v. Kalbfleisch, 11 Hun, 123.

9. Sweet v. Chapman, 7 Hun, 577.

10. Harger v. Wilson, 63 Barb. 237 (1872). The note was obtained from the maker by the payee on fraudulent representations on the sale of a worthless patent right. It was for $1,000, and was sold for $900 to the holder, the rate of discount amounting to 26 per cent. interest. It was held not usury, as the note was delivered as a valid security. It has likewise been held in New York, where the defense of usury is interposed to an action on a promissory note, the fact that the note was made payable to a third party, an alleged creditor of the party to the usurious agreement to whom it was delivered, does not estop the maker

but that it would apply where there was no delivery by the maker, but an obtaining of possession, and putting of it in circulation by fraudulent means.[11] These decisions are exceedingly refining in the distinctions taken, and the better opinion, it seems to us, is, that in all cases, if the holder at the time he received the note did not know the fact that it was not a valid subsisting security, there is no intention of borrowing and lending, which is necessary to create usury; and the holder may recover upon it as against the maker.[12] And to hold otherwise, it has been well said, "would reverse the general and sound principle of law and justice, that whenever one of two persons must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself." [13]

Under Negotiable Intsrument statute.—It has been held that the rule of law that the sale of accommodation paper is merely a loan of money, the purchaser being the lender and the seller the borrower, has not been changed or affected by the statute.[14]

§ 753. **If a note is offered for discount by the maker,** it is plainly usurious, as between him and the party to whom it is delivered, if the discount from its face value were greater than that allowed upon a loan; and if it be already indorsed, its presence in the maker's hands is evidence that the indorsement was for accommodation, and that it is not a valid security which may be the subject of sale.[15] An

thereof, having knowledge of such facts, from setting up the usury. See Goldman v. Uhlmann, 16 App. Div. 324, 44 N. Y. Supp. 636.

11. Hall v. Wilson, 16 Barb. 548 (1853). In this case the note for $120 payable to bearer was never delivered, but was stolen from the maker's desk by a laborer, and sold to Bigelow for $115. It was held that the latter could not recover, as the transaction constituted a loan, the note having no existence as such until it came into the hands of Bigelow upon a consideration that amounted to usurious interest. In Iowa, it is held that the fact that the *bona fide* holder of a promissory note, obtained originally by fraud and without consideration, purchased it for a considerably less amount than its face, will not affect or limit his right of recovery. Lay v. Wissman, 36 Iowa, 305.

12. Whitworth v. Adams, 5 Rand. 333; Taylor v. Bruce, Gilmer (Va.), 42; Brummel v. Enders, 18 Gratt. 873; Gimmi v. Cullen, 20 Gratt. 439; Bailey v. Hill, 77 Va. 497; Gaul v. Willis, 26 Pa. St. 259; Davis v. Marvine, 160 N. Y. 269, 54 N. E. 704; Henry v. Sansom, 2 Tex. Civ. App. 150, 21 S. W. 69.

13. Coalter, J., in Whitworth v. Adams, *supra.*

14. Appendix, sec. 29. Strickland v. Henry, 73 N. Y. S. 12, 66 App. Div. 23.

15. Whitworth v. Adams, 5 Rand. 411, Cabell, J.; Wallace v. Branch Bank, 1 Ala. 565; Overton v. Hardin, 6 Coldw. 376; Hendrie v. Berkowitz, 37 Cal. 113. See also Fielden v. Lahens, 2 Abb. App. 111; The Salmon Falls Bank v. Leyser, 116 Mo. 51, 22 S. W. 504.

accepted bill offered for sale by the acceptor would stand upon the same footing, as the acceptor is the party primarily bound for its payment, and could not himself sue any party to it.[16] It is also clear that if the payee of a bill or note whose name appears indorsed thereon prior to other indorsers, offers it for discount, the subsequent indorsers must be taken to have indorsed for such prior indorser's accommodation, and that it would be usurious if the party discounting it deducted more than legal discount as between him and the indorsers for accommodation, of whose character the nature of the transaction gives notice.[17] Whether or not the same rule would apply where a bill is offered for discount by the drawer is a question upon which the authorities differ, some taking the view that the transaction would be a usurious loan,[18] others that it would be a mere sale of a debt due the drawer by the drawee or acceptor.[19] The latter opinion seems to us correct, for reasons elsewhere stated.[20]

§ 753a. Purchaser must assume apparent relations of parties to be real.—An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself.[21] Where the maker of a note places it in the hands of a broker to be sold, without any restrictions as to the manner in which such sale is to be made,

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16. Carlisle v. Hill, 16 Ala. 405; Saltmarsh v. Planters, etc., Bank, 14 Ala. 668. See Witte v. Williams, 8 Rich. 304.

17. Mauldin v. Branch Bank, 2 Ala. 513. The fact that the payee upon the sale of a negotiable note becomes by indorsement liable for its payment does not characterize the transaction as a loan to him. Gate City Nat. Bank v. Thrall, 116 P. 487, 85 Kan. 394.

18. Lowes v. Mazaredo, 1 Stark. 385 (3 Eng. C. L.); Comyn on Usury, 181. See on this subject, King v. Ridge, 4 Price, 50, copied in Appendix, 5 Rand. 617; Whitworth v. Adams, 5 Rand. 333; Noble v. Walker, 17 Ala. 456.

19. Lloyd v. Keach, 2 Conn. 175; Hamilton v. Brennan, 90 Hun, 340, 35 N. Y. Supp. 805. See Steen v. Stretch, 50 Nebr. 572, 70 N. W. 48.

20. See §§ 767, 768.

21. Central Bank v. Hammett, 50 N. Y. 158; Hoge v. Lansing, 35 N. Y. 136. See also *post*, §§ 781, 812; Simms v. Bank of Alma, 32 Nebr. 607, 49 N. W. 332. A negotiable note in the hands of an agent, indorsed in blank by the principal, cannot be regarded by a stranger, having notice of the agency, as both *prima facie* proof of title in the agent and a power of attorney, conferring upon the agent all the power and authority that are incident to ownership, but he may deal with the agent as such, and rely upon the note as conferring apparent authority to sell it and receive payment on behalf of the principal. Merchants' & Manufacturers' Nat. Bank v. Ohio Val. F. Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312.

he is bound by the broker's representations to a *bona fide* purchaser that it is good business paper, and he cannot maintain suit against such purchaser to have the note canceled on the ground that it never had legal inception until it came into the hands of such purchaser, by whom it was discounted at a greater rate than allowed by law.[22]

§ 753b. Title in case of sale passes without delivery.—By the common law, a contract for the sale of specific ascertained goods vests the property therein immediately in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties; and title passes without delivery.[23] This principle is applicable to the sale of bills and notes; and where the payee of a note had made a contract to sell it to one Parks, and the plaintiff was aware of the fact when he purchased the note, it was held that, by the agreement made, title passed to Parks, and that the plaintiff was not a *bona fide* holder, and could not recover.[24]

SECTION II

AMOUNT OF RECOVERY AGAINST MAKER OR ACCEPTOR

§ 754. In the second place, as to the amount of recovery against the maker or acceptor, we have seen already that the holder may recover the full amount if the note was made, or bill accepted, upon a valuable consideration. And even if there was no consideration, as between the original parties, but a mere becoming a party for accommodation, the holder, although he knew the fact, could recover the whole amount, provided he paid full value.[25] But if he paid less than full value, it is a matter of dispute whether or not he is limited, in his recovery, against the maker, to the amount advanced.

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22. Ahern v. Goodspeed, 9 Hun, 265.

23. Benjamin on Sales (2d ed.), 226.

24. Sheldon v. Parker, 3 Hun, 499.

25. Charles v. Marsden, 1 Taunt. 224. And construing the Revised Statutes of the United States, section 5197, which authorizes national banks to charge interest at the rate allowed by the State in which such banks are located, the charge of 10 per cent. cannot be legalized by custom of banks which permits it, and the action provided by section 5198 of the Revised Statutes allowing the recovery back of usurious interest applies only to cases in which such interest has been actually paid. Talbott v. First Nat. Bank, 106 Iowa, 361, 76 N. W. 726.

§ **755. English authorities.**—The view taken in England on this subject has been stated by Mr. Chitty as follows: "With respect to the principal money, or that sum which is payable on the face of the bill or note, many instances occur in which, although the plaintiff may not have given full value for the bill, etc., he may, nevertheless, recover the whole sum, holding the overplus beyond his own demand as trustee for some other party to the bill, etc., entitled to receive such overplus. Thus, if a bill is drawn in the regular course of business, as for money really due from the drawee to the drawer, in such case, in order to avoid several actions, an indorsee, although he has not given the full value of the bill, may recover the whole sum payable, and be the holder of the overplus as a trustee for the indorser. * * * This rule, permitting the holder of a bill to recover more than is due to himself, only applies where there is some other person entitled to receive from the defendant the overplus of what is due to the plaintiff, and if there be no such person, the plaintiff will be permitted only to recover what is due to himself." [26] And he is certainly sustained by judicial authority; but the cases are in a state of confusion, without following clearly defined principles.

§ **756.** In the Court of King's Bench, where it appeared that the bill for £86 was for accommodation as between the drawer and acceptor, and was indorsed by the payee to another for £29, and the indorsee, who knew the circumstances, brought suit against the accommodation drawer, it was held that he could only recover the £29 paid.[27] So where the bill for £415 was accepted for the drawer's accommodation, and indorsed by him to the plaintiff for £265, the plaintiff's assignees, it was held, could only recover £265 from the accommodation acceptor.[28]

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26. Chitty on Bills (13th Am. ed.) [*677], 757.

27. Wiffen v. Roberts, 1 Esp. 261 (1795), Lord Kenyon, C. J., saying: "Where a bill of exchange is given for money really due from the drawee to the drawer, or is drawn in the regular course of business, in such case the indorsee, though he has not given to the indorser the full amount of the bill, yet he may recover the whole, and be the holder of the overplus above the sum he has really paid to the use of the indorsee; but where the bill is an accommodation one, and that known to the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has actually paid for the bill; and if the plaintiff in this case was entitled to recover, he could only do it to the amount of £29, the sum he really paid for it."

28. Jones v. Hibbert, 2 Stark. 271 (1817). See Barber v. Backhouse, Peake's Cases, 61.

It has been observed, however, in respect to the *nisi prius* decision of Lord Kenyon referred to in the notes, that he proceeded upon the fact, probably proved in the cause, that the bill was not sold out and out to the plaintiff, but was only pledged as a security for the money advanced; and that the case of a deposit or transfer of a bill for the security of money advanced upon its credit, and not for its absolute purchase, is the only case in which the holder can be trustee for the indorser for a part of the bill, unless he has repaid to the holder, on account of the bill, a part of its amount.[29] And this is, we think, clearly a correct view of the law.

§ 757. Authorities in the United States.—In the United States, the authorities are directly at war. But the true doctrine, as it seems to us, is, that the party paying less than its face value for paper made, accepted, drawn, or indorsed for accommodation, and not knowing the fact at the time of purchase, is entitled to recover the full amount against the accommodation parties, because they have deliberately and intentionally put forth themselves to be treated as being bound in the manner indicated.[30] But the view has been taken in a number of cases that he is only a *bona fide* holder to the extent of the consideration paid by himself or a prior party, and can recover that only against the accommodation party.[31] And even if he knew they were accommodation parties at the time of purchase, it would make no difference, provided the party he purchased it from was a *bona fide* holder, who could himself enforce it,[32] or was a subsequent holder to the parties between whom the accommodation existed, and appeared to the purchaser to be himself a *bona fide* holder, and not an agent for any of the parties to the accommodation.[33] It will be observed that if the purchaser of a bill accepted, or note made for

29. Whitworth v. Adams, 5 Rand. 377 (1827), Green, J., dissenting on main point decided, but not on this proposition.

30. Moore v. Baird, 30 Pa. St. 138; Gaul v. Willis, 26 Pa. St. 259; Dunn v. Ghost, 5 Colo. 139, citing the text; Bissell v. Dickerson, 64 Conn. 61, 29 Atl. 226; Benton v. German-Am. Nat. Bank, 122 Mo. 332, 26 S. W. 975.

31. Holcomb v. Wyckoff, 35 N. J. L. (6 Vroom) 37 (1870); Allaire v. Hartshorne, 1 Zabr. 665; Stoddard v. Kimball, 6 Cush. 469; Story on Bills (Bennett's ed.), § 188; Berkeley v. Tinsley, 88 Va. 1005, 14 S. E. 842, citing text in a case where the paper had been used as collateral security, and the amount secured was held the limit of recovery, the holder having acquired the paper with notice that the accommodation indorser had withdrawn. See § 832*a*.

32. Holcomb v. Wyckoff, 35 N. J. L. 37.

33. Whitworth v. Adams, 5 Rand. 333; Gimmi v. Cullen, 20 Gratt. 439.

accommodation, gives for it an amount less than the discount allowed by law, he will come within the provision of the statutes against usury, provided he knew its accommodation character.[34] Where no question of usury arises, and there is no question of fraud, we think that it matters not what the purchaser pays, and that he may recover the whole amount against anterior parties, accommodation or otherwise.

§ 758. Amount of recovery when bill or note has inception in fraud.—When the execution of the bill or note has been induced by fraud, a different rule, according to a number of authorities, would apply. The *bona fide* holder of it for value, and without notice, is undoubtedly entitled to be protected against a loss which would befall him if the party defrauded were permitted to set up the defense of fraud on the part of the payee against him, as we have already seen. But it does not, therefore (as has been considered), follow that he may recover of such party the whole amount, when he has paid a less sum. For his protection and security against loss, it is only necessary that he should be paid back the amount which he was induced to give for the instrument by its appearance of validity, and, therefore, such amount is the limit of his recovery against the drawer or maker who was defrauded into the execution of the instrument.[35] Thus, in New York, where the payee obtained a note for $1,000 by fraud, for a worthless patent right, and sold it to the plaintiff for $900 two days afterward, it was held that only $900 could be recovered against the maker.[36]

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34. See *ante*, § 751.

35. Scherer & Co. v. Everest, 168 Fed. 822 (under Iowa statute); Holcomb v. Wyckoff, 35 N. J. L. 38; Bank v. McNair, 116 N. C. 550, 21 S. E. 389, citing the text; Sperlin v. Peninsular Loan & Discount Co. (Tex. Civ. App.), 103 S. W. 232. Story on Bills, § 188. Plaintiff was the holder and owner of a promissory note for $2,600, bearing interest, executed by the maker to her own order, and indorsed by her in blank, and secured by special mortgage on the maker's property. She left this note on deposit with a notary public, fearing it might be destroyed by fire at her own residence. The notary sold, transferred, and delivered the same before maturity, for $2,000, to a third person, mentioning at the time that "it came from the plaintiff"; that it had been reduced to $2,000 by partial payment of $600 upon it; it was held that the purchaser having bought the note as one for $2,000, bearing interest, his rights must be limited accordingly, and that when the mortgage property was sold and the full principal and interest realized, the plaintiff was entitled to the balance. Theard v. Gueringer, 115 La. 242, 38 So. 979.

36. Harger v. Wilson, 63 Barb. 237 (1872), Talcott, J.: "A majority of the

And in the same State where the payee obtained a note from the maker by false and fraudulent representations made on the sale of a patent right, and passed it to the holder with another note for a span of horses, worth but half as much as the amount of the note, it was held that the value of the consideration only could be recovered against the maker.[37] Again, where a note for $10,000 was left at the

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court think that the *bona fide* holder of a note thus fraudulently obtained has no equity as against the party defrauded, beyond the amount of the advances he has made upon the faith of the note."

37. Huff v. Wagner, 63 Barb. 230 (1872), Talcott, J., saying in the course of his opinion: "The plaintiff had a verdict under the instruction of the court that he was a *bona fide* holder, and was entitled to recover on the note, notwithstanding the fraud practiced by Ferguson in obtaining the note. The Special Term granted a new trial upon the exception to the ruling as to the admission of the evidence, and upon the principle that a *bona fide* holder of commercial paper, to which, as between maker and payee, there is a good defense, is entitled to be protected only to the extent of the value which he has paid. This, I think, is correct. The protection of the holder for value in such cases, as in other cases, where the law protects *bona fide* purchasers against latent claims, is founded upon the idea of protecting such *bona fide* purchaser for value against any possible loss. And this is the precise reason why a *bona fide* holder of such paper, which has been transferred to him to secure an antecedent debt, cannot recover against the party who has been defrauded, namely, that he has lost nothing by his reliance upon the face of the paper. These principles are discussed and laid down in a very elaborate opinion of the late chancellor, delivered in the Court of Errors, in the leading case of Stalker v. McDonald, 6 Hill, 93, in which he expressly holds that, if the holder of such paper has paid but a part of the consideration or value of the property, he is only entitled to be considered as a *bona fide* purchaser *pro tanto*, and refers with approbation to the case of Edwards v. Jones, 7 Car. & P. 633, in which, in an action on a note for £100, the consideration of which was impeached by a plea, the plaintiff replied that it was indorsed to him for the consideration of £49. And he was only permitted to recover the £49 advanced. (Author's note, see § 827, and notes.) The proposition sought to be maintained by the counsel for the appellant in this case, namely, that whatever may have been the consideration of the transfer of a negotiable note, if it was a valuable one, the holder without notice of the invalidity of the note may recover the entire face thereof, without reference to the amount paid by him for it, would produce most unjust and startling results. It would enable the holder of a stolen note for $1,000 to recover the entire amount thereof from the maker, from whom it had been stolen, although the holder had purchased the same without notice for only $100—a result revolting to common sense, and going far beyond affording that protection which public policy requires should be extended to parties who purchase negotiable paper for value. I see no reason for any distinction between the case of a purchaser for money, and one where the note is exchanged for property. If such a distinction could be made, the maker of the note could have no protection. Such notes would be then used in the purchase of property, as in this case, instead of sold for money. The purchaser is fully protected against loss by being

payee's place of business, in contemplation of a settlement between him and the maker, but was not delivered to the payee or to any one for his use, and no settlement was effected, and the note was taken by the payee and indorsed by him to the plaintiff for the sum of $1,500, it was held that the latter's recovery against the maker was limited to the sum paid, with interest. Daniels, J., quoting numerous authorities, said: "Accordingly, it has been held that the indorser of commercial paper, not valid as a legal obligation in the hands of the payee negotiating, must be restricted in his recovery to the value with interest advanced by the payee upon the faith of it. These authorities fully sustain that proposition, and they are in no sense in conflict with the rule that allows a recovery for the full amount of paper improperly negotiated when an adequate consideration has been advanced in good faith upon it. The paper derives its vitality wholly from the circumstance that it has been obtained for value without notice by an innocent purchaser. For his protection it is maintained in his hands as a legal obligation. The object of the law is to save him from loss; and to do that a recovery of the amount he may have advanced is all that can be required. To go beyond it would be inequitable and unjust to the party, after that, equally entitled to be protected from unnecessary loss." [38] But in the same State it has been also held that if there was no intent to deliver the paper, and in fact no delivery, and the holder should acquire it from the payee at a price less than the discount allowed by law, the transaction would be usurious, and the holder could not recover at all.[39] Where some legal

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enabled to recover the full value of the property parted with on the purchase." Moore v. Ryder, 65 N. Y. 443.

38. Todd v. Shelbourne, 8 Hun, 512 (1876); Commercial Bank v. MacDougall Co., 8 App. Div. 1, 40 N. Y. Supp. 189. But it has been held in New York that if the note be diverted from its original purpose, the *bona fide* holder can only recover what he actually paid for the note. See First Nat. Bank of Springfield v. Haulenbeek, 65 Hun, 54, 19 N. Y. Supp. 567.

39. Hall v. Wilson, 16 Barb. 548 (1873); *ante*, § 751; Eastman v. Shaw, 65 N. Y. 522. In this case the defendant signed a note and put it in the hands of the payee to show to others as evidence that he would contribute that amount to a certain proposed enterprise. The company to carry it on was never formed as proposed, and the payee sold the note at a discount greater than legal interest. In an action by the holder against the maker, it was held that the note had no inception until the sale, and was usurious and void; and, therefore, that the holder could recover nothing. Dwight, C., said: "These authorities serve to show that the rule that a note must have had an inception, to make it the subject of sale, is not confined to the case of accommodation paper, but extends to all cases where the paper, though in the similitude of a note, has no existence as

consideration exists in the inception of the paper, it seems that in New York the *bona fide* holder may recover the full amount, no matter what amount he may give for it.[40] This seems to us the true distinction in such cases. If the paper is issued in fraud without consideration, the *bona fide* purchaser should be limited in recovery to the amount paid with interest.[41] But if there was an original valid consideration, or the paper was issued fairly and intentionally without consideration, then he is entitled to recover the whole amount regardless of the amount he pays.[42]

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between the immediate parties to it. This point is well shown by the case of Marvin v. McCullum, 20 Johns. 288. * * * On this ground it appears to me that the case of Hall v. Wilson, 16 Barb. 548, was correctly decided. * * * It is not necessary in reaching this conclusion to disagree with such cases as Howe v. Potter, 61 Barb. 356, and Harger v. Wilson, 63 Barb. 237. In each of these cases the transaction had all the elements of a contract. In Harger v. Wilson the maker of the note intentionally issued the note and put it in circulation, though induced to do so by the fraud of the payee. Here was a valid contract, though in its nature defeasible. The payee could have brought an action on the note, though the fraud might have been urged as a defense. It was properly held that the note had an inception in the hands of the payee. Such a case is plainly no authority, for the decision of one where the defense is, that the note never took effect at all, because there was no intent to deliver, and in fact no delivery."

40. Howe v. Potter, 61 Barb. 357 (1872). In this case nothing is said as to the amount reserved by the holder, but it appears to have been a full recovery upon the draft. As to the rule in Tennessee, see Coliger v. Francis, 58 Tenn. 423; *post*, § 778, note; and Holman v. Holson, 8 Humphr. 107; Petty v. Hinman, 2 Humphr. 102.

41. Holcomb v. Wyckoff, 35 N. J. L. 38 (1870), Depue, J., saying: "The case now before the court cannot be distinguished from Allaire v. Hartshorne upon any principle founded on reason or justice. In both cases the notes were void in the hands of the original parties, and the only vitality they possessed was that which they acquired from the consideration for which they were transferred. In the one case a portion of the sum mentioned in the note being a trust for the payee, as to whom the note was void, it was manifest that for so much the plaintiff ought not to recover; in the other case, the note being equally void, the plaintiff has no equity to recover, beyond what will be indemnity for the money prepaid for it."

42. See Daniels v. Wilson, 21 Minn. 530 (1875). In this case a note for $280.79, with accumulated interest, was sold by indorsement to the holder for $150. It was without consideration. Berry, J., said: "The familiar general rule is that an indorsee of negotiable paper, for value, before maturity, without notice of any infirmity, takes it clear of all equities and defenses between antecedent parties, and is, of course, entitled to full amount of the same, according to its tenor. When the originial consideration of the paper is illegal or fraudulent, or it is taken as collateral security, and perhaps in some other instances, an exception to this rule has been recognized, so as to restrict the right of recovery to the consideration actually paid by the indorsee, or to the amount of the debt to which the paper

§ **758a. Conflicting authorities.**—There are authorities which conflict with the doctrine of the text, and there is no doubt that some of those cited in support of it, by the courts which adopt it as sound law, are not strictly applicable as precedents. They are cases in which the holder took the paper invalid between original parties as security for a debt, and would hold the residue after discharging it as a trustee for the transferrer; and in such cases it has been properly held that as the transferrer could not himself recover, there could be no recovery as a trustee for his benefit, and, therefore, no recovery beyond the amount due the plaintiff.[43]

While we reject these cases as authoritative in support of the text, yet its conclusions seem to rest upon broad principles of equity, and to extend a just and sufficient protection to purchasers of commercial paper while not too rigorously pursuing those who have been innocently defrauded into its execution.

In Iowa, the contrary doctrine has been distinctly held in a case where a note for $150 obtained by fraud was indorsed to a purchaser for $80. Day, J., saying: "The defense that a note has been obtained fraudulently, or without consideration, does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defense does not avail, for without such defense he would recover the amount evidenced by the note." [44] And the like view seems to have obtained in other cases, though the question as to the limitation of the amount of recovery was not particularly presented, but rather assumed not to exist, if there could be any recovery at all.[45]

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is collateral. The defendant contends for a like exception in this case, in which it appears that the note was without consideration, and the plaintiff purchased it for less than its face. But in our opinion no such exception is admissible upon principle." Farber v. National Forge & Iron Co., 140 Ind. 54, 39 N. E. 249, citing the text; Holmes v. Gardner, 50 Ohio, 167, 33 N. E. 644.

43. Allaire v. Hartshorne, 1 Zabr. 663. See § 832; Barnby v. Wolfe, 44 Nebr. 77, 62 N. W. 318.

44. Lay v. Wissman, 36 Iowa, 305 (1873). See article in Alb. L. J., vol. XVIII, No. 13, Sept. 28, 1878, p. 247; Vinton v. Peck, 14 Mich. 296 (1866), Campbell, J.: "The maker of a note has no concern with the amount paid for it by a *bona fide* holder."

45. Bailey v. Smith, 14 Ohio St. 396 (1863); Mathews v. Rutherford, 7 La. Ann. 225, quoted for this doctrine, was a case of accommodation paper, and not of paper obtained by fraud. Bissell v. Dickerson, 64 Conn. 73, 29 Atl. 226, holds that accommodation paper must be treated in hands of a *bona fide* holder like business paper although it be obtained through the accommodation maker by fraud; and that the full amount with interest is recoverable although the

§ 758b. Doctrine of United States Supreme Court as to amount of recovery.—When there is no infirmity or defense between original parties to a negotiable instrument, a purchaser can recover from the maker the whole amount irrespective of what he may have paid therefor.[46]

The United States Supreme Court has expressed itself in favor of the doctrine that the purchaser of a negotiable security before maturity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, though he may have paid less than its par value, whatever may have been its original infirmity,[47] and this view seems to be the settled conclusion of that tribunal.[48]

§ 758c. When notice of fraud is received after part payment.—If the purchaser has paid only part of the amount agreed upon for the paper, and the contract remains unexecuted as to the residue, when he receives notice of fraud in the inception of the paper, it is clear that he can then recover only the amount which he had paid before such notice was received. As to what he pays after such notice he is not a purchaser in good faith.[49] And if a portion of the contract be entirely unexecuted when he receives notice of the fraud, he can recover nothing.[50]

§ 759. When there is usury established as between indorser and indorsee of a bill or note, the indorsee cannot sustain action against the indorser, because the contract is void. But it is held by some authorities that he may sue prior parties, tracing title through his indorser, because, in so far as it transfers title, it is an executed contract; and as a party claiming a stolen horse could recover him from the thief, although in proving it to be his property it appears that he

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holder paid less for it. See Belden v. Lamb, 17 Conn. 73; Rowland v. Fowler, 47 Conn. 74, 36 Am. Rep. 51.

46. Wade v. Chicago, etc., R. Co., 149 U. S. 327, 13 Sup. Ct. Rep. 892.

47. Cromwell v. County of Sac., 96 U. S. (6 Otto) 60 (1877); Bank v. Davis, 114 N. C. 343, 19 S. E. 280, 41 Am. St. Rep. 795, citing and approving text; Rotan v. Maedgen, 24 Tex. Civ. App. 558.

48. Railroad Companies v. Schutte, 103 U. S. 118, 145, Waite, C. J. (1880).

49. Dresser v. Mo., etc., R. Co., 93 U. S. (3 Otto) 95; Habbard v. Chapin, 2 Allen, 328; Lay v. Wissman, 36 Iowa, 309; Wade v. Chicuo, etc., R. Co., 149 U. S. 327, 13 Sup. Ct. Rep. 892; Campbell v. Brown, 100 Tenn. 245, 48 S. W. 970, citing text.

50. Crandell v. Vickery, 45 Barb. 156; § 789*a*.

acquired title under a usurious bargain, so the holder may prove his right to recover the amount due from those not implicated in the usury.[51] By other authorities the doctrine is denied; but it seems to us sound, though the views expressed against it are weighty.[52]

§ 759a. Amount of recovery under usurious contract.—When a contract is rendered void either *in toto*, or *pro tanto*, on account of usury, the extent of the forfeiture is determined by statute on that subject. At common law, it is not usury for a note to provide for payment of interest at a greater rate than that provided by law, if the debt is not paid at maturity; but, the Legislatures of many of the States have enacted what is called usury laws, with varying provisions as to the penalty for usurious interest. Some of them provide for a forfeiture of the entire principal; some for a portion of the principal; others for the entire interest, and still others for a forfeiture of the usurious interest, and sometimes with additional penalties. It is obviously necessary, therefore, that the statute law should be examined and consulted before passing upon this question in any particular jurisdiction. By section 5189 of the Revised Statutes of the United States, it is provided that if a national bank knowingly charges usurious interest, all interest is forfeited, and the borrower may recover double the amount of interest actually paid if suit is brought within two years. This section of the United States Revised Statutes has been construed as meaning that the borrower may recover double the amount of the *excessive* interest charged;[53] but

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51. Armstrong v. Gibson, 31 Wis. 66 (1872); Collier v. Nevill, 3 Dev. 31; Knights v. Putman, 3 Pick. 185, Wilde, J.: "It is manifest that the maker of a note is not affected by a usurious agreement between the indorser and indorsee. He is liable on his contract, and it is immaterial to him whether the action be brought in the name of the indorser, or that of the indorsee. But I hold further that the transfer of a note on a usurious consideration is neither void nor voidable. So far as the indorsement operates as a transfer of the note, it is an executed contract, and the statute against usury is not applicable. It only applies to the implied promise or guaranty of the indorser, which, being an executory contract, may be avoided. But in no case can an executed contract be set aside on the plea of usury. It is not, however, necessary to insist on this distinction for the purpose of sustaining the present verdict. It is sufficient for this purpose that the transfer is voidable only, and that it is not competent for the defendant, he not being a party to the transfer, to avoid it." Connor v. Donnell, 55 Tex. 173, citing the text. See *post*, § 764, notes.

52. Lloyd v. Keach, 2 Conn. 175; Nichols v. Pearson, 7 Pet. 103. See Wallace, Admr. v. Lipps, Admr., 47 W. Va. 339.

53. Norfolk Nat. Bank v. Schwenk, 46 Nebr. 381, 64 N. W. 1073.

there are decisions in Texas that support the view that the borrower is not restricted to a recovery of double the excess, but may recover double the interest, both legal and illegal, actually paid.[54]

§ 760. Right to trace title through usurious indorsements.—The authorities also differ upon the question whether or not a subsequent indorsee, who is not a party to the usury, may recover against parties prior to it, tracing title through the indorser who was a party to it. The difficulty may be avoided by such subsequent indorsee striking out the usurious indorsement, and all subsequent indorsements, where there is an indorsement in blank prior to the usury, under which he might then deduce title and enforce payment.[55] But this may not be practicable, or not desirable; and the better opinion, as it seems to us, is, that the holder without notice may sue and recover against all the parties save the indorser, from whom the usury was exacted. As to him, in so far as his contract is an assurance for the payment of money, it cannot be enforced. But, nevertheless, in so far as it evidences the fact that he has transferred the legal title, it seems to us that the indorsement would be sustained as valid for that purpose, upon the ground that the object and spirit of the statute would be subserved, and no violence done to its letter fairly interpreted. The objection to this view lies in the difficulty in distinguishing a note usurious as between the maker and payee, from an indorsement usurious as between the indorser and indorsee. In the first case, the note would be void in the hands even of an innocent holder; and some of the authorities have held that as the indorsement would in like manner be void, no title could be traced through it, and no recovery had against the indorser. That no recovery could be had against him we concede; but if the indorsement be declared so far void that title could not be traced through it, it would throw the forfeiture of the debt, not upon the usurer, as the law throws it, but upon the innocent holder; and to construe the statute to contemplate and design such a result would reverse the rule that courts should construe statutes so as to favor the remedy. The instrument being valid in its inception, stands on the same footing as a chattel, which the holder may sell at any price; and if operated with, like a horse or goods, under a usurious contract, a subsequent purchaser without

54. Boerner v. Traders' Nat. Bank, 90 Tex. 443, 39 S. W. 285; Smith v. Chilton, 90 Tex. 447, 39 S. W. 287; Colgin v. City Nat. Bank, 16 Tex. Civ. App. 346, 40 S. W. 634.

55. Story on Notes, § 190; 2 Parsons on Notes and Bills, 431.

notice would be protected, at least so far as the title is concerned, upon the principle that the wrongdoer will not be heard to deny rights acquired under executed contracts to which he is a party, although when void he might be permitted, on grounds of public policy, to resist their enforcement so far as they are executory. If this be not true, the legal debtor would be exonerated from the debt, and the usurer escape punishment, while the innocent holder alone would suffer. No such result can have been contemplated. The title having actually passed from the indorser, we think he could be no more heard to controvert it against an innocent party, than he would be to recover back money paid under a usurious bargain, or to recover in trover the instrument itself.[56] The opposite view has been taken by the United States Supreme Court, and is concurred in by other authorities.[57]

So where a bill was given by defendant to plaintiff in consideration of his entering into a copartnership with him, and the contract was broken, it was held that he could not recover the whole amount, but only, as Lord Kenyon, C. J., said, "the damages which he had already sustained by nonperformance of the contract."[58]

§ 761. When, however, there has been a novation of the debt, the case is different. Thus, where the indorsee gave $900 for a note of $1,000, indorsed first by its vendor, and then by L. & K., who indorsed it for accommodation of the vendor, at the indorsee's instance and when the note matured, the indorsee accepted two notes of the

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56. Parr v. Eliason, 1 East, 92 (1800); Daniel v. Cartony, 1 Esp. 275 (1795). [But these cases have been overruled. See Lowes v. Mazaredo, 1 Stark. 385 (1816); Chapman v. Black, 2 B. & Ald. 588 (1819).] Whitworth v. Adams, 5 Rand. 395, 396, Coalter, J. But see Whitworth v. Adams, 5 Rand. 419, Cabell, J.; Braman v. Hess, 13 Johns. 52; Munn v. Commission Co., 15 Johns. 44; Bush v. Livingston, 1 Caines' Cases in Error, 66; Foltz v. Mey, 1 Bay, 486; King v. Johnson, 3 McCord, 365; Harick v. Jones, 4 McCord, 402. See *post*, § 764, and notes.

57. Nichols v. Pearson, 7 Pet. 103; Lloyd v. Scott, 4 Pet. 205; Gaither v. Farmers', etc., Bank, 1 Pet. 43, Johnson, J.: "Suppose a note given to a woman who marries, and then indorses it without her husband's authority, such an indorsement would be void, and the indorsee could not recover, yet the husband and wife could recover." Lloyd v. Keach, 2 Conn. 175; Lowes v. Mazaredo, 1 Stark. 385; Chapman v. Black, 2 B. & Ald. 588; Whitworth v. Adams, 5 Rand. 419, 420, Cabell, J. (And see also opinions of Carr & Greene, JJ., who dissented on general grounds from the judgment of the court. On this point, see also same case, pp. 395–396, Coalter, J., *contra*); Story on Notes, § 190.

58. Ledger v. Ewer, Peake's Cases, 217.

vendor for $400 and $600 respectively, indorsed for the vendor's accommodation by L. & K., and surrendered up the note for $1,000, it was held that he could recover the whole amount of L. & K., though he knew they were accommodation indorsers.[59]

Under Negotiable Instrument statute.—The statute declares that a holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for full amount thereof.[60] The statute settles the conflict of authority discussed in the preceding sections as to the amount of recovery not only when defenses of want or failure of consideration are set up,[61] but also when the instrument had its inception in fraud.[62]

SECTION III

VALIDITY OF TRANSFER AND AMOUNT OF RECOVERY AGAINST TRANSFERRER

§ 762. The *third* question, whether or not there is usury upon the transfer of the instrument; and the *fourth* question, what is the amount of recovery against the indorser, if there be no usury—remain to be considered, and may be better presented in connection with each other.

§ 762a. Mere sale, without indorsement, at any price, unobjectionable.—It is quite clear, and universally conceded, that, if the transferrer does not indorse the instrument, the mere selling of it at any price is unobjectionable, as the transferrer does not bind himself for the repayment of the amount paid him in any event.[63] And

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59. Ingalls v. Lee, 9 Barb. 647. Novation means the substitution of one debtor by mutual agreement for another, and there must, therefore, be a new agreement between all the parties which takes the place of the old debt. See Horn v. McKinney, 5 Ind. App. 348, 32 N. E. 334; Wallace, Admr. v. Lipps, Admr., 47 W. Va. 339.

60. Appendix, sec. 57.

61. Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279; Becker v. Hart, 120 N. Y. S. 270; McNamara v. Jose, 28 Wash. 461, 68 Pac. 903.

62. Johnson County Savings Bank v. Walker, 82 Conn. 24, 72 Atl. 579; Lassas v. McCarty, 47 Or. 474, 84 Pac. 76; Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641.

63. See *ante*, § 751.

the same principle would apply if there were an indorsement "without recourse." [64] And if the holder received the instrument from an agent of the indorsee, not knowing the fact of his agency, there would then be no usury, as the apparent owner does not himself indorse it; but appears as the mere seller of a security valid in his hands, without warranting anything but its genuineness.[65] It is also quite clear that the transfer of a bill or note by delivery, or by indorsement, may be a feature of a usurious contract, as, for instance, where a note is indorsed as collateral security for a usurious loan of money, in which case it is not the indorsement *per se* which constitutes usury, but its entering into a usurious transaction as a component part thereof.[66] But when there is an indorsement of a bill or note upon its transfer for an amount less than the legal rate of discount upon an advancement of money, its effect *per se* gives rise to a disputation in which many views have been presented.

§ 763. View presented that transaction between indorser and indorsee is usurious and that no party can be sued.—The *first* view is, that as between indorser and indorsee the contract is usurious, and that the indorsee, who is a party to the usury, cannot sue his indorser, or any prior party, because he holds the instrument under a contract absolutely void.[67] Every indorser of a bill or note, it is said, is in law a new drawer; and that as the drawer of a bill, who discounts it at less than the rate allowed by law, binds himself for repayment of the amount, and in fact procures a loan upon the faith

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64. Freeman v. Britton, 2 Harr. 191; Durant v. Banta, 3 Dutch. 630. But see Ruffin v. Armstrong, 2 Hawks, 411.

65. Whitworth v. Adams, 5 Rand. 333; Gaul v. Willis, 26 Pa. St. 261; Taylor v. Bruce, Gilmer (Va.), 42; Gimmi v. Cullen, 20 Gratt. 439; Cook v. Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

66. Levy v. Gadsby, 3 Cranch, 180. Where, upon a usurious negotiation for a loan in reference to a pre-existing debt, the note was indorsed to the plaintiff, and thus came within the description of "an insurance for forbearance." See also Gaither v. Farmers' etc., Bank, 1 Pet. 37; Nichols v. Pearson, 7 Pet. 108; Newman v. Williams, 29 Miss. 212.

67. Whitworth v. Adams, 5 Rand. 419 (1827). Cabell, J., said: "If the note had passed from the payee to the person who paid the money on a contract of indorsement, by which the payee received for the bill less than its nominal amount, deducting legal interest, I should be decidedly of opinion that the indorsement was usurious and void, on the ground mentioned by Bailey, J., in Lowes v. Mazaredo, 1 Stark. 385; Conyn on Usury, 181, that 'every indorsement is considered in law as a new drawing.'" Freeman v. Britton, 2 Harr. 191, overruled in Durant v. Banta, 3 Dutch. 624.

of the bill as security, such discount by the drawer is usurious;[68] and so, in like manner, the indorsement of a bill or note for a less amount than the legal rate of discount is usurious.[69]

§ **763a.** If the statute which denounces usury does not declare the usurious contract *void*, the Supreme Court of the United States has considered, on grounds which seem just and tenable, that the views given in the foregoing section would not apply; and where usurious interest was paid in advance to a national bank, and a collateral indorsed to it, the bank was held entitled to recover on the note, although under the National Banking Act the debtor is entitled in cases of usury to sue for and recover twice the amount of interest paid.[70]

§ **764. View presented that transaction between indorser and indorsee is usurious, but that prior parties may be sued.**—The *second* view is, that although, as between indorser and indorsee, the transaction is usurious,[71] and the contract of the former, so far as it binds him to repay the money, is void; yet that so far as it has been executed by a transfer of the title, and right to sue prior parties, the courts should respect it, and enforce a recovery against them for the full amount.[72]

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68. Lowes v. Mazaredo, 1 Stark. 385 (2 Eng. C. L.); Comyn on Usury, 181; King v. Ridge, 4 Price, 50 (1817), copied in Appendix, 5 Rand. 617; Whitworth v. Adams, 5 Rand. 419; Saltmarsh v. Planters, etc., Bank, 14 Ala. 668; Noble v. Walker, 17 Ala. 456.

69. This doctrine is denied in Lloyd v. Keach, 2 Conn. 175. See *post*, § 767.

70. Oates v. National Bank, 100 U. S. (10 Otto) 249.

71. Ballinger v. Edwards, 4 Ired. Eq. 449 (1847); Ray v. McMillan, 2 Jones Law, 227 (1854); Bynum v. Rogers, 4 Jones Law, 399 (1859); McElwee v. Collins, 4 Dev. & Bat. 210 (1839). Daniel, J., said: "There is a distinction between taking a bill and advancing money on it, with an indorsement or guaranty, and one without. The last is a purchase, and may be for less than the real value; the other is a loan, and within the operation of Statute of Usury." Friend v. Duryee, 17 Fla. 118 (*semble*).

72. Collier v. Nevill, 3 Dev. 31. Ruffin, J., said: "The discounting of a bill or bond and taking the general indorsement of the holder does *ex vi termini* constitute a loan; and if the rate of discount exceed that fixed by statute, it is a usurious loan. * * * But upon the strength of the authorities, and the opinion heretofore generally received by the country at large and the profession, the court feels constrained to decide that the defendants cannot avail themselves of any intermediate illegality. The bond was available between the obligor and obligees. The former is not privy to the usurious agreement between the latter and the present holder." See also Littell v. Hord, Hard. 232; Cowles v. McVickar, 3

§ 765. View presented that transaction is not usurious, but that prior parties only may be sued.—The *third* view is that it is not usurious, because such indorsement shall be held to have been made for the purpose of transfer merely; and that although he thus makes himself liable to all the world but the purchaser, it is, as between them, a simple indorsement for the accommodation of the purchaser. And such purchaser, while he cannot recover at all against the indorser, may recover the whole amount of the maker, acceptor, and prior parties.[73]

§ 766. View that transaction is not usurious, but that recovery against indorser is limited.—The *fourth* view is that it is not usurious, because although the indorsee, who is regarded in the light of a purchaser, and not as a lender, may recover against the maker, acceptor,[74] or other prior parties,[75] the whole amount, as against the indorser who is the seller, he can only recover the amount paid with legal interest.[76] And so as against any party, in whatever form he

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Wis. 725; Armstrong v. Gibson, 31 Wis. 61; Importers, etc., Bank v. Littell, 47 N. J. L. 234; Connor v. Donnell, 55 Tex. 173, citing the text.

73. Whitworth v. Adams, 5 Rand. 388, Coalter, J. (not concurred in on this point by the other judges). Cowles v. McVickar, 3 Wis. (Smith) 731, does not decide this, as seems to have been thought by Prof. Parsons, vol. II, Notes and Bills, 428, but merely that the indorsement may be only to pass the title, where the transaction was by agreement a mere sale of the note.

74. Munn v. Commission Co., 15 Johns. 44 (1818), Spencer, J.: "The drawer and acceptor in a suit by the indorsee have nothing to do with the consideration paid for the bill by such indorsee to the drawer. They are bound to pay the bill; but as respects the payee and first indorsee, if he be sued by his immediate indorsee, it will be competent for him to show the real consideration paid; and if it be less than the face of the bill and the legal interest for the time the bill had to run, then he can claim to have the difference deducted." Ingalls v. Lee, 9 Barb. 650; Cobb v. Titus, 13 Barb. 47; Cram v. Hendricks, 7 Wend. 569.

75. Ingalls v. Lee, 9 Barb. 651, Parker, J.: "It is now settled that an indorsee, who buys a note at less than its face, can recover against the indorser no more than the sum for which he bought the note, with interest; though he may recover the full amount of the note against the maker. Whether the rule thus limiting the recovery would apply to third persons who indorse for the accommodation of the payee, and who are not parties to the transfer, has not been decided. * * * I think the rule referred to applies only as between the parties to the sale, and rests upon the consideration of recovering back the consideration paid." Belden v. Lamb, 17 Conn. 453.

76. Brown v. Mott, 7 Johns. 360 (1811); Braman v. Hess, 13 Johns. 52 (1816); Ingalls v. Lee, 9 Barb. 647; Cobb v. Titus, 13 Barb. 47; Cram v. Kendricks, 7 Wend. 569; Huff v. Wagner, 63 Barb. 215; Harger v. Wilson, 63 Barb. 237; Lane v. Steward, 20 Me. 104; Farmer v. Sewall, 16 Me. 456; French v. Grindle, 15 Me.

may bind himself, upon the transfer the assignee can only recover back the consideration paid.[77]

§ 767. View that transaction is not usurious, and that full amount is recoverable against all parties.—The *fifth* view is that it is not usurious, for the reason that the contract between indorser and indorsee is at best but a conditional or provisional contract, the indorser not being bound save upon the condition of due presentment and notice, and being regarded in the light of a guarantor against the insolvency of the promisor; and that the validity of the transaction turns upon the inquiry, was it an unaffected sale of the instrument, or merely a color for a loan? [78] And further, that if a *bona fide* sale, the indorsee may recover the full amount of all the parties.[79]

§ 767a. If a note be purchased at a judicial sale of the effects of the holder, the purchaser, although paying much less than its nominal amount, may recover the full amount against an indorser for accommodation of the maker.[80]

§ 768. Comments on conflicting views, and conclusion deduced.—Our own views coincide with that last presented, although the authorities to the contrary are weighty and numerous. The statutes against usury confine themselves to the interdiction of excessive interest for

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163; Brock v. Thompson, 1 Bailey Law, 329; Noble v. Walker, 32 Ala. 456; Hutchins v. McCann, 7 Port. 99; Coge v. Palmer, 16 Cal. 158; Stevenson v. Unkefer, 14 Ill. 105; McCrady v. Jones, 44 S. C. 407, 22 S. E. 414. In the last case it was held that upon suit by an indorser against a prior indorser, the plaintiff's cause of action is for money paid which defendant ought to have paid, and not technically on the note itself, and that, therefore, the plaintiff could recover only the amount actually paid with interest at the legal rate only, and not at a higher rate stipulated in the note to be paid after maturity.

77. Cobb v. Titus, 13 Barb. 47; Mazuzan v. Mead, 21 Wend. 285.

78. Lloyd v. Keach, 2 Conn. 175 (1817), in which it was held that the drawer may discount bills, or the indorser bills or notes at any price, and that it will only be usurious when a shift to evade the statutes. Nichols v. Pearson, 7 Pet. 109. But the court expressly declined to decide whether the whole amount might be recovered. State Bank v. Coquillard, 6 Ind. 232; Newman v. Williams, 29 Miss. 223; Gaul v. Willis, 26 Pa. St. 261; Moore v. Baird, 30 Pa. St. 139; Roark v. Turner, 29 Ga. 458.

79. National Bank of Michigan v. Green, 33 Iowa, 141 (1871); Durant v. Banta, 3 Dutch. 624 (1858), overruling Freeman v. Britton, 2 Harr. 191 (1839); Roark v. Turner, 29 Ga. 458; Cook v. Forker, 193 Pa. St. 461, 44 Atl. 560, 74 Am. St. Rep. 699.

80. McVeigh v. Allen, 29 Gratt. 588.

the "loan or forbearance of money." And while the indorsement of a bill or note for less than its face value may often be used as a part of the shift to evade the law, it does not seem to us to import *per se* either a direct usurious loan or a screen to hide it. No direct or imperative obligation to return the amount or any part thereof is entered into by the indorser. And it does not seem to us to come within the meaning of the terms usually employed, which declare void "all contracts or assurances made directly or indirectly for the loan or forbearance of money," as it does not indirectly bind the indorser for repayment of a loan by means of any shift or device. It only binds him directly to pay the full amount of a debt for which another is primarily bound, and for which he himself can only become bound by strictest diligence on the part of the holder in making presentment and giving notice. Loans of money to be returned with excessive interest are plainly contradistinguished from amounts paid for securities which are transferred in the usual course of business by indorsement; and as the statutes against usury are to be strictly construed, they do not seem to us to have contemplated commercial transactions of this kind, which partake rather of the nature of sales accompanied by a peculiar and conditional warranty. Prof. Parsons has expressed a similar opinion, in which he compares the indorsement to a sale of a chattel with warranty of its value at a certain future time.[81] The same reasons which induce these conclusions respecting an indorsement for less than the legal rate of discount from the face value of the paper, would apply where the drawer of a bill parts with it for less than the legal rate of discount. The debt due him by the drawee or acceptor is his property, and that property he may sell for any price. And the fact that he warrants its value "at a certain future time," does not, as it seems to us, impart to the transaction the nature of a loan. The drawer does not borrow the money, engaging to repay it with illegal interest, but simply sells a debt due to him by another, engaging that, if that other does not pay it, and peculiar acts of diligence are observed by the purchaser, he will make the debt good. The responsibility, trouble, and expense of pursuing the drawee or acceptor first, is an independent and often a most important consideration; and where such additional consideration enters into the negotiation, it is sufficient to prevent it from being usurious.[82]

81. 2 Parsons on Notes and Bills, 429, 430.

82. See on this subject, *ante*, § 763*a*, and Oates v. National Bank, 100 U. S. (10 Otto) 250.

CHAPTER XXIV

NATURE AND RIGHTS OF A BONA FIDE HOLDER OR PURCHASER

§ **769.** It is a general principle of the law merchant that, as between the immediate parties to a negotiable instrument—parties between whom there is a privity—the consideration may be inquired into; and that as to them the only superiority of a bill or note over other unsealed evidences of debt is, that it *prima facie* imports a consideration.[1] We propose herein to consider the relations of the purchaser or holder of the instrument, who has acquired the instrument from or through an original party, and to show when, and under what circumstances, he may be affected by fraud or illegality in, or failure of, the original consideration.

§ **769a. The term "purchaser" or "holder"; principles of evidence affecting the right to recover.**—By "purchaser" and "holder" of a negotiable instrument[2] is included any one who has acquired

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1. See *ante*, § 161 *et seq.*, and § 174 *et seq.* A promissory note must contain words of negotiability, in order to entitle the transferee thereof to the rights accorded by the law to *bona fide* purchasers of negotiable paper. Barrow v. Blasingame, 1 Ga. App. 358, 57 S. E. 926. One cannot, by causing a promissory note, for which he himself is to furnish the consideration, to be made payable to another person, and by having the latter to indorse it, become that *bona fide* transferee for value to whom the law accords rights superior to those of ordinary promisees. Empire Mut. Annuity & Life Ins. Co. v. Avery, 3 Ga. App. 97, 59 S. E. 324.

2. It was recently held in Massachusetts that the defense that a note was purchased by a national bank in violation of the National Banking Act, could not be availed of by the parties; that if *ultra vires* for the bank to purchase, it was, nevertheless, not one of those things which it lay in the mouth of the parties to the note to object. National Pemberton Bank v. Porter, 125 Mass. 333 (1878); Bankers' Magazine, Jan., 1879, p. 563; Cent. Law. Jour., Oct. 25, 1878, vol. VII, No. 17, p. 324, Lord, J., saying: "In this commonwealth the only questions which are involved are: *First.* Has the plaintiff legal capacity to sue? *Second.* Is the plaintiff the holder of the negotiable note declared on?" See Wroten, Assignee v. Armat, 31 Gratt. 228; National Bank v. Matthews, 98 U. S. (8 Otto) 621. If a national bank which is authorized by the terms of notes in its possession to sell them, purchases them itself, it is liable for conversion, even though it is not within the powers of the bank to sell them as the owner's agent. First Nat. Bank v.

it in good faith for a valuable consideration, from one capable of transferring it, and the following propositions may be considered as settled principles of commercial law—principles which have been, for the most part, reiterated by the Supreme Court of the United States, and prevail throughout the Union:

First. That the purchaser or holder of a negotiable instrument, who has taken it (1) *bona fide,* (2) for a valuable consideration, (3) in the ordinary course of business, (4) when it was not overdue, (5) without notice of its dishonor, and (6) without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity as between the antecedent parties,[3] as, for example, though it was without consideration origi-

Anderson, 172 U. S. 573, 19 Sup. Ct. Rep. 284. In Michigan, it has been held that a *bona fide* holder of a note as collateral security for an existing debt comes within the same principle. First Nat. Bank v. Shue, 119 Mich. 560, 78 N. W. 647. It is immaterial to an indorser, having no legal defense, whether the subsequent transfers of a note were made in good faith; for a valuable consideration, and before maturity, or not. Meyer v. Foster, 147 Cal. 166, 81 Pac. 402. Where a bank had purchased a note, its status as a *bona fide* holder was not affected by the fact that the maker was notified that the bank held the note "for collection." Bank of Baraboo v. Laird (Wis.), 136 N. W. 603.

3. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166; Doane v. King (Minn.), 30 Fed. 106; Woodall v. People's Nat. Bank, 153 Ala. 756, 45 So. 194; Johnson v. Hanover Nat. Bank (Ala.), 6 So. 909; Hogg v. Thurman (Ark.), 117 S. W. 1070; Cagle v. Lane, 49 Ark. 467; Oliver v. Miller, 130 Ga. 72, 60 S. E. 254; Venable v. Lippold, 102 Ga. 208, 29 S. E. 181; Taylor *et al.* v. Cribb, 100 Ga. 94, 26 S. E. 468; Jenkins v. Jones, 108 Ga. 556, 34 S. E. 149; Mann v. Merchants' Loan & Trust Co., 100 Ill. App. 224; McCauley v. Murdock, 97 Ind. 230; Lane v. Schlemmer (Ind.), 15 N. E. 454; Scotten v. Randolph, 96 Ind. 581; Kniss v. Holbrook, 16 Ind. App. 229, 44 N. E. 563, 934; Harris v. Pate (Ind. Ter.), 104 S. W. 812; Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512; Cochrane v. Dickerson, 40 La. Ann. 127; Bank v. Trudeau, 38 La. Ann. 898; Flower v. Noble, 38 La. Ann. 939; State Nat. Bank v. Flathers, 45 La. Ann. 75, 12 So. 243, 40 Am. St. Rep. 216; Barnum v. Phenix County, 60 Mich. 388; Gage v. Averill, 57 Mo. App. 111; First Nat. Bank v. Pennington, 57 Nebr. 404, 77 N. W. 1084, text cited; Stedman v. Rochester Loan & Banking Co., 42 Nebr. 641, 60 N. W. 890; Dobbins v. Oberman, 17 Nebr. 163; Breen v. Bickford, 60 N. H. 159; First Nat. Bank v. Dean *et al.*, 137 N. Y. 110, 32 N. E. 1108, citing text; Flour City Nat. Bank v. Traders' Nat. Bank, 42 N. Y. S. C. 246; Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540; People's Nat. Bank v. Hazard, 231 Pa. St. 552, 80 Atl. 1094; Trauck v. Hill (Pa.), 13 Atl. 937; Citizens' Trust & Savings Bank v. Stackhouse (S. C.), 74 S. E. 977; Lynchburg Nat. Bank v. Scott, 91 Va. 654, 22 S. E. 487, 50 Am. St. Rep. 860, approving text; Hutchins v. Langley, 27 App. Cas. (D. C.), 234. See also *ante,* § 198. Without notice that it was tainted with usury. American Savings Bank & Trust Co. v.

nally,[4] or that the consideration has failed,[5] or was subsequently re-

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Helgesen, 64 Wash. 54, 116 Pac. 837. Where notes were conditionally delivered to the payee, the maker cannot be heard to say, as against an innocent purchaser, that the notes were never executed because not delivered to the payee. Goodwin & McFarland v. Burton (Tex. Civ. App.), 118 S. W. 587. The rule that mortgages and trust deeds are not assignable so as to vest the title freed from any defense which the maker has against the original mortgagee or grantee, has no application to the rights of an innocent holder of negotiable promissory notes to secure which such mortgage or trust deed is executed; the legal right to proceed upon the notes and have a judgment at law is independent of any lien created by mortgage or trust deed. Zollman v. Jackson Trust & Savings Bank, 238 Ill. 290, 87 N. E. 297. Where post dated checks were deposited in a bank to the credit of a certain person in the usual course of business, and the bank took them in good faith before they were overdue, and paid full value for them, and had no notice of any alleged equities between the drawer and the person for whom they were deposited, the checks were unaffected in the hands of the bank by the equities. Symonds v. Riley, 188 Mass. 470, 74 N. E. 926. If a party make a contract in such a manner as is authorized by law, he has a right to object to being bound by any other; and so, a *bona fide* holder before maturity is allowed to receive the genuine contract, discharged from any equities attaching to the contract itself, as between the original parties, but he cannot get a contract where none was made. Max Simons & Co. v. McDowell, 125 Ga. 203, 53 S. E. 1031, as to sureties on a note which had been altered, the court holding that a change in the terms of the contract releases the surety from liability as against any person.

4. See *ante*, § 165 *et seq.*, and *post*, § 810 *et seq.*; Gee v. Saunders, 66 Tex. 333; Mader v. Cool, 14 Ind. App. 299, 42 N. E. 945, 56 Am. St. Rep. 304; Ellison v. Simmons, 6 Pen. (Del.), 200, 65 Atl. 591; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240; Saul v. Southern Seating, etc., Co., 6 Ga. App. 843, 65 S. E. 1065; Jefferson Bank v. Merchants' Refrigerating Co., 236 Mo. 407, 139 S. W. 545.

5. Bothell v. Fletcher & Strobaugh, 94 Ark. 100, 125 S. W. 645; Reynolds v. Roth, 61 Ark. 317, 33 S. W. 105; Parsons v. Parsons, 17 Colo. App. 154, 67 Pac. 345; Morgan v. Cedar Rapids Nat. Bank, 7 Ga. App. 699, 67 S. E. 1048; Simmons v. Council, 5 Ga. App. 386, 63 S. E. 238; Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; Cover v. Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394; Grace Methodist Episcopal Church v. Rickards, 16 Mont. 70, 40 Pac. 73; Tradesman's Nat. Bank v. Curtis, 167 N. Y. 194, 60 N. E. 429, 52 L. R. A. 430; Steward v. Commonwealth Nat. Bank (Okl.), 119 Pac. 216; Brown v. Feldwert, 46 or 363, 80 Pac. 414; McLaughlin v. Braddy, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681; McCormick v. Kampman, 102 Tex. 215, 115 S. W. 24; Gee v. Saunders, *supra*; Smith Bros. v. Flanders (Tex. Civ. App.), 122 S. W. 80. Where the consideration of a negotiable promissory note was certain services to be performed by the payee to the maker, failure of performance of the services was no defense to an action on the note brought by a purchaser thereof for value and before its maturity, though he knew of the consideration, but not of its failure, when he purchased. Wilensky v. Morrison, 122 Ga. 664, 50 S. E. 472. Where the plaintiff's right of recovery depends upon the nonpayment of a promissory note when due, which note is secured by a chattel mortgage on the property in question, and the plaintiff is an indorsee of the note, and assignee of the mortgage, the

leased [6] or paid,[7] and even though it was originally obtained by fraud, theft, or robbery.[8]

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defendant may prove an entire or partial failure of the consideration of the note, (1) if the note was transferred after maturity; or (2) if the plaintiff had notice of the defense before the transfer of the note. Dewey v. Bobbitt, 79 Kan. 505, 100 Pac. 77.

6. Schoet v. Houghlin, 50 Cal. 528; Palmer v. Marshall, 60 Ill. 289; Cover v. Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394.

7. Swall v. Clarke, 51 Cal. 227; Ward v. Howard, 88 N. Y. 74. Or that a note was the property of a trust estate, when the trust did not appear upon the face of the note. See Barroll v. Foreman, 86 Md. 675, 39 Atl. 273. See also Barroll v. Foreman, 88 Md. 188, 40 Atl. 883; Fogg v. School District, 75 Mo. App. 159, text cited.

8. See chapter on Consideration, § 165 *et seq*; Brown v. Spofford, 95 U. S. (5 Otto) 481; Goodman v. Simonds, 20 How. 343; Seymour v. Malcom, etc., Lumber Co., 7 C. C. A. 593, 58 Fed. 957; Bothell v. Fletcher & Stobaugh, 94 Ark. 100, 125 S. W. 648; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; Van Windisch v. Klaus, 46 Conn. 433; Journal Printing Co. v. Maxwell, 1 Pennewill, 511, 43 Atl. 615; Grooms v. Olliff & Co., 93 Ga. 789, 20 S. E. 655; Keenan v. Blue, 240 Ill. 177, 88 N. E. 553; Gumbel & Co. v. Ryan, 118 La. 606, 43 So. 251; Ogden v. Marchaud, 29 La. 61; Taylor v. Bowles, 28 La. 295; Burrill v. Parsons, 71 Me. 282; Hobart v. Penny, 70 Me. 248; Cover v. Myers, 75 Md. 406, 23 Atl. 850, 32 Am. St. Rep. 394; Robertson v. Coleman, 141 Mass. 231; Kinyon v. Wohlford, 17 Minn. 240; Bank of Newton v. Simmons (Miss.), 49 So. 616; Reeves v. Letts, 143 Mo. App. 196, 128 S. W. 246; National Bank of Rolla v. Romine, 136 Mo. App. 57, 117 S. W. 104; Franklin Savings Bank v. Heusman, 1 Mo. App. 336; First Nat. Bank v. American Exch. Nat. Bank, 170 N. Y. 88, 62 N. E. 1908; Belden v. Burke, 147 N. Y. 542, 42 N. E. 261; Central Bank v. Hammett, 50 N. Y. 159; Belmont Branch Bank v. Hoge, 35 N. Y. 65; First Nat. Bank v. American Exch. Nat. Bank, 49 App. Div. 349, 63 N. Y. S. 58; Johnson v. Way, 27 Ohio St. 374; Wisegarver v. Yinger (Tex. Civ. App.), 128 S. W. 1190, denying rehearing in (Tex. Civ. App.), 122 S. W. 925; Hames v. Stroud (Tex. Civ. App.), 112 S. W. 775; Scandinavian American Bank v. Johnson, 63 Wash. 187, 115 Pac. 102. A warehouseman cannot show that a receipt was issued by mistake as against a *bona fide* purchaser (Star Compress & Warehouse Co. v. Meridian Cotton Co., 87 Miss. 228, 39 So. 417), nor that it was issued in fraud. Farmer v. Etheridge (Ky.), 69 S. W. 761. The rights of a *bona fide* indorser for accommodation, of a note obtained by fraud, are not affected by the fact that he pays the note after notice of the fraud, since that is what the law compels him to do. He stands upon the footing of a *bona fide* holder without notice. Beckwith v. Webber, 44 N. W. 331. But otherwise if he were a party to the fraud. Erie Boot & Shoe Co. v. Eichenlaub (Pa.), 17 Atl. 889. In Mississippi, the law merchant is changed by the statute so far as to allow the promisor to make any defense existing before notice of assignment against a remote holder by indorsement before maturity which he could have made against the payee. Etheridge v. Gallagher, 55 Miss. 458. In Clark v. Tanner, 100 Ky. 275, 38 S. W. 11, it was held that the notes sued on, being under the laws of Tennessee where the contract was made upon the footing of an inland bill of exchange, and having been before maturity for a valuable

Second. That the possession of a negotiable instrument payable to bearer, indorsed in blank, or specially indorsed to the holder, carries title with it to the holder. The possession and title are one and inseparable.[9] "An individual negotiating for the purchase of a bill or note from one having it in possession and whose name is upon it, must assume that the title of the holder as well as the liability of all prior parties is precisely that indicated by the paper itself." [10]

Third. That the burden of proof lies on the person who assails the right claimed by the party in possession.[11]

Fourth. That suspicion of defeat of title or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, will not defeat his title.

But these propositions are subject to the following limitations or qualifications: *First.* That when it was shown by the defendant that the instrument originated in fraud or illegality, the burden of proof will be shifted to the holder, and he must then show that he is a *bona fide* holder for value.[12] *Second.* When it is shown that the instrument was given for a consideration which by statute is declared void, the original taint follows it, and it is void in the hands of every holder, however innocent.[13] And *Third.* That no party can enforce a negotiable instrument if it be not genuine, or if it be executed by a party incapable of entering into the contract in which it was given.[14]

Let us consider now these principles in their order. In some re-

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consideration transferred to appellant without notice of any fraud, are not affected by any fraud as between the original parties. Where notes procured by fraud never became bills of exchange, the maker can present the defense that they were so procured as against a *bona fide* purchaser of the notes, unless by some act he has estopped himself to make such defense subsequent to the original execution and delivery thereof to the purchaser. Deppen v. German-American Title Co. (Ky.), 70 S. W. 868, rehearing refused (Ky.), 72 S. W. 768.

9. See *post*, § 812; Texas Banking Co. v. Turnley, 61 Tex. 369, citing the text; Allen v. Harris, 79 Mo. App. 490, text cited.

10. Auten v. United States Nat. Bank, 174 U. S. 144, 19 Sup. Ct. Rep. 628.

11. See *post*, § 1503; Johnson v. Cobb, 100 Ga. 139, 28 S. E. 72. Held, in this case that the title of the holder of a promissory note cannot be inquired into unless it appears that the inquiry would in some way protect the defendant or let in some meritorious defense.

12. See *ante*, § 166; Knowlton v. Schultz, 6 N. Dak. 417, 71 N. W. 550; Wilson v. Pauly, 18 C. C. A. 475, 72 Fed. 129; Le Tourneux v. Gilliss, 1 Cal. App. 546, 82 Pac. 627; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081.

13. See *ante*, § 197; *post*, § 807. Hurlburt & Sons v. Straub, 54 W. Va. 303, 46 S. E. 163.

14. *Post*, § 807.

spects they are so interwoven with each other that it is impossible to sever and disconnect them. But we will endeavor to present as nearly as practicable, under separate heads, the several elements which must combine to panoply with the full protection of the law the party who acquires a negotiable instrument. And first we will endeavor more particularly to define who is a *bona fide* purchaser or holder for value.

Under Negotiable Instrument statute.—Under the provisions of the statute,[15] one who is a *bona fide* holder for value in due course, is not affected by defense available to prior parties among themselves of want or failure of consideration,[16] fraud,[17] invalidity,[18] usury,[19] or of nondelivery.[20]

SECTION I

BONA FIDES AND GROSS NEGLIGENCE

§ **770.** In the *first* place, the holder, in order to be entitled to protection against offsets and equities and defenses based upon frauds, pleaded by prior parties, must have acquired the paper in good faith

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15. Appendix, secs. 16, 23, 28, 52–57, 66. By the definition established in the act, a "holder" of a negotiable instrument payable to order, must be a holder by indorsement. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879.

16. National Bank of Commerce in St. Louis v. Morris, 156 Mo. App. 43, 135 S. W. 1008.

17. White v. Dodge, 187 Mass. 449, 73 N. E. 549. One who purchased a draft for value and without notice of any infirmity in the title to the instrument in the person who procured its issue, has good title and can recover against the drawer without regard to the nature of the fraud by which its issuance was procured. Jamieson & McFarland v. Heim, 43 Wash. 153, 86 Pac. 165. Where a check was issued through fraud on the maker, an innocent holder for value may recover thereon upon proof of the maker's signature, as the maker is estopped from denying the existence of the payee or his capacity to indorse. Boles v. Harding, 201 Mass. 103, 87 N. E. 481.

18. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126.

19. Wood v. Babbitt, 149 Fed. 818; Klar v. Kostink, 119 N. Y. S. 683, 65 Misc. 199; Broadway Trust Co. v. Manheim, 95 N. Y. S. 93, 47 Misc. 415. The defense of usury is available in an action by a state bank's receiver of notes purchased by it from the holder, with knowledge that the notes were void, as between the original parties, because usurious interest was included therein. Schlesinger v. Lehmaier, 191 N. Y. 69, 83 N. E. 657, 16 L. R. A. (N. S.), 626, 123 Am. Rep. 591.

20. Greeser v. Sugarman, 76 N. Y. S. 922, 37 Misc. 799.

from his predecessor. "Fraud cuts down everything," [21] and although the holder may pay value, yet, if his acquisition of the paper be in any respect fraudulent—as where it is made or transferred to give him preference over other parties to a compromise of creditors—he cannot claim the position of a *bona fide* holder.[22] In pleading, *mala fides* must be distinctly alleged, and an allegation that the party is not the *bona fide* holder is not sufficient.[23] It is the *bona fides* of the holder alone that is to be considered, not that of his transferrer, and the fact that the payee had an interest to part with the paper, is not a circumstance which affects the rights of his indorsee.[24]

§ 771. Early English rule as to bona fides.—The earlier English authorities regarded the *bona fides* of the acquisition of a negotiable instrument as the crucial test by which it was determined whether or not the party so acquiring it by purchase or discount was entitled to stand upon a better footing than his transferrer, and be entitled to full protection against equitable or other defenses which would otherwise have been valid against him. In a case before Lord Kenyon, where it appeared that a bill had been lost, and advertised in the newspapers, and had been discounted for one who found it, and fraudulently offered it, it was contended that the banker could not recover without using due diligence in inquiring into the circumstances as well respecting the bill as of the person who offered to discount it. But Lord Kenyon said: [25] "I think the point in this case has been settled by the case of Miller v. Race, in Burrow. If there was any fraud in the transaction, or if a *bona fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated would be at once to paralyze the circulation of all the paper in the country and with it all its commerce. The circumstance of the bill having been lost, might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might or might not have seen the advertisement, and it would be going great lengths to

21. Rogers v. Hadley, 32 L. J. Exch. 248; Hammill v. First Nat. Bank, 14 Colo. 1, 22 Pac. 1094.

22. See chapter VII, on Consideration, *ante*, § 193; Brook v. Teague, 52 Kan. 119, 34 Pac. 347; Bunzel v. Maas & Schwarz, 116 Ala. 68, 22 So. 568; Anderson & Co. v. Stapel, 80 Mo. App. 115.

23. Uther v. Rich, 10 Ad. & El. 784.

24. Helmer v. Krolick, 36 Mich. 373; Farthing v. Dark, 111 N. C. 243, 16 S. E. 337, citing text.

25. Lawson v. Weston, 4 Esp. 56 (1801).

say that a banker was bound to make inquiry concerning every bill brought to him to discount; it would apply as well to a bill for £10 as for £10,000." [26]

§ **772. Change of rule in England; " suspicious circumstances."**— For a long period this doctrine remained the undoubted law of England, until, in the case of Gill v. Cubitt, Lord Chief Justice Abbott (Lord Tenterden) laid down the principle that, although the holder had given value for the bill or note, yet, if he took it under circumstances which ought to have excited the suspicions of a prudent and careful man, he could not recover; and while professing "unfeigned reverence" for Lord Kenyon, from whom the previously accepted view had emanated, he declared that he could not regard it as the correct one.[27]

§ **773.** This cautious ruling (as observed by Read, J., in a well-considered case in Pennsylvania),[28] although carped at and quarreled with, remained the law for ten years, when, as it seems, the discredit of Bank of England bills on the European continent, and the complaints of the mercantile community, led to a modification of the doctrine of Chief Justice Abbott. And Lord Denman, C. J., told the jury, in a case where it was contended that the plaintiff had not used due caution, and had taken the bill under circumstances that ought to have excited the suspicions of a prudent man, to find for the plaintiff, if they thought that he had not been guilty of gross negligence.[29]

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26. See Miller v. Race, 1 Burr. 452; Skinner v. Raynor, 95 Iowa, 536, 64 N. W. 601.

27. Gill v. Cubitt, 3 B. & C. 466 (1824), Bayley and Holroyd, JJ., concurring; Strange v. Wigney, 6 Bing. 677 (19 Eng. C. L.) (1830); Snow v. Peacock, 2 Car. & P. 215 (1825); Beckwith v. Corrall, 2 Car. & P. 259 (1826).

28. See Phelan v. Moss, 67 Pa. St. 63 (1870). Lord Campbell says in his "Lives of the Chief Justices," vol. III, p. 310 (quoted in 2 Parsons on Notes and Bills, 273), that Lord Tenterden's rule died with its author. "It was soon much carped at; some judges said that fraud and gross negligence were terms known to the law, but of 'the circumstances which ought to excite suspicion, there was no definition in Coke or in Cowell;' and the complaint of bill brokers resounded from the Royal Exchange to Westminster Hall, that they could no longer carry on their trade with comfort or safety."

29. Crook v. Jadis, 5 B. & Ad. 909 (27 Eng. C. L.) (1834), Lord Denman, Ch. J.: "I used the expression gross negligence advisedly, because I thought nothing less ought to have prevented the plaintiff from recovery on the bill." Littledale, J.: "There must be gross negligence, at least, in a case like the present,

§ 774. Restoration of early rule in England.—Gross negligence was thus established as the test of the holder's right to recover. But it did not long remain so. For, two years later, the Court of King's Bench, which seems to have been impatient under the restriction which even that test imposed on the circulation of negotiable instruments, decided that, while gross negligence might be evidence tending to show *mala fides*, and as such admissible, it did not in itself amount to proof of *mala fides*, and was not sufficient to deprive the holder of his right to recover.[30] Thus the *bona fides* of the purchaser or holder is resorted to as the test of his right to recover, and, after a wide departure, the law re-established upon the original basis established by Lord Kenyon. And Lord Denman, C. J., said: "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

The rule thus finally re-established in England has been followed and approved there in subsequent cases,[31] and has met with the approbation of most all of the writers on negotiable instruments, on the ground that it relieves them of the clog which the contrary doctrine imposes on their negotiability, and presents at once the clear and intelligible question of *bona fides* for the consideration of the jury; whereas, to leave it to a jury to determine as to the degree of caution which a prudent man must exercise on taking such an instrument, would lead to much perplexity and to frequent injustice.[32]

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to deprive a party of his right to recover on a bill of exchange." Taunton, J.: "I think the case was properly submitted to the jury. I cannot estimate the degree of care which a prudent man should take. The question put by the Lord Chief Justice, whether the plaintiff was guilty of gross negligence, was more definite and appropriate." Patteson, J.: "I never could understand what is meant by a party's taking a bill under circumstances which ought to have excited the suspicion of a prudent man." Backhouse v. Harrison, 5 B. & Ad. 1098 (1834).

30. Goodman v. Harvey, 4 Ad. & El. 870 (1836).

31. Raphael v. Bank of England, 33 Eng. L. & Eq. 278 (1855); Arbouin v. Anderson, 1 Ad. & El. (N. S.) 498 (1841); Uther v. Rich, 10 Ad. & El. 784 (1839); Easeley v. Crockford, 10 Bing. 243 (25 Eng. C. L. 116) (1833); McCarty & Co. v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144; Owsley & Co. v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144.

32. Story on Notes, §§ 197, 382; Story on Bills, § 416; Edwards on Bills, 506;

§ 775. American authorities.—In the United States the decisions of the courts have varied, some following the rule declared in Gill v. Cubitt,[33] but by far the greater number concurring in the principle which has been finally established as the law of England.[34]

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2 Parsons on Notes and Bills, 277–279. See preface of Chitty & Hulme to Chitty on Bills; Bunzel v. Mass & Schwarz, 116 Ala. 68, 22 So. 568; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344, citing text; Atlas Nat. Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489.

33. Simmons Nat. Bank v. Dilley Foundry Co. (Ark.), 130 S. W. 162; Hamilton v. Marks, 52 Mo. 81 (overruled), Adams, J., saying: "We think the old doctrine the better rule, and is supported by the weight of authority and reason, both in England and America"; Hall v. Hale, 8 Conn. 336 (overruled); Russell v. Hadduck, 3 Gilm. 233 (overruled); McConnell v. Hodson, 2 Gilm. 640; Adkins v. Blake, 2 J. J. Marsh. 40; Lapice v. Clifton, 17 La. 152; Nicholson v. Patton, 13 La. (O. S.) 216; Varin v. Hobson, 8 La. 50; Marsh v. Small, 3 La. Ann. 402; Lanfear v. Blosman, 1 La. Ann. 148; Ayer v. Hutchins, 4 Mass. 370 (overruled); Cone v. Baldwin, 12 Pick. 545; Buckner v. Jones, 1 Mo. App. 538; Edwards v. Thomas, 12 Pick. 545; Buckner v. Jones, 1 Mo. App. 538; Edwards v. Thomas, 2 Mo. App. 283 (overruled); Wiggins v. Bush, 12 Johns. 306 (overruled); Holbrock v. Mix, 1 E. D. Smith, 154; Pringle v. Phillips, 5 Sandf. 157 (now overruled, see below); Beltzhoover v. Blackstock, 3 Watts, 20 (now overruled); Union Nat. Bank of Columbus, Ohio v. Mailloux (S. D.), 132 N. W. 168; Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522; Mee v. Carlson, 22 S. D. 365, 117 N. W. 1033; Hunt v. Sanford, 6 Yerg. 387; Ryland v. Brown, 2 Head, 273; Merrill v. Duncan, 7 Heisk. 164; Pierson v. Huntington, 82 Vt. 482, 74 Atl. 88, 29 L. R. A. (N. S.) 695, 137 Am. St. Rep. 1029; Limeric Bank v. Adams, 70 Vt. 132, 40 Atl. 166; Capital Savings Bank & Trust Co. v. Montpelier Savings Bank & Trust Co., 77 Vt. 189, 59 Atl. 827; Bromley v. Hawley, 60 Vt. 46, 12 Atl. 220; Hill v. Murray, 56 Vt. 170; Savings Bank v. National Bank, 53 Vt. 82; Gould v. Stevens, 43 Vt. 125, 5 Am. St. Rep. 265; Roth v. Colvin, 32 Vt. 125; Sanford v. Norton, 14 Vt. 234. In Johnson County Sav. Bank v. Rapp, 47 Wash. 30, 91 Pac. 382, it was held that in an action by a bank on indorsed drafts, which had been accepted on a purchase of goods which proved utterly worthless, the acceptor may show a similar transaction with the bank as tending to show knowledge on the part of the bank of the character of the paper they were purchasing. Where the circumstances show that the purchaser refrained from making inquiry lest he should thereby become acquainted with the transaction, out of which the note originated, he cannot occupy the position of a holder in good faith without notice. State Bank of Greentown v. Lawrence (Ind.), 96 N. E. 947. Under a statute (Civil Code 1910, § 4291) declaring that "any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due," the character and sufficiency of the circumstances in a particular case which should place a prudent man on his guard are to be determined as questions of fact by the jury, and not by the judge as questions of law. Park v. Buxton (Ga. App.), 73 S. E. 557.

34. Swift v. Smith, 102 U. S. (12 Otto) 444; Shaw v. Railroad Co., 101 U. S. (11 Otto) 564; Murry v. Lardner, 2 Wall. 110; Swift v. Tyson, 16 Pet. 1; Goodman

Chancellor Kent, in his Commentaries, embodies the views taken in Gill v. Cubitt; but at that time the present prevailing doctrine had

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v. Simonds, 20 How. 367; Bank of Pittsburg v. Neal, 22 How. 96; Reilly v. McKinnon, 159 Fed. 78; Union Nat. Bank v. Neill, 149 Fed. 711, 10 L. R. A. (N. S.) 426; First Nat. Bank of Council Bluffs v. Moore, 148 Fed. 953; National Salt Co. v. Ingraham, 143 Fed. 805; Bank of Sherman v. Apperson, 4 Fed. 25; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322; Merchants' Bank v. McClelland, 9 Colo. 610; Credit Co. v. Howe Mach. Co., 54 Conn. 357; Rowland v. Fowler, 47 Conn. 347; Craft's Appeal, 42 Conn. 146 (but see Skidmore v. Clark, 47 Conn. 20, as to purchaser's suspicion being evidence of knowledge of fraud, Brush v. Scribner, 11 Conn. 388; Morrison v. Hart, 122 Ga. 660, 50 S. E. 471; Mathews v. Poythress, 4 Ga. 287; Third National Bank of Columbus v. Poe, 5 Ga. App. 113, 62 S. E. 826; Walden v. Downing Co., 4 Ga. App. 534, 61 S. E. 1127 (but as to Georgia, see effect of statute referred to in preceding note). Winter v. Hutchins, 20 Idaho 749, 119 Pac. 883; Vaughn v. Johnson, 20 Idaho 669, 119 Pac. 879, 37 L. R. A. (N. S.) 816; Park v. Brandt, 20 Idaho 660, 119 Pac. 877; Kavanagh v. Bank of America, 239 Ill. 404, 88 N. E. 171; Bradwell v. Pryor, 221 Ill. 602, 77 N. E. 1115; Spreeves v. Allen, 79 Ill. 553; Comstock v. Hannah, 76 Ill. 530; First Nat. Bank of Litchfield v. Cox, 140 Ill. App. 98; Howell v. Merchants' T. & S. Co., 134 Ill. App. 467; Norlin v. Becker, 138 Ill. App. 488; Fidler v. Paxton, 101 Ill. App. 107; Dewey v. Merritt, 106 Ill. App. 156; Batesville Bank v. Lehner, 43 Ind. App. 457, 87 N. E. 990; Harris v. Pate, 7 Ind. Ter. 493, 104 S. W. 812; Voss v. Chamberlain, 139 Iowa 569, 117 N. W. 269, 19 L. R. A. 106, 130 Am. St. Rep. 331; Montrose Sav. Bank v. Claussen, 137 Iowa 73, 114 N. W. 547; Lehman v. Press, 106 Iowa, 389, 76 N. E. 818; Richards v. Munroe, 85 Iowa, 359, 52 N. W. 339, 39 Am. St. Rep. 301; Pond v. Waterloo Ag. Works, 50 Iowa, 600; Lane v. Evans, 49 Iowa, 156; Lake v. Reed, 29 Iowa, 258; Gage v. Sharp, 24 Iowa, 19; Youle v. Fosha, 76 Kan. 20, 90 Pac. 1090; Fox v. Bank, 30 Kan. 446, citing the text; McCarty & Co. v. Louisville Banking Co., 100 Ky. 4; Owsley & Co. v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144; Wing v. Ford, 89 Me. 140; Breckinridge v. Lewis, 84 Me. 349; Kellogg v. Curtis, 69 Me. 212; Farrell v. Lovett, 68 Me. 326; Ebert v. Gitt, 95 Md. 186, 52 Atl. 900; Citizens' Nat. Bank v. Hooper, 47 Md. 88; Maitland v. Citizens' Nat. Bank, 40 Md. 540; Commercial, etc., Nat. Bank v. First Nat. Bank, 30 Md. 11; Ellicot v. Martin, 6 Md. 509; Clark v. Roberts, 206 Mass. 235, 92 N. E. 461; Savage v. Goldsmith, 181 Mass. 420, 63 N. W. 918; Stimson v. Whitney, 130 Mass. 591; Carroll v. Hayward, 124 Mass. 120; Freeman's Nat. Bank v. Savery, 127 Mass. 75; Smith v. Livingston, 111 Mass. 342; Spooner v. Holmes, 102 Mass. 503; Wyer v. Dorchester, etc., Bank, 11 Cush. 51; Worcester County Bank v. Dorchester, etc., Bank, 10 Cush. 488; Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174; Detroit Nat. Bank v. Union Trust Co., 158 Mich. 557, 123 N. W. 28; Armstrong v. Stearns, 156 Mich. 597, 121 N. W. 312; Custard v. Hodge, 155 Mich. 361, 119 N. W. 583; Davis v. Seeley, 71 Mich. 210; Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792; Park v. Winsor, 115 Minn. 356, 132 N. W. 264; Robbins v. Swimburne Printing Co., 91 Minn. 491, 98 N. W. 331, 867; Gale v. Brimingham, 64 Minn. 555, 67 N. W. 659; Merchants' Nat. Bank v. Hanson, 33 Minn. 40; Brogess Investment Co. v. Vett, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Mayes v. Robinson, 93 Mo. 121;

not been re-established, and it is to be supposed that he merely incorporated in his text the then existing decisions of the English

Edwards v. Thomas, 66 Mo. 483, overruling former decisions; Bank of Ozark v. Tuttle, 144 Mo. App. 294, 127 S. W. 918; Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548; Reeves v. Letts, 143 Mo. App. 196, 128 S. W. 246; Bank of Ozark v. Hanks, 142 Mo. App. 110, 125 S. W. 221; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Stewart & Co. v. Andes, 110 Mo. App. 243, 84 S. W. 1134; Bank of Indian Territory v. First Nat. Bank, 109 Mo. App. 665, 83 S. W. 537; Creston Nat. Bank v. Salmon, 117 Mo. App. 506, 93 S. W. 288; Wilson v. Riddler, 92 Mo. App. 335; First State Bank of Corwith v. Hammond, 104 Mo. App. 403, 79 S. W. 493; Franklin Sav. Inst. v. Heinsman, 1 Mo. App. 339; Harrington v. Butte & Boston Min. Co., 33 Mont. 83, 83 Pac. 467, 114 Am. St. Rep. 330; First State Bank of Pleasant Dale v. Borchers, 83 Nebr. 530, 120 N. W. 142; Norwood v. Bank of Commerce of Lincoln, 77 Nebr. 205, 109 N. W. 152; Canon v. Farmers' Bank of Cook, 3 Nebr. (Unof.) 348, 91 N. W. 585; Hallock v. Young, 72 N. H. 416, 57 Atl. 236; Hamilton v. Vought, 34 N. J. L. (5 Vroom) 190; National Bank of the Republic v. Young (N. J.), 5 Cent. 115, citing the text; Perth Amboy Mut. Loan, H. & B. Assn. v. Chapman, 81 N. Y. S. 38, 80 App. Div. 556, affirmed 178 N. Y. 558, 70 N. E. 1104; Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949; Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 43 N. E. 68, 51 Am. St. Rep. 727; Gottberg v. United States Nat. Bank, 131 N. Y. 595, 30 N. E. 41; Seybel v. National Currency Bank, 54 N. Y. 288; Belmont v. Hoge, 35 N. Y. 67; Birdsall v. Russell, 29 N. Y. 249; Welsh v. Sage, 47 N. Y. 147; Thompson v. St. Nicholas' Nat. Bank (N. Y.), 21 N. E. 59; Mabie v. Johnson, 15 N. Y. Sup. Ct. (8 Hun.) 309; Magee v. Badger, 34 N. Y. 247; Siegel v. Oehl, 110 N. Y. S. 916; McCammon v. Shanyz, 63 N. Y. S. 611, 49 App. Div. 460; Hall v. Wilson, 16 Barb. 548. See New York authorities cited in notes to § 775; Peetsch v. Sommers, 31 App. Div. 255, 53 N. Y. Supp. 438; Gunningham v. Scott, 90 Hun, 410, 35 N. Y. Supp. 881; Farmers' and Merchants' Bank v. Germania Life Ins. Co., 150 N. C. 770, 64 S. E. 902; Setzer v. Deal, 135 N. C. 428, 47 S. E. 466; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Johnson v. Way, 27 Ohio St. 374; Matlock v. Scheuerman, 51 Ore. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747; McSparran v. Neely, 91 Pa. St. 17; Phelan v. Moss, 67 Pa. St. 62; Leatherman v. Hecksher (Pa.), 12 Atl. 485; Walker v. Kee, 14 S. C. 142; Witt v. Williams, 8 S. C. 290; First Nat. Bank v. Anderson, 28 S. C. 143; Grenaur v. Wheeler, 6 Tex. 526; Cochran v. Priddy, 49 Tex. Civ. App. 39, 107 S. W. 616; Frank v. Lilienfield, 33 Gratt. 390; Davis v. Miller, 14 Gratt. 5 (*semble*); First Nat. Bank v. Johns, 22 W. Va. 535; Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312; Kelley v. Whitney, 45 Wis. 110. Actual notice or facts showing bad faith may be shown by circumstantial as well as by direct evidence. Citizens' Trust & Savings Bank v. Stackhouse (S. C.), 74 S. E. 977. In Pennington County Bank v. First State Bank, 110 Minn. 263, 125 N. W. 119, 26 L. R. A. (N. S.) 849, 136 Am. St. Rep. 496, wherein a defense of forgery was set up, the court said that the term "good faith" means, not only honesty of intention, but the absence of suspicious circumstances, or if suspicious circumstances exist, then such inquiry as will satisfy a prudent man of the validity of the transaction, but held that the fact that a bank takes negotiable paper from a stranger and puts it off, either as owner or for collection,

courts.[35] But both upon principle and authority, it is safe to say that the experience of the commercial world, and of the courts before which the doctrines here discussed have so often passed in review, have satisfied jurists, as well as men of business, that the interests of commerce are best subserved by the liberal view which promotes the circulation of negotiable instruments; and that the *bona fides* of the transaction should be the decisive test of the holder's rights.[36] It is

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does not justify a finding that the defendant was not a *bona fide* holder of the check.

35. 3 Kent Comm. 103, 104.

36. The admirable remarks of Chief Justice Beasley, of New Jersey, in Hamilton v. Vought, 34 N. J. L. 187, are eminently worthy of quotation: "From this brief review of the cases, I think it may be safely said that the doctrine introduced by Lord Tenterden stands, at the present moment, marked with the disapproval of the highest judicial authority. Nor does such disapproval rest upon merely speculative grounds. That doctrine was put in practice for a course of years, and it was thus, from experience, found to be inconsistent with true commercial policy. Its defect—a great defect, as I think—was, that it provided nothing like a criterion on which a verdict was to be based. The rule was, that to defeat the note, circumstances must be shown of so suspicious a character that they would put a man of ordinary prudence on inquiry; and by force of such a rule it is obvious every case possessed of unusual incidents would, of necessity, pass under the uncontrolled discretion of a jury. An incident of the transaction from which any suspicion could arise was sufficient to take the case out of the control of the court. There was no judicial standard by which suspicious circumstances could be measured before committing them to the jury. And it is precisely this want which the modern rule supplies. When *mala fides* is the point of inquiry, suspicious circumstances must be of a substantial character, and if such circumstances do not appear, the court can arrest the inquiry. Under the former practice, circumstances of slight suspicion would take the case to the jury; under the present rule, the circumstances must be strong, so that bad faith can be reasonably inferred. Thus the subject has passed from the indefinite to the comparatively definite; from the intangible to the comparatively tangible. From a mere matter of fact, the question, to some extent, has become one of law. I cannot doubt, when we recollect that inquiries of this nature always attend that class of cases where judgments are sought against innocent and unfortunate parties, that the change is most beneficial. All experience has shown how hard it is to prevent juries from seizing on the slightest circumstance, to avoid giving a verdict against the maker of a note which had been obtained by fraud or theft. To preserve the negotiability of commercial paper and guard the interests of trade, it is absolutely necessary that large power should be placed in the judicial hand when the question arises as to what facts are sufficient to defeat the claim of the holder of a note or bill which has been taken before maturity, and for which value has been paid. It is only in this mode that the requisite stability in transactions of this kind can be retained." The American Exch. Nat. Bank v. New York Belting & Packing Co., 148 N. Y. 698, 43 N. E. 168; Knox v. Eden Musee Co., 148 N. Y. 454, 42 N. E. 988; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 202, 25 N. E. 402;

not the duty of parties about to purchase negotiable paper to make any inquiries not required by good faith, as to possible defenses of which they have no notice, either from the face of the paper, or facts communicated at the time.[37]

§ **776.** A case before the United States Supreme Court in 1864, fully illustrates the doctrine of the text, and shows the gradual growth of the principle. In that case it appeared that Lardner, who did business in Philadelphia, owned certain negotiable coupon bonds of the Camden & Amboy R. R. Co.; and that on the night of the 23d of February, 1859, they were stolen from his office in Philadelphia, and on the next day negotiated to Murray, a broker in New York, for value. Lardner sued in detinue to recover the bonds, in the United States Circuit Court for the Southern District of New York, and obtained judgment. To the instructions of the court that the burden of proof rested on the defendant to show that he received the paper without notice of the theft, and that it was for the jury to say whether there were such circumstances in the negotiation as would warrant the inference that there was ground of suspicion, Murray excepted, and the Supreme Court sustained his exception. Mr. Justice Swayne, who delivered the opinion, disapproved Gill v. Cubitt, 3 B. & C. 466, and quoted with approval Goodman v. Harvey, 4 Ad. & El. 870, in which Lord Denham said: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the

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Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 43 N. E. 68, 51 Am. St. Rep. 727; Cheever v. P. S. & L. E. R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646; First Nat. Bank v. Weston, 88 Hun, 29, 34 N. Y. Supp. 558, quoting with approval the text; Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979.

37. Murray v. Beckwith, 81 Ill. 43; Houry v. Eppinger, 34 Mich. 29; Mining Co. v. Bank, 10 Colo. App. 339, 50 Pac. 1055; Kinkell v. Harper, 7 Colo. App. 45, 42 Pac. 173; Second Nat. Bank v. Weston, 161 N. Y. 520, 55 N. E. 1080, 76 Am. St. Rep. 283; Thompson v. Love, 61 Ark. 81, 32 S. W. 65, citing text; Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640, 34 S. W. 344, citing text; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077, citing text. *Contra*, see Comings v. Leedy, 114 Mo. 454, 21 S. W. 804; Rotan v. Maedgen, 24 Tex. Civ. App. 558; Lamson v. Beard, 36 C. C. A. 56, 94 Fed. 30. See Breneman v. Mayer, 24 Tex. Civ. App. 164; Borgess Investment Co. v. Vett, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567; Fogg v. School District, 75 Mo. App. 159; Atlas Nat. Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489, citing text.

plaintiff without any proof of bad faith in him, there is no objection to his title." And considering that the good faith of Murray in the transaction had not been impeached, decided in his favor.[38] The same doctrine has been applied to coupons of United States bonds.[39]

Under Negotiable Instrument statute.—The statute declares that "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." [40] It thus appears that the majority rule referred to in the foregoing discussion that there must have been actual notice or bad faith, has been codified in those states which have enacted the statute.[41] According to that rule, and under the

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38. Murray v. Lardner, 2 Wall. 710. See chapter XLVII, on Coupon Bonds, section III, vol. II; and Collins v. Gilbert, 94 U. S. (4 Otto) 757.

39. Spooner v. Holmes, 102 Mass. 503; Seybel v. National Currency Bank, 54 N. Y. 288.

40. Appendix, sec. 56. See also secs. 52 and 55.

41. Hutchins v. Langley, 27 App. (D. C.) 234, the court saying that bad faith implies guilty knowledge or wilful ignorance; Taylor v. American Nat. Bank of Pensacola (Fla.), 57 So. 679; Arnd v. Aylesworth, 145 Iowa, 185, 123 N. W. 1000; McKnight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265; People's Bank of Minneapolis v. Reid, 86 Kan. 245, 120 Pac. 339; Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291; Fillebrown v. Haywood, 190 Mass. 472, 77 N. E. 45, holding that where a check was signed by a person as treasurer of a corporation, the holder would receive it under a presumption that it was lawfully issued; Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959; St. Charles Savings Bank v. Edwards (Mo.), 147 S. W. 978; Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588, holding that it is not necessary that there should have been specific knowledge of the infirmity; Reeves v. Letts, 143 Mo. App. 196, 128 S. W. 246; Piper v. Neylon, 88 Nebr. 253, 129 N. W. 277; Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61; Rice v. Barrington, 75 N. J. L. 806, 70 Atl. 169; Aldrich v. Peckham, 74 N. J. L. 711, 68 Atl. 345; Ward v. City Trust Co., 102 N. Y. S. 50, 117 App. Div. 130; Matlock v. Sheuerman, 51 Oreg. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747; First Nat. Bank of Elgin, Ill. v. Russell (Tenn.), 139 S. W. 734; Unaka Nat. Bank v. Butler, 113 Tenn. 574, 83 S. W. 655; City Nat. Bank of Roanoke v. Hundley (Va.), 70 S. E. 494; Scandinavian American Bank v. Johnston, 63 Wash. 187, 115 Pac. 102; Keene v. Behan, 40 Wash. 505, 82 Pac. 884. The fact that the purchaser of a note knew that the payee was an insurance agent and that the note was given in whole or in part in payment for an insurance premium, does not fix the purchaser with notice that a rebate had been allowed to the insured in violation of an anti-rebate insurance law. Gray v. Boyle, 55 Wash 578, 104 Pac. 828. Where a check payable to the payee or order, has been indorsed by the payee in blank before it was lost, one who purchases the check in due course of business for value and without notice of any defect in the title of the holder from whom he received it, acquires a perfect title, and the payee

statute, mere suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or even gross negligence on the part of the taker of the instrument at the time of the transfer, will not defeat his title.[42] While neither gross negligence, nor knowledge of suspicious circumstances, of itself

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cannot recover the amount from the bank as when the check has been paid to such *bona fide* holder, though the purchaser may have been negligent in failing to require identification of the person from whom the check was purchased. Unaka National Bank v. Butler, 113 Tenn. 574, 83 S. W. 655. Where a bank purchased from another bank notes which proved to have been forged, there was no notice of irregularity of the paper by the fact that the numbers on the notes were irregular, the numbers of the later being smaller than those of an earlier date and others bearing numbers of great disparity, and that there was a marked similarity between the signatures attached to the forged paper, when the notes were received at different times and the officers of the purchasing bank knew nothing of the signatures of the persons whose names purported to be attached to the notes nor of the other bank's system of numbering the same. State v. Corning State Savings Bank, 139 Iowa, 338, 115 N. W. 937. Knowledge by a bank of any lack of authority on the part of a person to dispose of municipal bonds cannot be inferred from the fact that he signed them as mayor, and such knowledge on the part of the bank afforded no ground for holding that its action in taking the bonds amounted to bad faith; notwithstanding that such person executed them in his official capacity, he had a right to become a purchaser of such securities, and a bank loaning money to such person on such bonds, may become a holder in due course. Borough of Montvale v. People's Bank, 74 N. J. L. 464, 67 Atl. 67. The facts that a certificate of deposit issued by one bank to another bank bore 8 per cent. interest, which is unusual in banking transactions, and that it is also unusual for a bank to transfer a certificate of deposit instead of presenting it for payment, have no tendency to indicate bad faith on the part of a purchaser of the certificate, and notice that it was not transferred in the usual course of business to the bank from which he purchased it. Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 N. W. 165. Where certificates of deposit were drawn payable to one as "trustee of F.," and indorsed in that form, the word "trustee" in such an indorsement is express notice to a purchaser that there is a *cestui que trust* or beneficiary, or in other words is actual knowledge to the purchaser within the meaning of the statute. Ford v. H. C. Brown & Co., 114 Tenn. 467, 88 S. W. 1036, 1 L. R. A. (N. S.) 188.

42. Hutchins v. Langley, 27 App. (D. C.) 234; Valley Sav. Bank v. Mercer, 97 Md. 458, 55 Atl. 435; Rice v. Barrington, 75 N. J. L. 806, 70 Atl. 169; Aldrich v. Peckham, 74 N. J. L. 711, 68 Atl. 345; Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61; Scandinavian American Bank v. Johnston, 63 Wash. 187, 115 Pac. 102. The fact that the cashier of a bank at the time discounted a note, may have known that the payee was engaged in the manufacture of stoves in one state and that the maker was a corporation engaged in the wholesale drug business in another state, would not be sufficient, under the statute, to fix the bank with knowledge of any defect in the note, or raise implication of bad faith in purchasing it. Jefferson Bank v. Chapman-White-Lyons Co., 122 Tenn. 415, 123 S. W. 641.

constitutes bad faith as matter of law, it is evidence from which bad faith may be inferred, and such facts when proven may be considered by a jury in arriving at the ultimate fact of good or bad faith.[43] What constitutes this actual knowledge of bad faith, under the statute, has been the subject of judicial discussion. Bad faith in taking commercial paper, it has been said, does not necessarily involve furtive motives.[44] It may be shown by a wilful disregard of and refusal to learn the facts when available and at hand,[45] and if a purchaser of a note for value before maturity has notice of facts tending to show defenses to the same, he cannot purposely refrain from making inquiries as to the inception of the paper, and at the same time claim to be a *bona fide* purchaser.[46]

§ **776a. Right of defrauded party to recover damages.**—The party who has been defrauded into the execution of a note may recover damages of the payee to whom he has delivered it. If the note at the time of trial be overdue, the damages would be nominal only, as it would then be open to defenses even if transferred thereafter to a *bona fide* holder; but if not due, it might bind the maker for the full amount in such a holder's hands, and the damages awarded should be the face value of the note.[47]

SECTION II

WHAT IS MEANT BY VALUABLE CONSIDERATION

§ **777.** In the *second* place he must have acquired the instrument

43. Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588. If the facts shown have any fair tendency to show bad faith, the question remains one of fact and not of law, and this is especially the case where the evidence of fraud is sufficient to put the burden of good faith on the holder. McKnight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 125 Am. St. Rep. 265. Where there is circumstantial evidence tending to show that the plaintiff had knowledge of the business in which the original payees of the note were engaged, and of the circumstances under which the note, and others which he purchased at the time were given, the question whether the plaintiff was a holder in due course may be submitted to the jury. Kipp v. Smith, 137 Wis. 234, 118 N. W. 848.

44. Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585.

45. *In re* Hopper-Morgan Co., 156 Fed. 525.

46. Walters v. Rock, 18 N. D. 45, 115 N. W. 511. See also Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237.

47. Thayer v. Manley, 8 Hun, 551 (1876); Cannon v. Moore, 17 Mo. App. 101.

for a valuable consideration.[48] In some cases it is said that the holder must have parted with "full value," sometimes "fair value," and sometimes the expression "for value" is used.

In New York it has been said that "the consideration for the transfer must be full and fair as well as valuable," [49] while in another case it is said that "when a parting with value is proved, the amount of the consideration is not otherwise important than as bearing on the question of actual or constructive notice." [50] This latter view seems to us the correct one. The owner of a bill or note has as much right to sell it as he has to sell his horse. The prior parties, by making it negotiable, have warranted the right of the payee or indorsee to make title to another.

And if he does so at any price, the holder acquires full rights and

48. See as to consideration of Negotiable Instruments, vol. I, §§ 160 to 207, inclusive. A purchaser of commercial paper is a holder for value and in due course of trade, when he "has given for his note his money, goods, or credit, at the time of receiving it, or has on account of it sustained some loss, or incurred some liability." Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068 (1907). Where in an action on a note brought by the transferee, the maker denies that the plaintiff was a *bona fide* innocent purchaser for value of the note, and sets up that the plaintiff did not pay a valuable consideration therefor, but is permitting himself to be used by the payee for the purpose of shielding the payee from the consequences of a legal fraud, the defenses asserted are open and available to the maker. Pidcock v. Merchants' Nat. Bank, 7 Ga. App. 303, 66 S. E. 973. Where the holder of a promissory note received it as a part of an advance payment on a contract which obligated him to drill oil wells for the indorser, and he expends large sums of money in preparation for such work, he will be regarded as a purchaser for value. Youle v. Fosha, 76 Kan. 20, 90 Pac. 1090 (1907). If an agent who is authorized to sell and collect takes from the purchaser a negotiable note payable to himself, and before it is due, and without consideration indorses it over to his principal, the principal takes it subject to the conditions, made within the scope of the agent's employment, affecting its execution. Such assignment will not defeat the maker's equities. Buckeye Saw Mfg. Co. v. Rutherford, 65 W. Va. 395, 64 S. E. 444 (1909).

49. Goldsmid v. Lewis County Bank, 12 Barb. 410.

50. Gould v. Segee, 5 Duer, 370, Duer, J. (1856); Oppenheimer v. Bank, 97 Tenn. 19, 56 Am. St. Rep. 778; National Bank v. McNair, 116 N. C. 551. It has also been held in New York that one who accepts, in full payment of indebtedness, part of which is based upon contract, and part in tort, notes made by one of the debtors and indorsed by three other parties, and thereby relinquishes valuable remedies against the original debtors, is a *bona fide* holder for value. See Chapman v. Ogden, 37 App. Div. 355, 56 N. Y. Supp. 73; Callahan v. Crow, 91 Hun, 346, 36 N. Y. Supp. 225. In the last case held that a valid promissory note may be purchased of the payee at any price, or even if given to the holder by the payee, the former may enforce it for its full amount.

interests in the instrument, as against all parties, unless he had notice of defects, or wilfully abstained from inquiry under circumstances which justify the imputation of bad faith.

One to whom a note has been loaned is not a purchaser for value, acquires no equities superior to those of the lender, and stands upon no better footing than a mere donee,[51] nor is a broker who has received notes for the purpose of sale a *bona fide* holder for value.[52]

Under Negotiable Instrument statute.—The statute defines a holder in due course as one who, beside other conditions, has taken the instrument for value.[53] A holder of a note cannot be said to be a holder for value when the actual value transferred was apparently so disproportionate that it is impossible to avoid the conclusion that the claim to have paid value is little more than a pretense.[54] The question of value is considered generally in determining the question whether the holder has purchased the instrument in good faith, and it has been held that one who has purchased a note for about fifty per cent. of its face value may recover its full value, as that fact alone is no evidence of bad faith,[55] though a purchase of an unquestionably

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51. King v. Nichols, 138 Mass. 20; Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979, 29 Am. St. Rep. 540; Bowman v. Metzger, 27 Oreg. 23, 39 Pac. 3. In the last case it was held that a purchaser for a valuable consideration before maturity, of a negotiable promissory note, is not, as a matter of law, affected by notice of facts calculated to arouse suspicion as to the transaction in which the note was given. The single question involved is whether he acted in good faith, and to aid in determining that question his knowledge, or lack of knowledge, of suspicious circumstances may be shown.

52. American Valley Co. v. Wyman, 92 Mo. App. 294.

53. Appendix, sec. 52.

54. *In re* Hill, 187 Fed. 214, so held as to notes executed by a bankrupt, aggregating $34,800, and transferred for $300 in cash, a note for $200 which was afterwards paid, and mining stock having a par value of $11,000, but no market value.

55. McNamara v. Jose, 28 Wash. 461, 68 Pac. 903, wherein the court said that unless the consideration be merely nominal, or so grossly inadequate as to lead to the conclusion that the purchase is made for the purpose of speculating upon the chance of collection, it is not of itself sufficient to justify a finding of bad faith; Bothwell v. Corum, 135 Ky. 766, 123 S. W. 291, as to a payment of 90 per cent. net for the drafts; all other matters being regular, the purchaser took free from any defect of title of prior parties, and free from defenses. The fact that a person purchased a second note and mortgage in the sum of $1,500 for $1,000, does not impart notice of its infirmity, when the property was incumbered by a prior mortgage of $3,500. Lassas v. McCarty, 47 Oreg. 474, 84 Pac. 76, wherein the court said: "If it be assumed, however, that notice of any invalidity in the giving of a promissory note could be implied from a purchase thereof at a discount, the defendant should have introduced evidence tending to show that the security was

good note, having less than six weeks to run, for but a little more than half its face value has been considered sufficient to require a submission of the case to the jury of the question of the *bona fides* of the purchaser.[56]

Under another section of the statute declaring that where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time,[57] it has been held that the fact that there may have been an indorsement without consideration is immaterial when there had been a prior indorsement for value before maturity.[58]

§ **777a. When price paid conveys notice of fraud.**—The price at which the paper is offered may amount *prima facie* to notice, and create the presumption of bad faith in the purchaser.[59] If a person

ample for the payment of the entire debt evidenced by the instrument thus assigned."

56. Becker v. Hart, 120 N. Y. S. 270.

57. Appendix, sec. 26.

58. Rogers v. Morton, 95 N. Y. S. 49, 46 Misc. 494. See also *post*, §§ 802*a*, *et seq.*

59. Hogg v. Thurman, 90 Ark. 93, 117 S. W. 1070, wherein the court said that any substantial consideration is sufficient, but it must be more than simply a nominal consideration. Under a statute declaring that good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms of technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious, it was held that where a certificate of deposit for $695 was obtained from the payee by means of fraud, and without consideration, by professional gamblers, and was by them sold to another for the sum of $50, such purchaser was not a *bona fide* purchaser in view of the price paid for the certificate and of the circumstance that he was so intimately acquainted with the gamblers that he became their bail when arrested, upon a charge of having defrauded the payee of the certificate, within two days after he received the certificate. Dunn v. National Bank of Canton, 15 S. D. 454, 90 N. W. 1045. The payment of $1,900 for a $2,000 note is not such a discount as to impart notice of a defect in the title to the note. Wells v. Duffy (Wash.), 124 P. 907. The facts that a note was for $1,250, that a purchaser may have had reason to believe that one of the indorsers was solvent, and that the payee was willing to take and did take $800 for the note, did not charge the purchaser with knowledge that the note was executed for the purpose of enabling the payee to raise an amount less than the face value on the note. Wright Investment Co. v. Friscoe Realty Co., 178 Mo. 72, 77 S. W. 296. On the question whether the sum paid on a note was so disproportionate to the amount of the note itself as to raise a presumption that there was want of good faith in the purchase, the usual rates of discount at the same place may be considered but evidence should not be received of the rates of discount at banks in other places of the same county. Canon v. Farmers' Bank of Cook, 3 Nebr. (Unof), 348, 91 N. W. 585.

were to offer a fine horse for sale for five cents, the very nature of the offer would warn the purchaser that he acted at his peril. And so if the amount which the holder offers to take for a negotiable instrument is totally insignificant as compared to its face value, it might be under the circumstances implied notice that there was something wrong about it; and if he took it without inquiry, he should not be protected. There is no conflict between this view and the cases which hold that gross negligence will not of itself be sufficient to impeach the holder's or purchaser's title. This is not merely gross negligence, but may be regarded as wilful or fraudulent blindness, and abstinence from inquiry, so great as to amount to evidence of bad faith. For it is the obvious suggestion of reason that a *bona fide* owner would not throw away his property for a mere song, and that the purchaser acted in bad faith when he acquired it for comparatively nothing.[60]

§ **778.** Where the plaintiff, knowing that the maker was able to pay, bought his note for $300 from a third party, paying only $5, and the note had been executed without consideration, it was held that the mere nominal price charged him with constructive notice of the defect.[61] So, also, where the purchaser acquired the note in consideration of a mere nominal sum, and a promise to pay a further sum equal to one-half of what might be realized from the note.[62] Like decisions have been rendered where the plaintiff bought a note for $333.33, paying only $125;[63] and where the plaintiff purchased a $300 note for $50;[64] but the grounds of decision in the latter case were simply

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60. Johnson v. Butler, 31 La. Ann. 776, approving text; Smith v. Jansen, 12 Nebr. 125; Richmond v. Diefendorf, 51 Hun, 538; Cunningham v. Scott, 90 Hun, 410, 35 N. Y. Supp. 881.

61. Dewitt v. Perkins, 22 Wis. (1868), Dixon, C. J.: "The buying of a note against a solvent maker, the purchaser knowing him to be such, for a mere nominal consideration, is very strong, if not conclusive, evidence of *mala fides*. It is constructive notice of the invalidity of the note in the hands of the seller, such as to put the purchaser upon inquiry, which if he fails to make he acts at his peril." See also Lay v. Wissman, 36 Iowa, 305.

62. Proctor v. Cole (Ind.), 2 West. Rep. 624.

63. Hunt v. Sandford, 6 Yerg. 387 (1834).

64. Gould v. Stevens, 43 Vt. 125 (1870). In Coliger v. Francis, 58 Tenn. 423, the holder paid $355 for an overdue note for $1,650 to a party in embarrassed circumstances; the purchaser had means of ascertaining approximate value of the note. It was held that while there was no proof of fraud, the circumstances were suspicious, and the holder was restricted in his recovery against the indorser's estate to the amount paid with interest. See also Petty v. Hinman, 2 Humphr.

that there was gross negligence, which alone is not now deemed a sufficient defense.

§ 779. Line of demarcation between negligence and notice.—It is difficult, indeed impossible, to lay down the exact line of demarcation and state what proportion the amount paid must bear to the face of the paper in order to charge the purchaser *prima facie* with notice, or raise the presumption of bad faith on his part. But, in general terms, it may be said that the consideration should be so utterly trifling as to bear upon its face the impress of fraud to leave open no reasonable conjecture but that the purchaser must have known, from the very nature of the facts, that they could not have originated from any but a corrupt source.[65] The known solvency of prior parties would of course strengthen the argument of implied notice and bad faith wherever they were alleged. If the amount paid for the paper were not so insignificant as, *per se*, to charge the transferee with notice, it might still be so inadequate as to be a pregnant fact to be given due consideration in connection with others, in determining whether he should be so chargeable or not.[66] As said in Rhode Island by Potter, J.: "The fact that the plaintiff purchased the note for a sum much below its face, even if he did not know of any equities between the original parties, might be a circumstance tending to show that he had wilfully shut his eyes to the means of knowing the facts." [67]

§ 779a. In Pennsylvania the sale of a $250 note of a maker known to be solvent, by a stranger to the plaintiff, for $100, was considered legitimate, and to constitute the purchaser a *bona fide* holder without

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102; Holman v. Hobson, 8 Humphr. 107. In Anten v. Gruner, 90 Ill. 300, it was held that sale of note at unusually large discount puts holder on inquiry.

65. See *post*, §§ 795, 796. In Bank of Monongahela Valley v. Weston, 172 N. Y. 259, 64 N. E. 946, it was held that a purchase of a note at a discount of 7 per cent., when the legal rate was 6 per cent., was not evidence of bad faith. See also Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949. In Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 202, 25 N. E. 402, the fact that notes of a responsible maker were purchased at a discount of from 15 to 18 per cent. was part of the evidence putting the indorsee on notice, and in Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836, a note was purchased for half its face value, and this with other facts raising an inference of bad faith was submitted to the jury.

66. Chouteau v. Allen, 70 Mo. 341; Hodson v. The Eugene Glass Co., 156 Ill. 397, 40 N. E. 971, citing text.

67. Millard v. Barton, 13 R. I. 610.

notice;[68] and so in Ohio, the purchase of a note for $2,500, secured by mortgage, for just half the amount ($1,250), was viewed in the same light.[69] In Nebraska the holder paid $50 for a $100 note, and testified that he did not regard the note as good; and the court held that his title was unimpeached.[70]

§ 779b. The apparent purchase must have been a purchase in fact and not a mere bookkeeping entry.—Mere discount and credit do not of themselves constitute a *bona fide purchaser* for value. To occupy that position the holder must actually have parted with something of value for the note. Thus, where a bank discounted a note for a company, and credited it with the amount, the credit, on account of other deposits, subsequently increasing, so that at the time of suit on the note the bank had actually paid nothing for it, it was held not a purchaser for value, and that its remedy was to tender the note back to the company, and cancel the credit.[71] This

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68. Phelan v. Moss, 67 Pa. St. 59 (1871), overruling Beltzhoover v. Blackstock, 3 Watts, 20.

69. Bailey v. Smith, 14 Ohio St. 402, Ranney, J., saying: "There is very little difficulty in saying that the rule does not require the full face of the paper to be paid. No decision to that effect has ever been made, and the strongest expressions customarily used do not import anything more than that the holder must have given for the paper what it was reasonably and fairly worth. To hold otherwise would be to deprive all paper, for any cause not worth its face, of one of the most essential and valuable incidents of negotiability, and most effectually to stop its circulation. A moment's reflection will satisfy any one how deeply and disastrously such a holding would affect the business and commerce of the country." See *post*, §§ 795, 796.

70. Cannon v. Canfield, 11 Nebr. 506 (1881).

71. Manufacturers' Nat. Bank v. Newell, 71 Wis. 312. The bank and the company were identified with each other in interests, and the indorsement of notes to the former by the latter wears the aspect of a contrivance for cutting off defenses of the maker. Lancaster County Nat. Bank v. Huver, 114 Pa. St. 216; Dougherty v. Cent. Nat. Bank, 93 Pa. St. 227; Dresser v. M. & I. R. Co., 93 U. S. 92; Clark Nat. Bank v. Bank of Albion, 52 Barb. 592; Mann v. National Bank, 30 Kan. 412; Fox v. Bank, 30 Kan. 444; Drilling v. First Nat. Bank (Kan.), 23 Pac. 94; Dykman v. Northbridge, 80 Hun, 258, 30 N. Y. Supp. 164. But the surrender by the bank of an obligation then valid against maker and indorser of a new note, would constitute the bank a *bona fide* holder of the new note. Dykman v. Northbridge, 1 App. Div. 26, 36 N. Y. Supp. 962; Vietor v. Bauer, 70 Hun, 246, 24 N. Y. Supp. 428; Bank v. Looney, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830; Drovers' Nat. Bank v. Blue, 110 Mich, 31, 67 N. W. 1105, 64 Am. St. Rep. 327, citing text. See also Bank v. Coal Co., 110 Mich. 447, 68 N. W. 232; Warman v. First Nat. Bank, 185 Ill. 60, 57 N. E. 6; Milmo Nat. Bank v. Cobbs

rule obtains if the depositor was not indebted to the bank in a sum greater than or as great as the amount of the credit,[72] or so long as no part of the deposit is drawn out before receiving notice of the infirmity or the balance of the account exceeds the amount of the proceeds of the discount;[73] and it is immaterial, in that event, that subsequently the depositor, who kept his account at the bank, had deposits equal to or exceeding the amount of the notes.[74] But it has been held that where the purchaser of a note had money on deposit with the transferrer, and the value of the note was credited against this deposit and charged by the transferrer to the purchaser, he was a purchaser for value.[75]

Under Negotiable Instrument statute.—Under several provisions of the statute,[76] it is held that merely giving the transferrer credit does not constitute the transferee a holder in due course.[77] Thus, when a bank simply discounts a note and credits the amount thereof on the indorser's account, without paying to him any value for it, such bank is not a purchaser for value or a holder in due course as defined by the statute,[78] but where a bank discounted a note and placed it to the credit of the payee, who drew checks upon his account, the balances on which varied from time to time and were at times overdrawn, and the depositor had drawn the whole amount of the note before the bank had any notice of any defenses to the note, the bank became a holder in due course and in good faith and for value.[79] And

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(Tex. Civ. App.), 115 S. W. 345; Union Nat. Bank of Columbus, Ohio v. Mailoux (S. D.), 132 N. W. 168.

72. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942.

73. Alabama Grocery Co. v. First Nat. Bank, 158 Ala. 143, 48 So. 340, 132 Am. St. Rep. 18; City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942; First Nat. Bank v. Pearsall, 110 Minn. 333, 125 N. W. 506, 136 Am. St. Rep. 496; Union Nat. Bank v. Windsor, 101 Minn. 470, 112 N. W. 999, 118 Am. St. Rep. 641; Sperlin v. Peninsular Loan & Discount Co. (Tex. Civ. App.), 103 S. W. 232.

74. Fredonia Nat. Bank v. Tommel, 131 Mich. 674, 92 N. W. 348.

75. Griswold, Hallette & Persons v. Davis, 125 Tenn. 223, 141 S. W. 205.

76. Appendix, secs. 25, 28, 52, 54, 57.

77. Albany County Bank v. People's Co-operative Ice Co., 86 N. Y. S. 773, 92 App. Div. 47, holding that the maker can set up defense of failure of consideration.

78. Albany County Bank v. People's Co-operative Ice Co., 86 N. Y. S. 772, 92 App. Div. 47.

79. Northfield Nat. Bank v. Arndt, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82. If a bank discounted a note and obtained credit in favor of the seller of the note in a solvent bank for the amount of the paper it discounted, that would be a sufficient consideration to constitute the purchaser a holder for value. Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068.

the mere crediting to a depositor's account, on the books of a bank, of the amount of a note or of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course,[80] though if the bank assumes a legal obligation to another on the faith of the deposit or credit, it becomes thereby a purchaser for value.[81] The question whether a bank becomes a holder in due course or for value when part of the deposit has been withdrawn or only when the deposit has been exhausted, is a matter about which there is some confusion in the authorities. In Wisconsin, under the statute, the court said that the bank is not a holder in due course except to the extent of the money actually drawn and charged against such credit,[82] and in Kentucky it has been held that where a bank received a check and pays part of the amount and deposits the balance, it is a holder in due course.[83] It has been held, however, that the transfer of negotiable paper to a bank in consideration of credit upon its books, which credit is not absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals, is not a purchase in the ordinary sense of that term.[84]

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80. Citizens' State Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765.

81. Montrose Savings Bank v. Claussen, 137 Iowa, 73, 114 N. W. 547. Where the debtor of a bank became the second indorser of a note to the bank, and, upon receiving the note, the bank extended the time of the payment of the debt, applied the proceeds as a credit to the debtor's account, and relinquished bills of lading pledged as collateral, the bank was a holder for the value. Allentown Nat. Bank v. Clay Product Supply Co., 217 Pa. 128, 66 Atl. 252. When on the day of discount the bank held a note of the depositor due on that day, charged to the depositor's account, and the account was made good at that time by the application of the proceeds from the discount of the note, this transaction made the bank a holder for value. Wallabout Bank v. Peyton, 108 N. Y. S. 42, 123 App. Div. 727.

82. Hodge v. Smith, 130 Wis. 326, 110 N. W. 92. A bank purchasing a note from a depositor placed the amount paid therefor to his credit on account subject to check; the balance on such account varied and at times it was overdrawn before the maturity of the note, and the bank did not know of any defense to the note until after its maturity. It was held that the fact that at various times afterwards, including the date of maturity of the note, the amount of the credit to the seller exceeded the amount due on the note did not prevent the bank from being a *bona fide* holder for value. Northfield Nat. Bank v. Arnt, 132 Wis. 383, 112 N. W. 451, 12 L. R. A. (N. S.) 82.

83. Choteau Trust & Banking Co. v. Smith, 133 Ky. 418, 118 S. W. 279.

84. McKnight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265.

SECTION III

THE ORDINARY OR USUAL COURSE OF BUSINESS

§ **780.** In the *third* place, the holder must have acquired the paper in the ordinary or usual course of business, by which phrase is meant to describe a transfer according to the usages and customs of commercial transactions.[85] Whether or not a transfer in payment of preexisting debt is of this character, was for a long time questioned; but the doctrine is now settled that it is.[86] And when the paper is trans-

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85. Kinkel v. Harper, 7 Colo. App. 45, 42 Pac. 173; Kellogg v. Curtis, 69 Me. 212; Graham v. Smith, 155 Mich. 65, 118 N. W. 726; Mindlin v. Appelbaum, 114 N. Y. S. 908, 62 Misc. Rep. 300; Murchison Nat. Bank v. Dunn Oil Mills Co., 150 N. C. 718, 64 S. E. 885; Kipp v. Smith, 137 Wis. 234, 118 N. W. 848. In Elias v. Finnegan, 37 Minn. 145, the indorsement of a negotiable note making it payable to the order of A., who had no personal interest in the transaction, for the benefit of B., was held not to be in the usual course of business so as to exclude defenses of the maker against the payee. *Post*, § 819. Where an agent who holds a person's money for investment obtained a note indorsed in blank and exhibited to such person as having been theretofore purchased with his money, such person is not a *bona fide* holder thereof when the agent knew that the ownership was in another. Bettanier v. Smith, 129 Iowa, 597, 105 N. W. 999, 5 L. R. A. (N. S.) 628. Where an agent was employed to obtain orders for machinery, and a note was executed in payment thereof by a third person to the purchaser of the machinery or bearer upon certain conditions, and the note was sent to the principal who delivered the machinery to the payee of the note, such principal is not an indorsee in due course as the agent should in the exercise of ordinary care have communicated his knowledge of the conditions to his principal. New Birdsall Co. v. Stordalen, 21 S. D. 26, 109 N. W. 516 (1906). Though the payee of a note in his lifetime only indorsed the note to a certain person and intended to give it to him, the title to the note after his death passed to his administrator, and could only be transferred by operation of law, and a purchaser from such indorsee, to whom delivery had not been made by the payee, having purchased with knowledge of the title to the notes, has not the rights of an innocent purchaser. Burchett v. Fink, 139 Mo. App. 381, 123 S. W. 74. Where a commission company assigns and guarantees the payment at maturity of accommodation notes to a bank, and an officer of the commission company who is not a guarantor of the notes, but who has theretofore given a written undertaking to the bank indemnifying the bank for any debts of the company thereafter contracted to an amount much larger than the amount of the notes, pays after maturity a balance due upon the notes, and receives the notes from the bank, he does not thereby become a purchaser of the notes for value in the usual course of business. Rockefeller v. Ringle, 77 Kan. 515, 94 Pac. 810, 15 L. R. A. (N. S.) 737.

86. See chapter VII, on Consideration, *ante*, § 184; Merchants' Bank v. McClelland, 9 Colo. 611; Jones v. Wisen, 50 Nebr. 244, 69 N. W. 762.

ferred as collateral security for a contemporaneous or pre-existing debt, there are many variations of the question, and many views taken, as to whether or not it is in the usual course of business for a valuable consideration, according to the mercantile use of those terms.[87]

§ 781. Transfers which are not in usual course of business.— There are some transfers, however, in which the legal or equitable title to the instrument passes, but which are not in the usual course of business.

Thus, a receiver appointed by a court, and who comes in possession of a bill or note of a litigant by operation of law acquires no better title than such litigant possessed, for, as said in New York, "he acquires title by legal process, and not in the regular course of dealing in commercial paper." [88] The like decision was rendered in Connecticut, in respect to the receivers of assets of a bank, for the benefit of its creditors.[89] So the assignment of a bill or note by operation of a bankrupt or insolvent law, is an instance out of the usual course of commercial business.[90] So also is a transfer by the payee or holder to a trustee for the benefit of creditors.[91] Under statute in the State of

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87. See chapter XXV, section I, § 820 *et seq.*

88. Biggs v. Merrill, 58 Barb. 379. See also Huchins v. Langley, 27 App. Cas. (D. C.) 234. As to assignments, see *ante*, chapter XXII.

89. Litchfield Bank v. Peck, 29 Conn. 384.

90. Billings v. Collins, 44 Me. 271.

91. Roberts v. Hall, 37 Conn. 205. A. obtained a note from B. by fraud, and transferred it to C. as trustee for certain creditors in part, and the balance for A.'s wife. The creditors accepted the transfer, and directed the trustee to bring suit. B. had demanded the note back before the transfer, and pleaded fraud against the trustee. It was held not a transfer in the usual course of business, and the defense was allowed, Carpenter, J., saying: That commercial paper may be properly used as security for a pre-existing debt. "The purpose for which the paper was used is exceptional and unusual. We apprehend that cases like this are rarely to be met with in business circles. Let us examine it more carefully. A man has a piece of negotiable paper, with which he wishes to pay or secure certain debts. If there is but one debt, he can transfer it directly to the creditor, and the law protects the transaction. This is according to the usual course of business. But if he transfers it to a friend, to hold till due, and then collect it, and with its avails pay the creditor, that is unusual and suspicious upon its face, and requires explanation. Unless some good reason can be shown for such a proceeding, the law ought not to protect it. But it is said there were several creditors, which, it is claimed, sufficiently explains the fact, that the security was effected through the intervention of a trustee. Let us test this position. If the paper is right and free from defects, why not sell it in the market,

Iowa, it has been held, that an indorsement of a note by the sheriff, who had levied upon it, had the same effect as if made by the holder himself.[92] But if the note levied on were not the property of the debtor, neither the purchaser nor any one claiming under him could acquire a title by its sale under execution.[93]

Under Negotiable Instrument statute.—Under the statutory defini-

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or get it discounted, and with its avails pay the debts at once? Or, if the debts are not to be paid until the paper is due and collected, why not retain it in his own hands until due, and if necessary sue and collect it in his own name? Such a course would be natural and usual. But what honest reason can be suggested, why it should be transferred to a third party, who has no interest in the matter, to be sued in his name? Such a course is unusual, and not in the course of trade. The transaction at once suggests the idea that there is some equity in favor of the maker, inherent in the note itself, and which can be made available against the payee, and which the payee is seeking to avoid! * * * The fact that a part of this money was payable to the wife of Yale (the payee), is worthy of notice, also, in this branch of the case. To that extent, as we have already seen, the plaintiff was the agent of Yale. * * * The fact that Yale himself is still interested in this note, either in his own right or the right of his wife, should suggest to all parties concerned an inquiry as to the reason and occasion of this conveyance."

92. Earhart v. Gant, 32 Iowa, 481, Cole, J., saying: "The note was payable to John Walker, but was then, or afterward became, the property of Isaac Walker, against whom John Morford had a judgment. Under execution issued thereon, John Walker, still holding the note, was garnished; and such legal proceedings were had as that the note was indorsed by the sheriff to John Morford, pursuant to order of the court, Morford agreeing to take the same at its face. It is now and here claimed, by appellee's counsel, that such transfer did not operate as an indorsement under the law merchant by the payee, to transfer the note discharged of its infirmity. Our statute says (Rev., § 3272): 'Bank bills and other things in action may be levied upon and sold, or appropriated as hereinafter provided, and assignments thereon by the officer shall have the same effect as if made by the defendant, and may be treated as so made.' And it is further provided, by section 3222, that money, promissory notes, etc., may be appropriated without being advertised or sold, if the plaintiff will receive them at their par value. The precise point made is, that the transfer by the officer is to have the same effect as if made by the defendant, and that Isaac Walker, and not John Walker, was the execution defendant. We think this too narrow a construction to place upon the statute, which is surely a remedial one. In our view, the garnishee, holding such paper, and having legal title in himself, may properly be said to be the defendant, at least in the garnishment proceedings. A fair construction of the sections, when their purpose is considered, will make the defendant include not only the execution defendant, but also the garnishee defendant. The indorsement by the officer is to have the same effect as if made by the defendant in the garnishment. Such an indorsement will, therefore, have the same effect in this case as an indorsement by the legal holder under the law merchant."

93. McCormick v. Williams, 54 Iowa, 50.

tions of a holder in due course,[94] it has been held that a trustee under a deed of trust to secure all the creditors of the grantor is such a holder, and that the statute has probably changed the rule under the law merchant in this respect.[95]

§ 781a. Who cannot ostensibly transfer a good title.—A bill or note in the hands of one not the payee, and unindorsed where it is not payable to the payee or bearer, would be open to defenses in the hands of the transferee, for such possession and transfer are not in the usual course of business.[96] A bill in the hands of the drawer and payable to his order, might be properly acquired from him, and the holder under his indorsement would be protected against defenses, for the acceptor is the primary debtor, and the drawer the original creditor.[97]

§ 781b. Whether acceptor of bill indorsed in blank can transfer a good title before maturity.—Whether or not a bill in the hands of the acceptor before maturity could be acquired from him under an indorsement in blank by the payee, so as to protect the indorsee from defenses available between anterior parties, is a disputed question. In New York it has been held that it cannot, on the ground that the presumption in such a case is that the acceptor either holds it for acceptance, or after payment, in either of which cases he would have no authority to negotiate it.[98] In England it has been held that the

94. Appendix, secs. 52, 53.

95. Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14, the court saying that where the act defines generally who shall be holders in due course, and makes an express exception of a certain class, who would otherwise be embraced, as in section 53, the exception negatives the idea that any other class was to be excepted, in accordance with maxim "*Expressio unius est exclusio alterius.*"

96. Gibson v. Miller, 29 Mich. 355; Mills v. Porter, 2 Hun. 524. So held in Texas, of an indorsement and transfer by the husband of a note payable to the wife. Kempner v. Comer, 73 Tex. 201, citing the text; Durein v. Moeser, 36 Kan. 443; Quigley v. Mexico Southern Bank, 80 Mo. 295, citing the text; Lyon, Potter & Co. v. First Nat. Bank, 29 C. C. A. 45, 85 Fed. 120, text cited. See *ante*, §§ 573, 741, and *post*, §§ 812, 1181*a*.

97. Merritt v. Duncan, 7 Heisk. 156. See *post*, § 812.

98. See *ante*, § 753, and *post*, § 812; Central Bank v. Hammett, 50 N. Y. 158 (1872). In this case, Balch & Co., being indebted to defendants, gave them an acceptance upon a draft drawn by them and made payable to order of B. & Co. Failing to get it discounted, they returned the bill to B. & Co., who gave them another acceptance. Instead of canceling the first draft as instructed, Balch & Co. negotiated it to the Central Bank, before maturity. Held, that the Central Bank could not recover against the drawers. No notice is taken in the

party acquiring the bill for value under such circumstances is entitled to protection as a *bona fide* holder without notice, on the ground that he has a right to presume that the bill has been drawn for accommodation of the acceptor, and Lord Abinger, C. B., in giving judgment to this effect, has forcibly expressed this view, which seems to us correct.[99]

Under Negotiable Instrument statute.—Several provisions of the statute define "a holder in due course," [1] and several cases have applied the statutory definitions to one who takes an instrument before maturity, for value, and in good faith and without notice of any infirmity or defect of title.[2] And taking a note as collateral security

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opinion of the court, of the case of Morley v. Culverwell, 7 M. & W. 174 (1840), where the contrary doctrine is held, and has been well expounded by Lord Abinger. Central Bank v. Hammett, 50 N. Y. 686 (1872), the court saying: "The possession of a bill or note payable to bearer, or indorsed in blank by one not a party to the instrument, is presumptive evidence of ownership. But a possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself. The actual relations to each other of the several parties to the instrument are presumed to be precisely such as the law declares, in the absence of any special circumstances to take the instrument out of the general rule, and vary the liabilities of the parties as between each other. An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other or different rights, or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument."

99. Morley v. Culverwell, 7 M. & W. 174 (1840), Lord Abinger, C. B., saying: "Suppose mutual accommodation acceptances to be given, and to be exchanged before they have been negotiated, the names remaining on them:—the parties may circulate them so as to give a title to a *bona fide* holder, before they become due; and wherein does this case differ from that? Therefore a bill is not properly paid and satisfied according to its tenor unless it be paid when it is due; and consequently if it be satisfied before it is due, by an arrangement between the drawer and acceptor, that does not prevent the acceptor from negotiating it, or an innocent indorsee for value from recovering upon it." To the same effect see the case of Witte v. Williams, 8 Rich. 304; and opinion of Moses, C. J., which disapproves of the conclusion in Central Bank v. Hammett, 50 N. Y. 158. In the first edition of this work the author stated the law upon the authority of the New York decision as therein laid down. Examination of the English authorities, and of the South Carolina case, has satisfied him of the error, and that the English view is correct.

1. Appendix, secs. 27, 52–59.

2. Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923; Christian Feigenspan v. McDonald, 201 Mass. 341, 87 N. E. 624; Massachusetts Nat. Bank v. Snow, 187

under the above circumstances makes the transferee a holder in due course,[3] but one was not a holder in due course, it has been held, who received a check from the payee as a loan, and not for an antecedent debt, and returned it to the payee when its payment was stopped.[4]

SECTION IV

THE PHRASE "BEFORE MATURITY"

§ 782. In the *fourth* place, the holder, in order to acquire a better right and title to the paper than his transferrer, must become possessed of it before it is overdue. For if it were already paid by the maker or acceptor, and had been left outstanding, it would be already discharged, and they would not be bound to pay it again to any one who acquired it after the period when payment was due. And if it were not paid at maturity, it is then considered as dishonored; and, although still transferable, in like manner and form as before, yet the fact of its dishonor, which is apparent from its face, is equivalent to notice to the holder that he takes it subject to its infirmities, and can acquire no better title than his transferrer.[5] The doctrine ap-

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Mass. 159, 72 N. E. 959; Goetting v. Day, 87 N. Y. S. 510; Park v. Exum, 156 N. C. 228, 72 S. E. 309; Hull v. Angus (Oreg.), 118 Pac. 284; Scandinavian American Bank v. Johnston, 63 Wash. 187, 115 Pac. 102; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192. Where an owner of property gave a check to a contractor to pay off his men and upon the supposition that the architect had given a certificate for the work, and stopped payment of the check upon finding that the certificate had not been given, a person who cashed the check for the payee was a holder in due course though the payee failed to pay the men and abandoned his work upon the building about the same time. Siegmeister v. Lispenard Realty Co., 107 N. Y. S. 158.

3. American Nat. Bank v. J. S. Minor & Son, 135 S. W. 278, 142 Ky. 792; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37; Brown v. James, 80 Nebr. 475, 114 N. W. 591. See also Jett v. Standafer, 137 S. W. 513, 143 Ky. 787, as to one receiving a note from the payee thereof in consideration of his becoming his surety of the payee, under an agreement that the note shall be his unless the payee pays his debt.

4. Rosenthal v. Parson, 110 N. Y. S. 223.

5. Morgan v. United States, 113 U. S. 500; Harrell v. Broxton, 78 Ga. 129; Money v. Ricketts, 62 Miss. 209; Texas Banking Co. v. Turnley, 61 Tex. 370, citing the text; Speck v. Pullman Car Co., 121 Ill. 57; Towner v. McClelland, 110 Ill. 549; Simons v. Morris, 53 Mich. 155; Church v. Clapp, 47 Mich. 257; Wood v. McKean, 64 Iowa, 18, citing the text; Haywood v. Seeber, 61 Iowa, 574; Clute v. Frazier, 58 Iowa, 268; Edney v. Willis, 23 Nebr. 56; Woodsum v.

plicable to this subject has been admirably stated by Chief Justice Shaw, who says: "Where a negotiable note is found in circulation after it is due, it carries suspicion on the face of it. The question instantly arises, why is it in circulation? why is it not paid? Here is something wrong. Therefore, although it does not give the indorsee notice of any specific matter of defense, such as set-off, payment, or fraudulent acquisition, yet it puts him on inquiry; he takes only such title as the indorser himself has, and subject to any defense which might be made if the suit were brought by the indorser."[6] But there is this limitation to this doctrine: that if the holder acquired the paper after maturity, from one who became a *bona fide* holder for value and without notice before maturity, he is then protected by the strength of his transferrer's title.[7]

Cole, 69 Cal. 142; Hays v. Kingston, 16 Atl. 745; Osborn v. McClelland (Ohio), 1 West. Rep. 227, citing the text; James v. Yaeger (Cal.), 24 Atl. 104; Texas v. Hardenberg, 10 Wall. 58; Davis v. Miller, 14 Gratt. 1; Arents v. Commonwealth, 18 Gratt. 750; Marsh v. Marshall, 53 Pa. St. 396; Kellogg v. Schnaake, 56 Mo. 137; Kittle v. De Lamater, 3 Nebr. 325; Goodson v. Johnson, 35 Tex. 622; Henderson v. Case, 31 La. Ann. 215; Greenwell v. Haydon, 78 Ky. 333; Hinckley v. Union P. R. Co., 129 Mass. 61; Callahan v. Crow, 91 Hun, 346, 36 N. Y. Supp. 225; McElwee Mfg. Co. v. Trowbridge, 62 Hun, 471, 17 N. Y. Supp. 3; British-American Mortgage Co. v. Smith, 45 S. C. 83, 22 S. E. 747; Quimby v. Stoddard, 67 N. H. 287, 35 Atl. 1106; Emerson v. Crocker, 5 N. H. 159; Farnham v. Fox, 66 N. H. 673; The Stockton Sav. & Loan Society v. Giddings, 96 Cal. 84, 30 Pac. 1016, 31 Am. St. Rep. 181; Vandagrift v. Bates County Inv. Co., 144 Mo. App. 77, 128 S. W. 1007; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984. See *ante*, § 724 and as to the effect of the Negotiable Instrument statute, see *ante*, under § 726. The phrase "in due course of business" requires indorsement before maturity. Cochran v. Stein (Minn.), 136 N. W. 1037. An indorsee of a note before maturity with notice of payment to a third person pursuant to an order of the payee may transfer the note to an innocent purchaser for value before maturity, who may enforce the note notwithstanding such payment. Snead v. Barclift, 2 Ala. App. 297, 56 So. 592. Where an agent, often owner of a note, made an agreement with the maker extending the time of payment, without the consent of the owner, the time of payment was not extended, and a transferee of the note took it after maturity. Merchant Loan & Trust Co. v. Welter, 205 Ill. 647, 68 N. E. 1082.

6. Fisher v. Leland, 4 Cush. 456; Owen v. Evans, 134 N. Y. 514, 31 N. E. 999; Anderson & Co. v. Stapel, 80 Mo. App. 115.

7. See *ante*, § 726, and *post*, §§ 786, 803, 805; Barker v. Lichtenberger, 41 Nebr. 751, 60 N. W. 79. Where a negotiable promissory note has been, before maturity, duly indorsed and delivered in escrow, with the contract of its purchaser to convey in consideration of it certain land, and proceedings were necessary to enable the purchaser of the note to convey the land and carry out the contract for which the note was taken, the fact that such proceedings were not completed, and the contract not fulfilled, and the note not delivered by the depositary to the pur-

The indorsement and delivery, when made have no retroactive force, and the rights of the indorsee are to be determined by the facts existing at the time of the indorsement and delivery, and though the instrument may have been purchased and the money paid therefor prior thereto, if the indorsement and delivery occur after maturity, the indorsee is a purchaser after maturity.[8]

Under Negotiable Instrument statute.—Under the statutory definition of a holder in due course,[9] where a note, dated Sept. 21st, was payable one day after date, or Sept. 22nd, it was not overdue at any time on the 22d, and a purchase of the note on that day was made before the note was overdue.[10]

§ 783. When instruments payable on sight or on demand deemed overdue.—It is said by Professor Parsons in respect to bills on sight, and bills or notes payable on demand: "A reasonable time must elapse before mere nonpayment dishonors the bill or note. What this time is, has not been and cannot be fixed by any definite and precise rule. One day's delay of paper on demand certainly would not dishonor it; five years certainly would. And in each case, how many days, or weeks, or months are requisite for this effect, must depend upon the test, whether so long a time has elapsed, that it must be inferred from the particular circumstances and the general conduct of business men, both of which should be considered, that the paper in question must have been intended to be paid within this period, and if not paid, must have been refused." [11] And again

chaser until after it matured, will not deprive the buyer of the rights of a *bona fide* purchaser before maturity, where he had completed the transaction in ignorance of any defense. Cummingham v. Holmes, 66 Nebr. 723, 92 N. W. 1023.

8. Dazey v. Jeffers, 127 Ill. App. 307; Wright v. Mississippi Valley Trust Co., 144 Mo. App. 640, 129 S. W. 407.

9. Appendix, sec. 52.

10. Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37.

11. 1 Parsons on Notes and Bills, 263, 264. See further on this subject, Kerby v. Wade (Ark.), 142 S. W. 1121; Jersey City Sav. Bank v. Jersey City Bank, 48 N. J. L. 513; Mitchell v. Catchings, 23 Fed. 710, citing the text. In this case it was held that a lapse of twenty-three days was insufficient to dishonor the paper. In Paine v. Central Vt. R. Co., 14 Fed. 270, four months held sufficient. Bull v. First Nat. Bank of Kasson, 14 Fed. 613. In La Due v. First Nat. Bank of Kasson, 31 Minn. 33, a bank draft payable on demand was drawn by a Minnesota bank on a New York bank, and was, after outstanding four months and twenty-three days, indorsed to the holder. The court held that it was to be regarded as overdue and that the indorsee took it subject to equities (and to offsets under the Minnesota statute), and Mitchell, J., giving the opinion, said: "The only ques-

the same learned author observes: "If the paper be demanded and refused within that period before the termination of which there is

tion left, then, is whether this draft was 'overdue' when Edison indorsed it to Jordan on the 8th March, 1882, four months and twenty-three days after its date. In the case of a bill, note, or check, payable on demand, no exact date is fixed in the instrument. The general rule is that it must be presented for payment within a reasonable time, having in view ordinary business usages, and the purposes which paper of that class is intended to subserve. The term 'overdue,' as applied to a demand bill of exchange, is used in different connections, in each of which it has a different meaning; and the failure to keep these distinctions in mind has perhaps led to some misapprehensions regarding the present case. Sometimes it is used in reference to a right of action against a drawer or indorser. In that connection a bill is not overdue until presented to the drawee for payment, and payment refused. Sometimes the term is used in considering whether an indorser has been released by a failure of the holder to present the bill for payment, and to give the indorser notice of its dishonor within a reasonable time. Again, the term is applied to a bill which has come into the hands of an indorsee so long after its issue as to charge him with notice of its dishonor, and thus subject it in his hands to the defenses which the drawer had against it in the hands of the assignor. It is in this last connection that the term 'overdue' is considered in the present case. That in this case a bill may be said to be overdue, although it has never been in fact presented to the drawee for payment, is recognized everywhere throughout the books, and will be apparent, we think, on a moment's reflection. Suppose a draft has been held by the payee five years, without ever having been presented to the drawee for payment, and is then indorsed to another party. It would not be due so as to give a right of action against the drawer, because his contract is only to pay in case it is not paid by the drawee on presentation. But there would be no doubt that it would be overdue or dishonored, so as to charge it in the hands of the indorsee with any defenses which the drawer had against it in the hands of the payee, although when he took it it had never been presented for payment. The retention of a demand draft so long a time without presentment, when no defense exists against it, is so unusual and contrary to business usages that this circumstance could be held to charge the indorsee with notice when he purchased the draft that it was dishonored. The lapse of time would in such case be so great as to put a purchaser upon inquiry as to the reason why it was still outstanding and unpaid. The cases are almost innumerable in which it has been held that paper payable on demand had been outstanding so long when transferred as to be deemed overdue and dishonored, so as to subject it, in the hands of the purchaser, to any defenses which the maker or drawer had against it in the hands of the payee; and in none of these cases is the question whether or not the paper had been, before the transfer, presented for payment to the maker or drawee, referred to as at all material. Down v. Halling, 4 B. & C. 330; First Nat. Bank v. Needham, 29 Iowa, 249; Cowing v. Altman, 71 N. Y. 435; Sylvester v. Crapo, 15 Pick. 92; Ranger v. Carey, 1 Metc. (Mass.) 369; Herrick v. Wolverton, 41 N. Y. 581; Story on Promissory Notes, § 207, and note; Thompson v. Hale, 6 Pick. 258; American Bank v. Jenness, 2 Metc. (Mass.) 288; Carlton v. Bailey, 27 N. H. 230; Parker v. Tuttle, 44 Me. 459; Nevins v. Townsend, 6 Conn. 5; Camp v. Scott, 14 Vt. 387; Morey v. Wakefield, 41 Vt. 24. That in determining whether

no presumption of dishonor, a taker after such demand, and within that period, having no notice or knowledge of the demand or refusal, cannot be affected by it. For example, suppose a note on demand so circumstanced that the court would say the lapse of one month is not sufficient to dishonor it, and the lapse of two months is sufficient, and a transferee takes it on the twenty-fifth day without notice or knowledge that on the twenty-fourth day it had been demanded and refused. We should say that the law would allow him the right of presuming nondishonor during the whole of that month, and would protect his rights accordingly."[12] And it has been held that where a large amount had been paid on the note, and the last payment was but a few days before its purchase, the facts were not such as to raise

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an indorsee took a demand note or bill as dishonored and overdue paper, subject to all equities or defenses, the test is the length of time it has been outstanding, and not whether it has in fact been presented for payment, may be illustrated in another way. Suppose a draft had in fact been presented for payment, and payment refused, on the very day it was issued, it would then be overdue as to the drawer so that an action would lie then against him. But suppose, immediately after such presentation, and on the same day, the holder should indorse the draft to another, who took it in good faith, for value, without notice of this actual dishonor; clearly such indorsee would not take it as overdue paper, subject to the equities or defenses against it in the hands of the former holder, because a reasonable time for its presentation not having expired, there was nothing to put him upon inquiry, or to charge him with notice of such equities. Himmelman v. Hotaling, 40 Cal. 111. In fact, in determining whether an indorsee takes such paper as overdue paper, subject to such defenses or equities, the question of actual demand and dishonor does not enter into the discussion. The point of inquiry is, had the paper been outstanding so long after its date as to put the purchaser upon inquiry, and charge him with notice that there is some defense to it? In view of the well known fact that bills of exchange are not always transmitted immediately for payment, but first pass through the hands of several intermediate holders in the ordinary course of business, and in other cases are purchased by travelers to be carried with them instead of currency or coin, to be negotiated as occasion may require, we are not disposed to lay down any narrow rule on this subject. But in this case we think that the fact that this draft was, without any explanation of the reason, found outstanding nearly five months after its date, fully justified the trial court in holding it overdue and dishonored when Jordan took it, so as to charge it in his hands, or the hands of those who held under him, with any defense or set-off which the drawer had against it in the hands of Edison."

12. 1 Parsons on Notes and Bills, 270. See also Bartrum v. Caddy, 9 Ad. & El. 275–278; Cripps v. Davis, 12 M. & W. 159, 165. The fact, standing alone, that a note payable on demand was purchased 18 months after its date, would have made the note overdue, but when the note was kept alive by continuous payments of monthly interest to the original payee and to the purchaser after he took the note, it cannot be considered as overdue at the time of transfer. McLean v. Bryer, 24 R. I. 599, 54 Atl. 373.

a reasonable presumption that the note, at the time of its purchase, was a dishonored note.[13]

Under Negotiable Instrument statute.—Under the statutory definition of a holder in due course,[14] as between the maker and indorsee of a demand note, the latter is deemed to be a holder in due course if it has come into his hands for value in the ordinary course of business within a reasonable time after its date, and it has been held that such a note must be considered to have been overdue when at the time of the transfer the principal sum named had been nearly fully paid, and the transferee had notice that there was a dispute whether there was a balance due on the note.[15] And the statutory declaration that where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course [16] repeals a statute under which a note payable on demand was open to the same defenses in the hands of an indorsee as if the action had been brought by the promisee.[17]

§ 783a. Cancellation of paid paper.—It is important that bills and notes, especially those not payable at a fixed day, should be destroyed when paid, or so marked by writing or stamped words as to show payment; for otherwise, as their payment would not appear from their face, the parties might be held liable, were they reissued, to a *bona fide* purchaser without notice.[18]

§ 784. Presumption that bill or note is acquired before maturity.—There is always a presumption when the payee's or an indorser's name is indorsed upon the bill or note, that it was done before its maturity; and likewise the presumption that the holder acquired the instrument before maturity, whether the legal title be transferable by indorsement, or by delivery merely.[19] Proof that a note was in

13. First Nat. Bank v. Mineral Farm Consol. Min. Co., 17 Colo. App. 452, 68 Pac. 981.

14. Appendix, sec. 52.

15. Brophy Grocery Co. v. Wilson, 45 Mont. 489, 124 P. 510.

16. Appendix, sec. 53.

17. Gordon v. Levine, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361.

18. District of Columbia v. Cornell, 130 U. S. 655, 9 Sup. Ct. Rep. 694.

19. See *ante*, § 728; New Orleans, etc. v. Montgomery, 95 U. S. (5 Otto) 16 (1877); Whitney Nat. Bank v. Cannon, 52 La. Ann. 1484, 27 So. 948, citing text; New Albany Woolen Mills v. Myers, 43 Mo. App. 124, citing text; Crawford v. Johnson, 87 Mo. App. 478, citing text; Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984.

the possession of the original holder a short while prior to maturity does not carry the burden resting on the defendant of showing that an undated indorsement was made after maturity.[20] Indeed the law will presume in favor of the holder, according to many authorities, that the indorsement or assignment was of even date with the instrument itself; [21] but it can rarely be the case that any stronger or more definite presumption will be needed than that he acquired it before maturity, as he is then protected against defenses available to his transferrer. We can conceive, however, of cases in which the further presumption that the transfer was of even date might be desirable to the holder—as where it were proved that at a certain time after date of the paper he had notice of a defect which would prevent his better title, if it were not then established. And where the time of a payment of a note had been extended and the extension indorsed thereon, and there was nothing on the face of the note to indicate that it had been dishonored, but on the contrary it appeared therefrom that by reason of the extension of time it had not matured when it was purchased, the purchaser was an innocent purchaser before maturity.[22] Where, however, the drawer of a bill of exchange sets up fraudulent representations by the original payee, by which the drawer was induced to sign the bills or drafts, this presents a good defense, and the burden of proof is cast on a purchaser to show that the bills were purchased by him before maturity, and for a valuable consideration.[23]

§ 784a. Strength of presumption as to date of acquisition.—But the presumption as to the time of acquiring the instrument is not a strong one. The indorsement is almost invariably without date, and without witnesses. The transfer by delivery merely, leaves no footprint upon the paper by which the time can be traced. And the presumption in favor of the holder as to the time of transfer being without any written corroborative testimony, is of the slightest nature, and open to be blown away by the slightest breath of suspicion.[24]

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20. Baskins v. Valdosta Bank & Trust Co., 5 Ga. App. 600, 63 S. E. 648. See Cropley v. Eyster, 9 App. D. C. 373, holding that the fact that the note was in the actual custody and control of the indorser on the day of maturity was sufficient to overcome the presumption.

21. See *ante*, § 728; Whitney Nat. Bank v. Cannon, 52 La. Ann. 1484, 27 So. 948, citing text.

22. Conklin v. Young, 141 Iowa, 676, 120 N. W. 353.

23. Woodall v. People's Nat. Bank, 153 Ala. 756, 45 So. 194. See also *post*, § 815.

24. Gibson, J., in Snyder v. Riley, 6 Barr, 164; Hill v. Kraft, 29 Pa. St. 186;

§ **785.** The presumption that the holder of a note acquired it before maturity has been held not to apply where the note is payable in so short a time as one day after date, on the ground, as stated, that the time to run is so short that it is not probable that it would be put into circulation before maturity—at least, not sufficiently so as to raise a presumption in favor of the holder; that such paper is rather evidence of a debt than a promise made with expectation of payment at the time named, and does not belong to the class of paper intended for negotiation and circulation for commercial purposes.[25] But this departure from the general principle, which relieves the holder from nothing but the burden of proof, is not sanctioned by the law merchant; and, although the time is brief, the execution of a negotiable instrument payable at so brief a period is in itself evidence of a need of money for the period named. And we know of no reason why a party may not use negotiable instruments for a short loan as well as a long one.

§ **786. Rule as to accommodation paper, acquired overdue.**— While it is the general rule that if the paper be overdue at the time of the transfer that circumstance of itself is notice, and he can acquire no better title than his indorser; yet, the fact that the paper was executed for accommodation without consideration, and that the indorsee knew it, is no defense even when the paper was overdue at the time of the indorsement, it being considered that parties to accommodation paper hold themselves out to the public by their signatures to be bound to every person who shall take the same for value, to the same extent as if paid to him personally.[26] If the holder

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Hatch v. Calvert, 15 W. Va. 97; Henry v. Sneed, 99 Mo. 423, citing the text; Osborn v. McClelland (Ohio), 1 West. Rep. 227.

25. Beall v. Leverett, 32 Ga. 104, Lyon, J.

26. This doctrine seems just, and is sustained by numerous authorities, though not without conflict. Favoring it, see Story on Notes, § 194; Story on Bills (Bennett's ed.), §§ 188, 191; 2 Rob. Pr. (new ed.) 253; Byles on Bills (Sharswood's ed.), 285; Dunn v. Weston, 71 Me. 270; First Nat. Bank v. Grant, 71 Me. 374; Harrington v. Dorr, 3 Rob. 283; Davis v. Miller, 14 Gratt. 6; Sturtevant v. Ford, 4 M. & G. 101, 4 Scott, 608; Charles v. Marsden, 1 Taunt. 224; Lazarus v. Cowie, 3 Q. B. 459 (43 Eng. C. L.); Caruthers v. West, 11 Ad. & El. 144. In Redfield & Bigelow's Lead. Cas., 216, 217, it is said: "To hold otherwise would be to encourage fraud, and to relieve the party from the very responsibility which he expected to meet, and which, upon every principle of justice and fair dealing, he should be compelled to abide by." See *ante*, §§ 726, 782; Seyfert v. Edison, 45 N. J. L. 393; Maffatt v. Greene, 149 Mo. 48, 50 S. W. 809, text cited; Hodges v. Nash, 141 Ill. 391, 31 N. E. 151.

received the paper after maturity from an indorser who took it *bona fide* before maturity, there is no question as to his right to recover;[27] but if he takes it after maturity from the party for whose accommodation it was made, indorsed, or accepted, there is conflict of decision on the subject;[28] but the doctrine of the text is sustained by the highest authority.[29]

§ 787. Rule when instalment of principal or interest is overdue.—If the note be payable by instalments it is dishonored when the first instalment becomes overdue and unpaid, and he who takes it afterward takes it subject to all equities between the original parties,[30] though it has been held that where a note is payable one-tenth annually, and the interest semi-annually, in the absence of express stipulations to the contrary, the entire note does not become due and payable upon default in the payment of any of its instalments.[31] Whether or not the same rule applies when there is an instalment of interest overdue and unpaid is a controverted matter. The weight of authority is to the effect that the *bona fide* purchaser for value of negotiable paper is within the protection of the law merchant, although interest is overdue and unpaid at the time of the purchase, interest being a mere incident of the debt, and the holder losing no right as against the parties, whether makers or indorsers, by failure to demand it.[32] And so, under the rule that a provision in a note that

27. Howell v. Crane, 12 La. Ann. 126; Riegel v. Cunningham, 9 Phila. (Pa.) 177; Story on Bills, § 188. See *ante*, §§ 726–782; *post*, §§ 803–805.

28. Chester v. Dorr, 41 N. Y. 279; Coghlin v. May, 17 Cal. 506; Simons v. Morris, 53 Mich. 155.

29. See *ante*, § 726, and notes.

30. Vinton v. King, 4 Allen, 562; Field v. Tibbetts, 57 Me. 359; Hart v. Stickney, 41 Wis. 630; McCorkle v. Miller, 64 Mo. App. 153, citing text; Vette v. La Barge, 64 Mo. App. 179; Norwood v. Leeves (Tex. Civ. App.), 115 S. W. 53.

31. Hinton v. Jones, 136 N. C. 53, 48 S. E. 546. A provision in an instalment note: "Any instalment past due to draw 6 per cent. interest per annum. If not paid within ten days after due, the whole note to become due on the option of holder," does not make the note *ipso facto* become due when the first instalment becomes past due, but it requires affirmative action on the part of the holder. Sheffield v. Johnson County Savings Bank, 2 Ga. App. 221, 58 S. E. 386.

32. Kelley v. Whitney, 45 Wis. 110 (1878), overruling Hart v. Stickney, 41 Wis. 630 (1877), and reaffirming Boss v. Hewitt, 15 Wis. 260 (1862). See *post*, § 1506, and cases cited, 30 Am. Rep. 702, 703; Bigelow on Bills and Notes (2d ed.) 445; Cooper v. Hocking Valley Nat. Bank, 21 Ind. App. 358, 50 N. E. 775, 69 Am. St. Rep. 365; Farmers' & Merchants' Bank v. Daiker (Iowa), 133 N. W. 705. In National Bank of North America v. Kirby, 108 Mass. 497, the court, referring to the contention that when an instalment of interest is overdue the

default in the payment of interest should cause the whole note to become immediately due is not self-executory, it has been held that such a provision does not make the note dishonored when at the time it was indorsed a payment of interest was past due.[33] This seems to be the correct rule, though the contrary view is not without some weighty consideration to support it.[34] Where more than one note is executed upon the same consideration, they are not all to be regarded as dishonored when one is overdue and unpaid [35] unless the notes themselves, or the security of the notes, stipulate that the failure to pay any one of the notes when due will mature the others, in which case, when one or more of the notes are past due, a purchaser of the other or others is not an innocent purchaser.[36]

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note is dishonored, said: "While nonpayment of interest is not to be allowed the effect here claimed for it, it is still a fact proper to be considered by the jury, in connection with other circumstances, on the question whether the holder is entitled to the position of one who has taken in good faith and without actual or constructive notice of existing defenses." In Guckian v. Newbold, 22 R. I. 279, 47 Atl. 543, with respect to a demand note on which the interest was payable annually, it was held that the nonpayment of annual interest renders a note overdue, and therefore subject to the equities between the original parties. But in Guckian v. Newbold, 23 R. I. 553, 594, 51 Atl. 210, citing the text, the court explained the Guckian v. Newbold case, *supra*, and said that where a demand note had run so long, with no apparent reason for delay, and when, in addition, the note provided for interest, which most men expect to receive at least once a year, and the payment of which would have recognized the obligation, but none was paid, the note must be taken as overdue.

33. Gillette v. Hodge, 170 Fed. 313. The liability arising under the provision of a note that in the event of default being made in the payment of any instalment of interest when due "then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note," does not arise until the holder exercises the option given to him, and the holder has a reasonable time in which to determine whether or not he will exercise his option and declare the principal of the note at once due and payable; and when the option was exercised within a reasonable time, the liability of an indorser was fixed when he was given notice of dishonor on the day the option was exercised. Kinsel v. Ballou, 151 Cal. 754, 91 Pac. 620. In Hodge v. Wallace, 129 Wis. 84, 108 N. W. 212, 116 Am. St. Rep. 938, it was held that where a note contained a stipulation that "if any payment or part payment * * * or any interest" thereon, should "become due and unpaid, such delinquency" should "cause the whole note to immediately become due and collectible," a purchaser of such note after delinquency was not a purchaser before maturity, at this stipulation did not leave it optional or permissive with the payee.

34. Merchants Nat. Bank v. Brisch, 154 Mo. App. 631, 136 S. W. 28; Newell v. Gregg, 51 Barb. 263. See authorities cited, § 1506*a*.

35. Patterson v. Wright, 64 Wis. 291; Boss v. Hewitt, 15 Wis. 260.

36. Rowe v. Scott (S. D.), 132 N. W. 695; Lybrand v. Fuller, 30 Tex. Civ. App. 116, 69 S. W. 1005. *Compare* Crilly v. Gallice, 148 Fed. 835.

Under Negotiable Instrument statute.—It has been held that where four notes were executed at the same time, upon the same consideration, maturing at different times, the notes providing that a failure to pay interest as it became due should mature both principal and interest at the option of the holder, a purchaser of the notes after the maturity of the first note, upon which indorsements of payments had been made, was a *bona fide* purchaser of the three notes not due at the time of the purchase.[37]

§ **787a. Transfer on last day of grace.**—A purchaser of a negotiable instrument, before the close of business hours, on the last day of grace, and before its dishonor, has been held, and, as we think, correctly, to be fully protected as having received it while current; [38] but a contrary view has been taken in Massachusetts.[39] The effect of a purchase pending suit is hereafter considered.[40]

SECTION V

WHAT IS MEANT BY "PURCHASER WITHOUT NOTICE"

§ **788.** In the *fifth* place, the holder must have acquired the paper without notice of its dishonor. Sometimes a bill payable at so many days after sight, or after a certain event, is presented for acceptance, and dishonored before the time of payment by nonacceptance; and in such cases, the party acquiring it with notice of such dishonor stands upon the same footing as one who acquires it after maturity, and is chargeable in like manner with constructive notice of any flaw in the right or title of his transferrer.[41] Sometimes the instrument bears upon its face the marks of its dishonor for nonacceptance, and

37. Appendix, sec. 56. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509.

38. Crosby v. Grant, 36 N. H. 273; Continental Nat. Bank v. Townsend, 87 N. Y. 10; Osborne v. Moncure, 3 Wend. 170; Hopping v. Quin, 12 Wend. 517; Cayuga County Bank v. Hunt, 2 Hill, 635; Bosch v. Cassing, 64 Iowa, 314; Fox v. Bank, 30 Kan. 442, citing the text; Haug v. Riley, Admr., 101 Ga. 372, 29 S. E. 44, approving text; Holton & Winn v. Hubbard & Co. *et al.*, 49 La. Ann. 715, 22 So. 401.

39. Pine v. Smith, 11 Gray, 38. It did not appear in this case whether or not the transfer was during business hours, nor did the court seem to attach any importance to the inquiry.

40. See § 1199, vol. II.

41. Crossly v. Ham, 13 East, 498.

in such cases it bears, as has been said, "a death wound apparent on it." [42] If it has been dishonored for nonpayment when payable on demand or at sight, the like rule applies; but it is only when the bill or note is payable at a day certain that the purchaser can perceive, by the very fact that it is overdue, that it has been dishonored. The United States Supreme Court has observed on this subject that "a person who takes a bill which, upon the face of it, was dishonored, cannot be allowed to claim the privileges which belong to a *bona fide* holder. If he chooses to receive it under the circumstances, he takes it with all the infirmities belonging to it, and is in no better condition than the person from whom he received it." [43] And the doctrine was enforced in another case, where, in speaking of a promissory note so marked as to show for whose benefit it was to be discounted, and that discount had been refused, the same tribunal held that all those dealing in paper "with such marks on its face must be presumed to have knowledge of what it imported." [44]

§ 789. Notice of fraud, defect of title, and illegality.—In the *sixth* place, in order to stand upon a better footing than his transferrer, the holder must acquire the instrument without notice of fraud, defect of title, illegality or want of consideration, or other fact which impeaches its validity in his transferrer's hands; and the word "notice" in this connection signifies the same as knowledge.[45] Knowledge of fraud, defect of title or illegality, or want of consideration impeaches the *bona fides* of the holder, or at least destroys the superiority of his title, and leaves him in the shoes of the transferrer.[46]

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42. Goodman v. Harvey, 4 Ad. & El. 870; Byles [* 160], 283.

43. Angle v. Northwestern, etc., Ins. Co., 92 U. S. (2 Otto) 341–342; Andrews v. Pond, 13 Pet. 65; District of Columbia v. Cornell, 130 U. S. 661.

44. Fowler v. Brantly, 14 Pet. 318; Angle v. Northwestern, etc., Ins. Co., 92 U. S. (2 Otto) 342; Swift v. Smith, 102 U. S. (12 Otto) 445.

45. Merchants' Nat. Bank v. Norris, 163 Ala. 481, 51 So. 15; Bothell v. Fletcher & Stobaugh, 94 Ark. 100, 125 S. W. 645; Standard Cement Co. v. Winham Nat. Bank, 71 Conn. 684, 42 Atl. 1006; Laschinsky v. Margolis, 114 N. Y. S. 296, 129 App. Div. 529. Where a wife sold property to her son, who executed in part payment thereof a note payable to himself and indorsed it in blank, and the husband had possession of the note, a person holding from the husband would take without any equity which would raise a presumption of bad faith. Clark v. Whitaker, 117 La. 298, 41 So. 580.

46. Hanauery v. Doane, 12 Wall. 342; Sherrer v. Enterprise Banking Co., 160 Ala. 329, 49 So. 779 (that one of the signers was a mere surety); Braly v. Henry, 71 Cal. 481, 60 Am. Rep. 544; Standard Cement Co. v. Windham Nat. Bank, 71 Conn. 668, 42 Atl. 1006; Johnston v. Loar, 145 Ill. App. 443; Fudge v. Marquell,

And any fraud upon the transferrer incapacitates the transferee, or one acquiring from him with notice. from recovering against the transferrer.[47]

Injunction lies to restrain the negotiation of a bill or note to the inception of which the defense is fraud.[48]

Under Negotiable Instrument statute.—The statute, in several pro-

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164 Ind. 447, 72 N. E. 565, rehearing denied 73 N. E. 895 (as to a material alteration); Hale Admr. v. Aldaffer, 5 Kan. App. 40, 47 Pac. 320, 52 Pac. 194; *In re* Estate of Littell, 50 La. Ann. 299, 23 So. 314; Crampton v. Perkins, 65 Md. 24; McNamara v. Gargett, 68 Mich. 454; Mace v. Kennedy, 68 Mich. 389; Fisher v. Leland, 4 Cush. 456; Johnson County Sav. Bank v. Redfern, 141 Mo. App. 386, 125 S. W. 224; Bank of Chillicothe v. Ornsdorff, 126 Mo. App. 654, 105 S. W. 664; Bank v. Edholm, 25 Nebr. 742; Joy v. Diefendorf, 130 N. Y. 6, 28 N. E. 602, 27 Am. St. Rep. 484; Skilding v. Warren, 15 Johns. 270; Kasson v. Smith, 8 Wend. 437; Johnson County Savings Bank v. Chase, 151 N. C. 108, 65 S. E. 745; Farthing v. Dark, 111 N. C. 243, 16 S. E. 337, citing text; First Nat. Bank of Bellefonte v. Rogers, 198 Pa. St. 627, 48 Atl. 686; Harrisburg Bank v. Meyer, 6 Serg. & R. 537; Hickson v. Early, 62 S. C. 42, 39 S. E. 782; Bank of Spearfish v. Graham, 16 S. D. 49, 91 N. W. 340; Ryland v. Brown, 2 Head, 270; Smith v. Traders' Nat. Bank, 74 Tex. 458; Meade v. Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245; Norvell v. Hudgins, 4 Munf. 496; Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312. An agent having in his possession paper belonging to his principal, indorsed in blank or in such other form as to permit transfer of title thereto by mere delivery, may be regarded, by strangers having no notice of the agency or the capacity in which such paper is held, as the owner thereof, and dealt with accordingly in respect to it; but one who has destroyed his *prima facie* title to negotiable paper, arising from the fact of possession, by admitting that he has no title, cannot restore it by a mere verbal claim that he has since obtained title or the right to discount the paper for his own benefit, as a purchaser who is put on inquiry by sufficient knowledge cannot rely upon information imparted by one whose interest it is to deceive him. Merchants' & Manufacturers' Nat. Bank v. Ohio Valley Furniture Co., 57 W. Va. 625, 50 S. E. 880, 70 L. R. A. 312. But notice of such infirmity traced to the holder will not suffice the maker if the holder take the note at the solicitation of the maker and upon his promise to secure and pay the same—maker would be estopped from denying his liability. Shipley v. Reasoner, 87 Iowa, 555, 54 N. W. 470. Where there was no evidence, or offer to introduce evidence, to show notice to the holder, or reasonable ground for suspicion upon his part, that the purpose of the payee in negotiating the note was to defraud creditors, it was not erroneous to exclude testimony to the effect that the payee had expressed an intention to transfer the note in order to avoid payment of debts. Oliver v. Miller, 130 Ga. 72, 60 S. E. 254.

47. Lenheim v. Fay, 27 Mich. 70; Bergmann v. Salmon, 79 Hun, 456, 29 N. Y. Supp. 968. (See comment on this case in notes to § 815.) Sprinkle v. Taylor, 1 Ind. App. 74, 27 N. E. 122; Brook v. Teague, 52 Kan. 119, 34 Pac. 347; Wilson v. Pauly, 18 C. C. A. 475, 72 Fed. 129.

48. Dickenson v. Bankers, etc., Co., 93 Va. 498, 25 S. E. 548.

visions, defines the rights of a holder in due course with respect to acquiring paper without notice of dishonor or of infirmity or defect of title.[49] For one thing, it prescribes that a holder in due course is one who has taken an instrument that is complete and regular on its face.[50] And so, where, upon a note partly printed and partly written, the words "Payable with interest" are in the same hand-writing as are the other written portions of the note, except the maker's name, and the words were not interlined but written on a blank space after the words "value received" and where they should appropriately appear, there was nothing upon the face of the note to show that it had been altered or to awaken suspicion,[51] and a note given in payment for lightning rods erected upon the maker's building, without containing a red ink declaration of its consideration upon its face, as required by statute, is good against the maker in the hands of an innocent purchaser for value.[52] One who took notes without knowledge of fraud or of the breach of a collateral contract between the original parties is a holder in due course,[53] and a negotiable promissory note, void in the hands of the payee because it is a foreign corporation doing business in the state without having complied with the laws, may be enforced by a *bona fide* purchaser and indorsee for value,

49. Appendix, secs. 52, 54, 55, 56, 57.

50. The fact that at the time of the transfer of a check the payee remarked that the maker had asked him to wait two or three days for presentation of the check did not disclose to the transferee that the instrument did not represent on its face all of the contract between the parties and did not render it indefinite as to time of payment; such a request was not binding on the payee and did not vary the terms of the writing. Matlock v. Scheuerman, 51 Oreg. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747. A material man who sold materials to a contractor for several jobs and kept separate accounts for each job, and received from the contractor checks drawn by owner payable to the contractor "on contract" was not a "holder in due course," and he could not, without notice to the owner, divert the proceeds of the checks, and charge him with a lien for the amount diverted. Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633.

51. Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14.

52. Arnd v. Sjoblom, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842.

53. Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88. When a corporation opens an account with a banking institution, it confers upon that institution the power to determine whether any check drawn upon the account conforms to the contract between the depositor and the depositary, and when it makes a mistake in the determination of such a question, the depositary may be liable to the depositor; but the depositor cannot recover back the money paid on such check to a third person who has received it in good faith relying on the representation of the deposit bank that the check was all right and has subsequently parted with the money. Havana Cent. R. Co. v. Knickerbocker Trust Co., 198 N. Y. 422, 92 N. E. 12.

before maturity, without notice of the facts rendering it void in the hands of the payee.[54] But a holder cannot claim the rights of a *bona fide* holder or of a holder in due course when he had notice that the one from whom he received the paper was not the owner and had the right to use it as collateral merely.[55]

§ **789a. Time of notice.**—The notice affecting the holder must exist at the time he acquires the paper, for then his relation to it is fixed; and subsequent notice does not affect his title or right to transfer it,[56] unless he is so situated that he can protect the maker without injury to himself.[57] If notice of fraud be communicated to the holder before he pays for the paper, although the contract has been entered into, he cannot stand upon the footing of a *bona fide* holder without notice,[58] and if he has paid a part of the amount agreed upon when he receives notice of fraud, he will only be protected to that extent, and no more,[59] and so, it has also been held that where an in-

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54. National Bank of Commerce v. Pick, 13 N. D. 74, 99 N. W. 63, holding that in a statute providing that every contract made by or on behalf of any corporation, association, or joint-stock company doing business in the state without having complied with the statute requiring domestication, shall be wholly void on behalf of such corporation, association, or joint-stock company and its assigns, the word "assigns" does not include the indorsee of negotiable paper who takes the same before maturity, for value, and without notice of defenses thereto.

55. *In re* Hopper-Morgan Co., 156 Fed. 525.

56. Bank of Luverne v. Birmingham Fertilizer Co., 143 Ala. 153, 39 So. 126; Hogg v. Thurman (Ark.), 117 S. W. 1070; Heard v. Shedden, 113 Ga. 162, 38 S. E. 387; MacRitchie v. Johnson, 49 Kan. 321, 30 Pac. 477; Hillard v. Taylor, 114 La. 883, 38 So. 594; Madison County Bank v. Graham, 74 Mo. App. 251; Perkins v. White, 36 Ohio St. 530; Meade v. Sandidge, 9 Tex. Civ. App. 360, 30 S. W. 245. Where neither the principal nor his agent through whom a note was purchased had any notice that the note was without consideration as to one of the makers, the fact that the agent discovered this in the negotiation for a renewal of the note would not affect the rights of the principal as his rights were fixed by the original transaction. Coyne v. Anderson's Exrs. (Ky.), 73 S. W. 753.

57. Youle v. Fosha, 76 Kan. 20, 90 Pac. 1090 (1907). Where an indorsee, after learning of the dishonor of and want of consideration for a note, has funds of the indorser in his hands sufficient to satisfy the note, he cannot recover of the maker. State Bank v. J. Blakey & Co., 35 Tex. Civ. App. 87, 79 S. W. 331.

58. Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Crandell v. Vickery, 45 Barb. 156; Davis v. Wait, 12 Oreg. 425. A *bona fide* holder, against whom the defense of fraud or mistake cannot be availed of, must take it in good faith, for a valuable consideration, in the usual course of business, before maturity, and without notice, at the time of the transfer or before payment therefor, of an existing defense. Bank of Monette v. Hale (Ark.), 149 S. W. 845.

59. Dresser v. Missouri, etc., R. Co., 93 U. S. (3 Otto) 93. See *ante*, §§ 757,

dorsee had in his hands funds of a nonresident payee sufficient to pay the note after notice of fraud, the indorsee cannot recover from the maker.[60] Actual notice of the defect is not required, where the evidence of the infirmity consists of matters apparent on the face of the instrument. This question is subsequently considered.[61]

Under Negotiable Instrument statute.—To constitute a holder in due course there must have been an actual payment, and when the full amount agreed to be paid has not been paid before notice of infirmity, the purchaser becomes a holder in due course only to the amount theretofore paid.[62]

§ **790. Notice of accommodation paper.**—It is to be observed, however, that knowledge of the mere want of consideration as between the original parties will not alone prevent the purchaser from becoming a *bona fide* holder and occupying a better position than his transferrer. Accommodation paper is daily placed in market for discount or sale, and an indorsee or purchaser who knows that a bill or note still current was drawn, made, accepted, or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact,[63] and even where he acquires it overdue.[64] And if any one

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758*c*. See a learned discussion of this question in Weaver v. Barden, 49 N. Y. 286; Richards v. Munroe, 85 Iowa, 359, 52 N. W. 339, 39 Am. St. Rep. 301.

60. Union Nat. Bank v. Menefee (Tex. Civ. App.), 134 S. W. 822.

61. §§ 795, 795*a*, 795*b*, 1408.

62. Appendix, sec. 54. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

63. Charles v. Marsden, 1 Taunt. 224; Bank of Ireland v. Beresford, 6 Dow. 237; Earle v. Enos, 130 Fed. 467; Levy & Cohn Mule Co. v. Kauffman, 114 Fed. 170; Greenway v. William, etc., Co., 29 C. C. A. 330, 85 Fed. 536; Isreal v. Gale, 23 C. C. A. 274, 77 Fed. 532, citing text; Armstrong v. Scott, 36 Fed. 63; Marks v. First Nat. Bank, 79 Ala. 550; Gilman v. New Orleans R. Co., 72 Ala. 577; First Nat. Bank v. Dawson, 78 Ala. 71, citing the text; Hamiter v. Brown, 88 Ark. 97, 113 S. W. 1014; City Electric Street Ry. Co. v. First Nat. Bank, 65 Ark. 543, 47 S. W. 855; Bissell v. Dickerson, 64 Conn. 73, 29 Atl. 226; Hodges v. Nash, 141 Ill. 391, 31 N. E. 151; Miller v. Larned, 103 Ill. 570; Cronise v. Kellogg, 20 Ill. 11; German-American Sav. Bank v. Hanna, 124 Iowa, 394, 100 N. W. 57; Bankers' Iowa State Bank v. Mason Hand Lathe Co., 121 Iowa, 570, 90 N. W. 612, 97 N. W. 70; Jones v. Berryhill, 25 Iowa, 289; *In re* Estate of Littell, 50 La. Ann. 299, 23 So. 314; Mathias v. Kirsh, 87 Me. 524, 33 Atl. 19; Beacon Trust Co. v. Robbins, 173 Mass. 261, 53 N. E. 868; Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912; First Nat. Bank of Grafton v. Babbidge, 160 Mass. 563, 36 N. E. 462, Thatcher v. West River Nat. Bank, 19 Mich. 196; Maffatt v. Greene, 149 Mo. 48;

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64. See *ante*, §§ 726, 782, 786; *post*, §§ 803, 805; Talmage & Co. v. Millikin & Meigs, 119 Ala. 40, 24 So. 843.

purchase accommodation paper with knowledge that the terms and conditions on which the accommodation was given have been violated, he is not a *bona fide* holder as against the party who lent his name for accommodation.[65] The defense must not only show that the paper was diverted from its purpose, but also that such diversion was known to the holder when he received it, misapplication not being such fraud as shifts the burden of proof.[66]

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50 S. W. 809; Citizens' Bank v. Fredrickson, 83 Nebr. 755, 120 N. W. 462; Baker v. Union Stock Yards Nat. Bank, 63 Nebr. 301, 89 N. W. 269, 93 Am. St. Rep. 484; Grant v. Ellicott, 7 Wend. 227; Powell v. Waters, 17 Johns. 176; Mentross v. Clark, 2 Sandf. 115; Grandin v. Leroy, 2 Paige, 509; Fitch v. McDowell, 80 Hun, 207, 30 N. Y. Supp. 31; Pryor v. Storke, 37 App. Div. 364, 56 N. Y. Supp. 94; National Bank v. White, 19 App. Div. 390, 46 N. Y. Supp. 555; Stephens v. Monongahela Nat. Bank, 87 Pa. St. 163; Charleston Savings Inst. v. Farmers' & Merchants' Bank, 73 S. C. 545, 54 S. E. 216; King v. Parks, 26 Tex. Civ. App. 95, 63 S. W. 900; Marling v. Jones, 138 Wis. 82, 119 N. W. 931, 131 Am. St. Rep. 996; Weill v. Trosclair, 7 So. 232. In Thatcher v. West River Nat. Bank, 19 Mich. 202, Christiancy, J., said: "The want of consideration, and the assurance of Sprague that the note would be taken care of, do not affect the right of the bank as indorsee, though taking it with notice. Mere accommodation paper is generally at least, without consideration, and such assurances, express or implied, are always given or relied upon when such accommodation paper is given. Such facts might constitute a good defense as against the party for whose accommodation it is given, but to allow them to defeat a recovery by an indorsee who advances money upon it—when that is the purpose for which it is given—would defeat the purpose for which such paper is made, and render the transaction absurd." But if the purchaser took with notice that the accommodated party received no consideration, he cannot recover from the accommodation party. Greenville v. Ormand, 51 S. C. 58, 28 S. E. 50, 64 Am. St. Rep. 663.

65. Small v. Smith, 1 Den. 583; Thompson v. Posten, 1 Duv. 415; Daggett v. Whiting, 35 Conn. 372; Fetters v. Muncie Nat. Bank, 34 Ind. 251; Hickerson v. Raiguell, 2 Heisk. 329; Evans v. Kymer, 1 B. & Ad. 528; Roberts v. Eden, 1 Bos. & P. 398; Buchanan v. Findley, 9 B. & C. 738; Key v. Flint, 8 Taunt. 21; Hidden v. Bishop, 5 R. I. 29; Benjamin v. Rogers, 126 N. Y. 60, 26 N. E. 970; National Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773, citing text.

66. Stoddard v. Kimball, 6 Cush. 469; Robertson v. Williams, 5 Munf. 331; Gray v. Bank of Kentucky, 29 Pa. St. 365; Clark v. Thayer, 105 Mass. 216; Mohawk Bank v. Corey, 1 Hill, 513; Dunn v. Weston, 7 Me. 270. See *post*, § 814; Arnold v. Lane, 71 Conn. 61, 40 Atl. 921; Bank v. Hunt, 124 N. C. 171, 32 S. E. 546; Lookout Bank v. Aull, 93 Tenn. 645, 27 S. W. 1014, 42 Am. St. Rep. 934; Peters v. Gay, 9 Wash. 383, 37 Pac. 325; Union Square Bank v. Hellerson, 90 Hun, 262, 35 N. Y. Supp. 871; Bunzel v. Maas & Schwarz, 116 Ala. 68, 22 So. 568; Farley Nat. Bank v. Henderson, 118 Ala. 441, 24 So. 428, citing text; Isaacs v. Cohn, 10 App. Div. 216, 41 N. Y. Supp. 779; Kuch v. Cornett, 79 Mo. App. 574, text cited. Yeomans v. Lane, 101 Ill. App. 228. Where a note, made payable to the president of a corporation, was indorsed for the accommodation of the corporation, a bank advancing money thereon was not responsible for misappro-

Under Negotiable Instrument statute.—Under the express provisions of the statute, an accommodation party is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party.[67]

§ 791. The rule in New York is different, and there it is held that a diversion is such fraud as to shift the burden of proof upon the holder.[68] But the principle of the text is, we think, in conformity

priation of the money by the president when it had no notice of his intention to divert the funds to a wrongful purpose; nor is it a matter of any moment that, instead of paying the president money in hand, the bank, at his request, gave him credit for it on the books of the bank, as this was in effect the same thing as payment. Klein v. German Nat. Bank, 69 Ark. 140, 61 S. W. 572, 86 Am. St. Rep. 183.

67. Appendix, sec. 29. See also secs. 56 to 59. Willard v. Crook, 21 App. D. C. 237; Edward Knapp & Co. v. Tidewater Coal Co. (Conn.), 81 Atl. 1063; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; English v. Schlesinger, 105 N. Y. S. 989, 55 Misc. 584; Weiss v. Rieser, 114 N. Y. S. 983, 62 Misc. 292; National Bank of Newport v. H. P. Snyder Mfg. Co., 102 N. Y. S. 478, 117 App. Div. 370; Packard v. Windholz, 84 N. Y. S. 666, 88 App. Div. 365, affirmed 180 N. Y. 549, 73 N. E. 1129; White v. Savage, 48 Oreg. 604, 87 Pac. 1040; Lumbermen's Nat. Bank of Portland v. Campbell, (Oreg.) 121 Pac. 427; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170.

68. Farmers' & Citizens' Nat. Bank v. Noxon, 45 N. Y. 762; Grocers' Bank v. Penfield, 7 Hun, 279. See Moore v. Ryder, 65 N. Y. 439; Edwards on Bills, 319, 321. In Wardell v. Howell, 9 Wend. 170, the note was indorsed for accommodation of the maker, to be used in renewal of a former note due at a bank. It was transferred by the maker as collateral security for another debt, which negotiation is held, in New York, not to constitute the creditor a *bona fide* holder for value. Sutherland, J., said: "Where a note has effected the substantial purpose for which it was designed by the parties, an accommodation indorser cannot object that it was effected in the precise manner contemplated at the time of its creation. * * * But where a note has been diverted from its original destination, and fraudulently put in circulation by the maker or his agent, the holder cannot recover upon it against an accommodation indorser, without showing that he received it in good faith, in the ordinary course of trade, and paid for it a valuable consideration." Spencer v. Ballou, 18 N. Y. 331; Schepp v. Carpenter, 51 N. Y. 604; Comstock v. Hier, 73 N. Y. 270; Ayers v. Doying, 17 Jones & S. 630. But see § 792, and Brooks v. Hey, 23 Hun, 372; American Exch. Nat. Bank v. New York Belting & Packing Co., 148 N. Y. 698, 43 N. E. 168; Blair v. Hagemeyer, 26 App. Div. 219, 49 N. Y. Supp. 965. But if it appears from the entire testimony that there is not sufficient evidence that the defendant had notice of the diversion, plaintiff cannot recover. See Union Square Bank v. Hellerson, 90 Hun, 262, 35 N. Y. Supp. 871; American Exch. Nat. Bank v. New York Belting Co., 74 Hun, 446, 26 N. Y. Supp. 822, citing text. But it has likewise been held in New York that the burden of showing that the use of the note was diverted is upon the defendant. Isaacs v. Cohn, 10 App. Div. 216, 41 N. Y. Supp. 779; First Nat.

with the current and weight of authority and the true theory of the law merchant. The fraud which shifts the burden of proof must be in the consideration, or representations used in obtaining the execution of the instrument, and not an after breach of trust in diverting it from the uses for which it was intended.

§ 792. What amounts to diversion of accommodation paper.—It is immaterial that paper executed or indorsed for accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. No change in the mere mode or plan of raising the money, though not applied to the purpose intended by the accommodation party, will constitute a misappropriation. In order to constitute a misappropriation, there must be a fraudulent diversion from the original object and design; and it is now well settled that where a note is indorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note, if it is discounted at another bank, or used in the payment of a debt or otherwise for the credit of the maker.[69] If the note has effected the substantial purpose for which it was designed by the parties, an accommodation maker or indorser cannot object that the accommodation was not effected in the precise manner contemplated, where there is no fraud, and the interest of the indorser is not prejudiced.[70]

Bank of Springfield v. Haulenbeek, 65 Hun, 54, 19 N. Y. Supp. 567. See notes upon this case, §§ 819 and 855*a*. But the rights of a holder of a wrongfully diverted negotiable paper, acquired by him for value, before due, cannot be defeated without proof of actual knowledge of the defects in title, or bad faith on his part evidenced by circumstances. Cheever v. Pittsburg, etc., R. Co., 150 N. Y. 59, 44 N. E. 701, 55 Am. St. Rep. 646; United States Nat. Bank v. Ewing, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. Rep. 615; Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025.

69. Frank v. Quast, 86 Ky. 652, citing the text; Morris v. Morton, 14 Nebr. 360; Evans v. Speer Hardware Co., 65 Ark. 204, 45 S. W. 370, 67 Am. St. Rep. 919, citing text; Hefferlin v. Krieger *et al.*, 19 Mont. 123, 47 Pac. 638; American Exch. Nat. Bank v. Ulm, 21 Mont. 440, 54 Pac. 563, approving text.

70. Duncan & Sherman v. Gilbert, 29 N. J. L. (5 Dutch.) 521; Jackson v. First Nat. Bank, 42 N. J. L. (13 Vroom) 178; Briggs v. Boyd, 37 Vt. 538; Purchase v. Mattison, 6 Duer, 87; Wardell v. Howell, 9 Wend. 170. See Schepp v. Carpenter, 51 N. Y. 604; Reed v. Trentman, 53 Ind. 438. But see United States Nat. Bank v. Ewing, 131 N. Y. 506, 30 N. E. 501, 27 Am. St. Rep. 615; Hay v. Jaeckle, 90 Hun, 114, 35 N. Y. Supp. 650, quoting with approval the text; Farley Nat. Bank v. Henderson, 118 Ala. 441, 24 So. 428, citing text.

§ **793.** Thus, where a bill was indorsed for accommodation, for the purpose of enabling the maker to get the note discounted at a particular bank, and the maker used it to take up notes on another bank, the court said: "Within the proper legal sense of the term, there has been no diversion of the note from the purpose for which it was made and indorsed. The indorsers lent their names for the purpose of giving the maker credit, generally, and without any concern with the use which should be made of that credit." [71] Nor would it be a misappropriation to discount a note with a private person that was intended to be discounted at a particular bank, the proceeds being applied to the purpose intended.[72] If the note be made for general accommodation without restriction as to its use, the party accommodated may use it in any way beneficial to himself, provided such use be legal, and it will not matter that he fails to apply the proceeds according to a prior agreement, for otherwise there could be no recovery on accommodation paper.[73]

§ **793a. Use of accommodation paper to pay pre-existing debts, and as collateral security.**—And so where a bill was indorsed for accommodation, to enable one to raise money, and he applied it to the payment of a pre-existing debt, it was held immaterial, Downey, J., saying: "The accommodation party must have some interest in the application of the money, otherwise he is not in condition to contend successfully that there has been a misapplication of it, or of the security on which it was to be raised." [74] It has been said, in Pennsylvania, by Black, C. J.: "The maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as col-

71. Mohawk Bank v. Corey, 1 Hill, 513; Hay v. Jaeckle, 90 Hun, 114, 35 N. Y. Supp. 650; Russ v. Sadler, 197 Pa. St. 51, 46 Atl. 903.

72. Powell v. Walters, 17 Johns. 176; Bank of Chenango v. Hyde, 4 Cow. 567; Parker v. Sutton (N. C.), 9 S. E. 283; Parker v. McDowell, 95 N. C. 245, citing the text; Proctor v. Whitcomb, 137 Mass. 303.

73. Brooks v. Hey, 23 Hun, 372; Meeker v. Shanks, 112 Ind. 212, citing the text; Morelands, Assignee v. Citizens' Sav. Bank, 97 Ky. 211, 30 S. W. 637, citing the text, quoting with approval the text; American Exch. Nat. Bank v. Ulm, 21 Mont. 440, 54 Pac. 563.

74. Quinn v. Hard, 43 Vt. 375; Fetters v. Muncie Nat. Bank, 34 Ind. 254. See Schepp v. Carpenter, 51 N. Y. 602; Jackson v. First Nat. Bank, 42 N. J. L. (13 Vroom) 178. But it has been held otherwise where the paper was made payable to the party to whom it was to be discounted, and was passed to another for a pre-existing debt. Farmers', etc., Bank v. Hathaway, 36 Vt. 539; Carter *et al.* v. Odom, 121 Ala. 162, 25 So. 774.

lateral security merely. He who chooses to put himself in the front of a negotiable instrument, for the benefit of his friend, must abide the consequence, and has no more right to complain if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way."[75] In accordance with these principles, an accommodation indorser cannot complain that a creditor of the holder, with whom the latter has deposited as collateral security for his own debt, has sold the note to a *bona fide* purchaser for value, in violation of the rights of the payee and depositor; for if the payee could pledge the note as collateral security the subsequent sale does not increase the indorser's liability.[76] And it may be considered as settled that the use of accommodation paper as collateral security is a legitimate and proper use, within the fair contemplation of the parties; and that unless the transferee, in addition to knowing that it is accommodation paper, knows also that such use is restricted, he can recover upon it.[77] In Iowa, D & R. executed a note to J. or bearer. The note was joint, but D. was in fact a surety. The understanding was that R. was to negotiate the note to J. for a yoke of cattle, and execute a chattel mortgage to D. to indemnify him. R.,

75. Lord v. Ocean Bank, 20 Pa. St. 384; Hart v. United States Trust Co., 118 Pa. St. 568; Cozens v. Middleton, 118 Pa. St. 632; Miller v. Larned, 103 Ill. 579; Dunn v. Weston, 71 Me. 270; Jackson v. First Nat. Bank, 42 N. J. L. (13 Vroom) 178. See also Kimbro v. Lytle, 10 Yerg. 417. In Ruthland Bank v. Buck, 5 Wend. 66, it appeared that a person signed a note as surety for accommodation of other parties, the note to be discounted at a certain bank. The bank refused to discount it, and it was passed off by the principals as collateral for the payment of a judgment. Held, no misappropriation. But see Merchants' Nat. Bank v. Comstock, 55 N. Y. 24. In Alabama a different rule from that stated by Black, C. J., *supra*, prevails: the holder of such paper, taking it for a pre-existing debt, is subject to the defense of want of consideration or other equities between the parties. Boykin v. Bank of Mobile, 72 Ala. 262, 47 Am. Rep. 411; Union Square Bank v. Hellerson, 90 Hun, 262, 35 N. Y. Supp. 871; American Exch. Nat. Bank v. Ulm, 21 Mont. 440, 54 Pac. 563. *Contra*, Merrill v. First Nat. Bank, 94 Cal. 59, 29 Pac. 242.

76. Dawson v. Goodyear, 43 Conn. 548; St. Louis Nat. Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773, citing text. Compare Union Trust Co. v. McClellan, 40 W. Va. 405, 21 S. E. 1025.

77. Dunn v. Western, 71 Me. 270; DeZeng v. Fyfe, 1 Bosw. 336; Robbins v. Richardson, 2 Bosw. 253; Pitts v. Foglesong, 37 Ohio St. 681; Cont. Nat. Bank v. Townsend, 87 N. Y. 8. Where the accommodation payee of a note delivered it to a bank as collateral security for the payment of an existing debt, the payment of such indebtedness by the payee relieved the maker from all liability upon the note, any indebtedness of the payee which was contracted, as well as any extension of credit given, after the maturity of the note, in no way bound the maker. Riverside Bank v. Jones, 78 N. Y. S. 325, 75 App. Div. 531.

instead, traded the note to L. for a yoke of cattle, the latter knowing that the note was designed to be negotiated to J. for a yoke of cattle, and suspecting D. was a surety, but having no knowledge that he was to have the chattel mortgage. It was held that D. was liable to R. on the note.[78]

Under Negotiable Instrument statute.—Under the statute[79] it has been held that where accommodation paper has been received in payment of or security for an antecedent debt, the holder may recover thereon,[80] and that the rule that accommodation makers or indorsers of negotiable paper are not liable to a holder thereof, where the same had been fraudulently diverted from the purpose for which it was made or the indorsement given, and the holder had received it solely as collateral security for an antecedent debt, has not been changed by the above statute.[81] But when a person indorsed a note to enable the payee to get it discounted and thereby raise cash out of which the payee would pay a debt due the indorser, it has been held that such person was an accommodation indorser notwithstanding the language of the statute.[82]

§ **794.** Where, however, the note is designed to be discounted for the purpose of taking up other paper of the person giving the accommodation, or was otherwise intended for his benefit, the failure to have it discounted would be a misappropriation,[83] and if the bank refused to discount it, the holder should return it to the accommodation maker or indorser.[84] And if the holder misappropriates the paper he will be bound to reimburse to the party whose name is misused any resulting loss.[85] When there is a full consideration for acceptance of a bill, it matters not whether it be applied according to original agreement, or to another purpose.[86]

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78. Laub v. Rudd, 37 Iowa, 618.

79. Appendix, secs. 25, 29.

80. Neal v. Scherber, 93 N. E. 628, 207 Mass. 323; English v. Schlesinger, 105 N. Y. S. 989, 55 Misc. 584.

81. Sutherland v. Mead, 80 N. Y. S. 504, 80 App. Div. 103.

82. Morris County Brick Co. v. Austin (N. J.), 75 Atl. 550, the court saying that the words "value therefor" mean value for the negotiable instrument, not value for the loan of the name.

83. Wardell v. Howell, 9 Wend. 170; Moore v. Ryder, 65 N. Y. 440.

84. Kasson v. Smith, 8 Wend. 437; Denniston v. Bacon, 10 Johns. 198.

85. Comstock v. Hier, 73 N. Y. 269.

86. Moore v. Ward, 1 Hilt. 337.

§ 795. Express notice.—It is quite certain that if the notice or knowledge of the transferrer's defective title be express, it will destroy the purchaser's better position; for if he is actually informed of the infirmity—as when he is told by the maker that it is without consideration, and that it will not be paid—he errs willingly if he perseveres in negotiating for the paper, and has no claim whatever for peculiar protection.[87]

§ 795a. Implied or constructive notice from appearance of the paper.—Express notice is not indispensable. There may be evidence of the infirmity in the paper apparent on its face, or such indications as to put the purchaser upon inquiry.[88] And in such cases

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87. See *ante*, § 789*a*; Norvill v. Hudgins, 4 Munf. 496; Dogan v. Dubois, 2 Rich. Eq. 85; Gilman v. New Orleans R. Co., 72 Ala. 581, citing the text; *In re* Hopper-Morgan Co., 156 Fed. 525 (as to indorsement as collateral merely). A purchaser of a note before maturity, which had been signed by several makers, is not a *bona fide* purchaser when he was informed by one of several of the makers claiming credits that such credits had not been made though he was later informed by another of the signers but not one of those claiming credits that the matter had been adjusted. Bank of Chillicothe v. Oronsdorff, 126 Mo. App. 654, 105 S. W. 664. Where one to whom a note was payable on its face, was in fact the joint owner with another, and he so informed a purchaser of the note, and though the payee informs the purchaser of his interest that a certain person, indebted to the purchaser, is the owner of the other half of the note, the purchaser takes it at his peril and if such other half of the note in fact belongs to another person, he must recognize such person's right to the property. Kersey v. Fuquay (Tex. Civ. App.), 75 S. W. 56. If a bank gave a railroad company a recommendation with which it went to persons to obtain signatures to notes given in consideration of the construction of a certain railroad, knowing at the time this recommendation was given that the railroad company would not be able to carry out its contracts, the bank had notice of the infirmity in the instruments, and would not be a *bona fide* purchaser. Gross v. Bennington, 52 Wash. 417, 100 Pac. 846. As against the *bona fide* purchaser for value of a negotiable instrument, a married woman signing thereon as apparent maker will not be allowed to show that she was a surety for the purpose of invalidating the contract under section 2488 of the Civil Code, which prohibits a married woman from binding her separate estate by any contract of suretyship; but she will be permitted to show that she was a surety for the purpose of defending against the enforcement of the contract on the ground that the holder of the instrument after notice of the true relationship thereto did such an act to her prejudice as in law will discharge her. Smith v. First Nat. Bank, 5 Ga. App. 113, 62 S. E. 826.

88. Davis Machine Co. v. Best, 105 N. Y. 59; Prins v. South Branch Lumber Co., 20 Ill. App. 236; Smith v. Munch, 21 Ill. App. 323; Hamilton v. Wilson, 67 Ga. 498; Newman v. Tillman *et al.*, 71 Miss. 26, 15 So. 798; Westinghouse v. German Nat. Bank, 188 Pa. St. 630, 44 Atl. 734; Wilson v. National Fowler Bank, 47 Ind. App. 689, 95 N. E. 269. The fact that a note was transferred just

constructive notice is held sufficient upon the ground that when a party is about to perform an act which he has reason to believe may affect the rights of third persons an inquiry as to the facts is a moral duty, and diligence an act of justice.[89] In Connecticut the unusual character of the instrument—its being written on tracing paper, coupled with suspicious circumstances in the negotiation—was held to authorize inquiry of a broker "whether a banker or a broker would discount a note of that character without a wilful failure to inquire into the circumstances under which it was obtained," with a view to impeaching the good faith of the transaction.[90] And so in New York, an unsigned blank left for signature was held to affect the purchaser with notice of the defect.[91] A line drawn over the words "*or order*" and a memorandum written on the paper, "this note is not negotiable," would of course notify the purchaser.[92]

before maturity, and that it bore interest on its face at the rate of 6 per cent. per month, instead of per annum, which fact escaped the notice of the transferee until the time of the trial, was not sufficient to put him upon inquiry as to equities between the maker and the payee. Woolf v. Clarke, 17 Cal. App. 696, 121 Pac. 407. That a note was that of a farmer, and that it was taken up by an agent in his own name, and that the revenue stamp was canceled by another than the maker, whose initials were used, did not put the assignee on notice of any defenses of the maker. Martindale v. Stotter, 80 Kan. 87, 101 Pac. 629. Where a guardian opened an account in his name as guardian, and deposited and drew on such account moneys of a corporation of which he was manager, and gave to a creditor of the corporation a check signed by him as "Guardian," this gave the payee notice that presumptively the funds being paid to him were not those of the corporation or his own, and put the payee on inquiry to ascertain the maker's authority to apply the money in payment of the company's debt. Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653.

89. Angle v. Northwestern, etc., Ins. Co., 92 U. S. (2 Otto) 342. See vol. II, § 1408. A negotiable note is payable on its face to a payee, with the word "attorney" suffixed to his name; and he indorses it to a party, suffixing to his own name the word "attorney," in his signature to the indorsement. The note is owned by the payee and the other parties. The word "attorney" indicates an interest in such other parties, and puts the purchaser upon inquiry as to their rights, and the right of the payee to sell the note. Hazeltine v. Keenan, 54 W. Va. 600, 46 S. E. 609, 102 Am. St. Rep. 953, quoting text.

90. Rowland v. Fowler, 47 Conn. 347.

91. Davis Machine Co. v. Best, *supra*.

92. Prins v. So. Branch Lumber Co., *supra*. In Tennessee, held, that the unexplained initials" C. I. P.," afterward ascertained to mean "Chapin Iron Process" (a patent) and written on the face of the note, do not convey notice to an innocent indorsee of the note before maturity for value and in due course of trade, that it was given in purchase of a patent, so as to let in defenses against such indorsee. Bank v. Stockell, 92 Tenn. 252, 21 S. W. 523; Dymock v. Missouri, etc., Ry. Co., 54 Mo. App. 400.

The doctrine of notice is applied to the case of a note payable to a certain person as "Trustee," and indorsed in the same style by the trustee, who sold the note and appropriated the proceeds,[93] and when an instrument is indorsed as "Trustee," a purchaser is put upon notice that others than the trustees are the legal owners of the note.[94] A purchaser of notes of a receiver signed in his name and as "Receiver," and indorsed by him personally, took them with constructive notice of the receiver's want of authority to issue them, and the company is not liable on the notes,[95] and a certificate of deposit to "C, guardian," is notice that it is trust property, putting one receiving it on inquiry.[96] And so, a purchaser of negotiable paper made by a married woman must take notice of the coverture of the maker.[97] If the note be payable to an agent, and be left by the principal in his possession, the authority to transfer it by indorsement follows, and the purchaser will not be put upon inquiry as to the *bona fides* of his conduct in selling the note.[98]

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93. Barroll v. Foreman, 88 Md. 188, 39 Atl. 273; Third Nat. Bank v. Lange, 51 Md. 138; Shaw v. Spencer, 100 Mass. 382, the case of a stock certificate; McBain v. Seligman, 58 Mich. 294; Payne v. First Nat. Bank, 43 Mo. App. 377; Hanover Nat. Bank v. American Dock & Trust Co., 75 Hun, 55, 26 N. Y. Supp. 1055; Cheever v. Pittsburgh, S. & L. E. R. Co., 72 Hun, 380, 25 N. Y. Supp. 449; Isham v. Post, 71 Hun, 184, 23 N. Y. Supp. 211, 1168. See comment upon the decision of the court in the case, § 271. *Contra*, Mayer v. Columbia Sav. Bank, 86 Mo. App. 108. See, *ante*, § 271. In Mayor of New York v. Sands, 39 Hun, 520, the purchaser was held to have participated in a breach of official trust committed by a municipal officer in transferring paper appearing on its face to be public property. But if the trust character of the obligation does not appear upon the face of the instrument, and there is no notice to the purchaser, the title acquired would be good. Barroll v. Foreman, 86 Md. 675. In Westmoreland v. Foster, 60 Ala. 448, such expression is regarded as mere *descriptio personæ*. See, *ante*, § 271.

94. Chicago Title & Trust Co. v. Brugger, 196 Ill. 96, 63 N. E. 637; Henshaw v. State Bank, 239 Ill. 515, 88 N. E. 214, 130 Am. St. Rep. 241.

95. Zielian v. Baltimore Plate Ice Co., 115 Md. 658, 81 Atl. 22.

96. United States Fidelity & Guaranty Co. v. Adoue & Lobit (Tex.), 137 S. W. 648, reversing judgment, 128 S. W. 636; rehearing denied, 138 S. W. 383.

97. Northwall Co. v. Osgood, 80 Nebr. 764, 115 N. W. 308; Haas v. American Nat. Bank, 42 Tex. Civ. App. 167, 94 S. W. 439.

98. Wells v. Sutton, 85 Ind. 70. But if agent or trustee has power or authority to execute a negotiable note, the fact that the purchaser thereof knew of the trust relations and the specific purpose for which the note was negotiated, would not charge him with notice of misappropriation of the proceeds derived therefrom, when it appears that the said purchaser in no way participated in diversion or misappropriation, and he would be entitled to protection as a *bona fide* holder for value, without notice. See Arnau v. First Nat. Bank of Florida, 30 Fla. 398;

It has been held that where a purchaser takes the paper from a person who is the payee and first indorser, and the subsequent indorsements of other parties appear thereon, he will be charged with notice of the fact that such subsequent indorsers do not further occupy that relation to the first indorser; and he is thereby put upon inquiry as to the circumstances under which such paper returned to the first indorser's possession. In such case, the first indorser occupies his original position, namely, that of surety to, and not for, a subsequent indorser.[99]

Where a purchaser of a note had notice from the recitals contained therein that it was the property of another and that it was held by the holder as collateral to secure a loan made to the owner, such purchaser has no right to presume from such possession that the holder had a right to negotiate the note, and must account to the owner for the note, subject to the payment to him of the amount of the loan secured by the note.[1]

The fact that a note was presented for discount by the maker has been held notice to the discounter that an indorsement thereon was

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Shattuck v. Eldridge, 173 Mass. 165, 53 N. E. 377; Citizens' Bank v. Loenhart, 126 Ind. 206, 25 N. E. 1099; Galloway v. Glesson, 61 Mo. App. 21. Where an agent was authorized to indorse checks payable to his principal for deposit to the credit of his principle, and the agent took the checks of customers payable to his employer and deposited them as margins in his own speculative stock account in his personal broker's office, he was not proceeding within the actual or apparent scope of his employment, to the knowledge of the broker. Salen v. Bank of State of New York, 97 N. Y. S. 361, 110 App. Div. 636.

99. Adrian v. McCaskill (N. C.), 9 S. E. 284; *post*, § 1202. Possession by the payee of a promissory note indorsed to a third party may constitute *prima facie* evidence of title in the payee, in the absence of circumstances reasonably tending to show otherwise; but where the name of the indorsee has been erased, and the evidence is conclusive that the erasure was a forgery, and the claim of ownership by the payee is open to question, then it is the duty of prospective purchasers to make reasonable inquiry concerning the title. Minneapolis Threshing Mach. Co. v. Gilruth, 109 Minn. 23, 122 N. W. 466. Where indorsers of a note, who were the original payees, have returned the note to the maker upon canceling a trade between them, a purchaser of the note from the maker has no rights against the indorsers. Upon the face of the paper, the maker was liable to the indorsers and could make no demand against them. Downing v. Neeley & Stephens (Tex. Civ. App.), 129 S. W. 1192, the court saying further that the holder could only recover against the indorsers if they were accommodation indorsers, but it was not so in this case.

1. Sill v. Pate, 230 Ill. 39, 82 N. E. 356. See also Hamilton Nat. Bank v. Upton, 91 N. Y. S. 475, 100 App. Div. 105, holding that taking a note as collateral security from a note broker, does not show the bank officials acted in bad faith, or with any sort of notice that the broker was using the note unlawfully.

for accommodation.[2] An indorsement "for collection" leaves a note open to all defenses which could have been made if the note had remained in the hands of the indorser,[3] but the mere fact that a note is indorsed "without recourse" does not deprive the indorsee of the position of a holder in due course.[4]

Under Negotiable Instrument statute.—Under the statute,[5] it has been held that where a line was drawn through the words on a note stating the place at which it was made payable, and another place of payment was written in the note, after its execution and delivery, an assignee took the paper subject to all defenses that might be made against it in the hands of the original payee,[6] but an indorsement "without recourse" is not sufficient to put the purchaser upon notice, and destroy the negotiability of the instrument.[7]

§ 795b. Constructive notice from extrinsic circumstances.—The circumstances of the transaction may be of such a character as to intimate strongly a defect in the title, and if they are such as to invite inquiry they will suffice, provided the jury think that abstinence from inquiry arose from a belief or suspicion that inquiry would disclose a vice in the paper.[8] Then indeed his *bona fides* would be impeached.

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2. National Park Bank v. Remsen, 43 Fed. 226.

3. Second Bank of Baltimore v. Bank of Alama (Ark.), 138 S. W. 472; Merchants' Nat. Bank v. Hanson, 33 Minn. 43; Norfolk Nat. Bank v. Nenow, 50 Nebr. 429, 69 N. W. 936; Smith v. Bayer, 46 Oreg. 143, 79 Pac. 497, 114 Am. St. Rep. 858.

4. Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308, 134 Am. St. Rep. 989 (under the rule that there must have been actual notice or bad faith). In Mee v. Carlson, 22 S. D. 365, 117 N. W. 1033, 29 L. R. A. (N. S.) 351, however, under the rule of the prudent man, it was held that the fact that the payee indorsed the note "without recourse" is a circumstance calculated to arouse suspicion in the mind of a prudent person.

5. Appendix, sec. 124.

6. Mitchell v. Reed (Ky.), 106 S. W. 833.

7. Appendix, sec. 38. Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068; Leavitt v. Thurston (Utah), 113 Pac. 77.

8. See *ante*, § 777 *et seq.;* Hulbert v. Douglas, 94 N. C. 122; Bank at Hamburg v. Flynn, 38 Fed. 798; Bank v. Rider, 58 N. H. 512; Ormsbee v. Howe, 54 Vt. 182; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Merrill v. Hole, 85 Iowa, 66, 52 N. W. 4; Newman v. Tilman *et al.*, 71 Miss. 26, 13 So. 934; Hays, Executrix v. Lapeyre *et al.*, 48 La. Ann. 749, 19 So. 821; Norfolk Nat. Bank v. Nenow, 50 Nebr. 429, 69 N. W. 936; First Nat. Bank of Cameron v. Stanley, 46 Mo. App. 440; Bowman v. Metzger, 27 Oreg. 23, 39 Pac. 3, 44 Pac. 1090; Second Nat. Bank v. Weston, 31 App. Div. 403, 52 N. Y. Supp. 315; Van Voorhis v. Brown, 29 App. Div. 119, 51 N. Y. Supp. 440; Cheever v. Pittsburgh, S. & L. E. R. Co., 28

But further than this, gross negligence, which is not in itself proof of *mala fides*, may be so great as to amount to proof of notice. "I agree," says Baron Parke, "that notice and knowledge mean not merely express notice, but knowledge or the means of knowledge to which the party wilfully shuts his eyes." [9]

But it is not a good ground of defense against a *bona fide* holder for value that he was informed that the note was made or the bill accepted in consideration of an executory contract, unless he was also informed of its breach.[10] If he has such knowledge he cannot recover.[11]

App. Div. 81, 50 N. Y. Supp. 1067, citing text; J. I. Case Threshing Mach. Co. v. Hall, 32 Tex. Civ. App. 214, 73 S. W. 835 (as to knowledge of a breach of warranty); Nottingham v. Ackiss, 107 Va. 63, 57 S. E. 592 (as to conditions contained in a collateral agreement). In a suit by an assignee of a note against the maker, evidence tending to show that the payee, a stranger in the community and known to the assignee to be engaged in some kind of business, was engaged in a fraudulent business, and had defrauded another person whose note he had taken in the course of that business, and that those facts had been made known to the assignee before he purchased the note in suit, is admissible to show circumstances calculated to attract the assignee's notice, put him on his guard and stimulate inquiry as to the character of the note. Loftin v. Hill, 131 N. C. 105, 42 S. E. 548. On taking a note as collateral indorsed in the partnership name by one of the partners, the unexplained fact that a partnership security has been received in discharge of a separate claim against himself is a badge of fraud which it is incumbent on the party who takes the security to remove by showing either that the party from whom he received it acted with the authority of his partners or that he himself had good reason to believe so; the omission to make inquiry so customary exhibits heedlessness or a purpose not to scrutinize. United States Exch. Bank v. Zimmerman, 113 N. Y. S. 33.

9. May v. Chapman, 16 M. & W. 355; Hamilton v. Vought, 34 N. J. L. 187; Edwards v. Thomas, 66 Mo. 486; Sherwood, C. J.: "Neither courts nor juries are allowed to shut their eyes to natural and rational inferences, clearly deducible from proven facts." Bush v. Groomes, 125 Ind. 14, 24 N. E. 81; Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141. See Johnson v. Realty Co., 62 Mo. App. 156. See also, *ante*, § 775.

10. Bank v. Cason, 39 La. Ann. 867; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; Whitehead v. Purdy (Mich.), 137 N. W. 684; Hakes v. Thayer, 131 N. W. 174, 165 Mich. 476; Patten v. Gleason, 106 Mass. 439; Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 366; Madison County Bank v. Graham, 74 Mo. App. 251; Davis v. McCready, 17 N. Y. 230; Croix v. Sibbett, 15 Pa. St. 238; Buchannan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077, quoting text; Moyses v. Bell, 62 Wash. 534, 114 Pac. 193; Bend v. Wietze, 12 Wis. 611. In Harris v. Nicholls, 26 Ga. 413, it is held that failure of consideration may be pleaded against a transferee who took the note with knowledge of the contract,

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11. Wilson v. Carter, 4 Ga. App. 349, 61 S. E. 494; Wagner v. Diedrich, 50 Mo. 484; Coffman v. Wilson, 2 Metc. (Ky.) 542; Bonman v. Van Kuren, 29 Wis. 218.

Under Negotiable Instrument statute.—And under the statute, knowledge that a note was given in consideration of an executory agreement or contract of the payee which has not been performed will not deprive the indorsee of the character of a *bona fide* holder unless he also has notice of the breach of that agreement or contract.[12]

§ 795c. From circumstances of corporate obligation.—When a purchaser takes negotiable paper made, drawn, indorsed or accepted under circumstances which make it *prima facie* the obligation of the corporation, and without notice of a defect therein and for value, he may recover thereon.[13] But a purchaser is put on implied notice of infirmity in the paper when the corporation was without power to issue negotiable paper,[14] when it was accepted or indorsed by a corporation for accommodation,[15] when it was an *ultra vires* guarantee

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and that the consideration was liable to fail. In Deavenport v. Green River Deposit Bank, 138 Ky. 352, 128 S. W. 88, 137 Am. St. Rep. 386, it was held that where notice of warranty of personal property for the purchase of which a note was given was not brought home to the indorsee of the note, such indorsee was an innocent purchaser for value before maturity, and no set-off or counterclaim is available as a defense. And in Cunningham v. Toye, 97 Ark. 537, 134 S. W. 962, it was held that an assignee of notes for the purchase money of land, who knew that the assignor and payee was under obligation to make title to the land when the notes were paid, took the notes burdened with the obligation.

12. Appendix, sec. 56. McKnight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265.

13. Second Nat. Bank v. Snoqualime Trust Co., 83 Nebr. 645, 120 N. W. 182; Nassau Trust Co. v. Matherson, 100 N. Y. S. 55, 113 App. Div. 693; Cherry v. First Texas Chemical Mfg. Co. (Tex.), 123 S. W. 689; Lake Charles Nat. Bank v. J. I. Campbell Co. (Tex. Civ. App.), 122 S. W. 601. The fact that one of the indorsees of a note was a stockholder in the corporation which was the payee and indorser, was not sufficient to charge him with notice of any defense the maker may have had. Landa v. Mechler (Tex. Civ. App.), 111 S. W. 752. Where a corporation, payee of a note, could not have maintained an action thereon because it was unlawfully carrying on its business in the State, an indorsee of the note is not deprived of the right to sue on it when he is a *bona fide* holder of the note. Neyens v. Worthington, 150 Mich. 580, 114 N. W. 404. Where a note, purporting to be executed for a corporation by its general manager, was in fact a forgery as to the signature of the general manager, but was attested by the secretary as the note of the company and as the genuine signature of such manager, a purchaser of the note was an innocent holder. Merchants' & Farmers' Cotton Oil Co. v. Lufkin Nat. Bank, 34 Tex. Civ. App. 551, 79 S. W. 651.

14. Scott v. Bakers' Union of the World, 73 Kan. 575, 85 Pac. 604.

15. Cook v. American Tubing & Webbing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193, holding that where drafts were drawn by a corporation payable to the order of and indorsed by the drawer, and accepted by the drawee, which was

by a corporation,[16] or when it appeared to be a corporate obligation for the personal debt of an officer of the corporation.[17]

Under Negotiable Instrument statute.—Under the statutory provision that knowledge of such facts that a transferee's action in taking the instrument amounted to bad faith constitutes notice of an infirmity,[18] a person is charged with notice of fraud or irregularity who takes in payment of a private debt a negotiable instrument of a corporation, executed by his debtor as an officer of the corporation,[19] and where an indorsee took notes with notice that they were indorsed in the name of the corporation payee by one who was the treasurer of the corporation, and that he assumed to use its name and credit in his private affairs, he was put upon inquiry in respect to such treasurer's authority to indorse, and, therefore, cannot be held to have

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a firm of which a stockholder of the corporation was a member, and discounted for the acceptors, the indorsees were notified of the character of the drafts as accommodation paper by the fact that it was so presented and discounted. Notice of the infirmity of paper accepted or indorsed by a corporation for accommodation, and the knowledge that may be imputed from such notice, may arise from any irregularity in the paper or in its chain of title, or from the fact that the maker only has put the note in circulation and for his benefit. Simmons Nat. Bank v. Dilley Foundry Co. (Ark.), 130 S. W. 162.

16. Gaston & Ayres v. J. I. Campbell Co. (Tex. Civ. App.), 130 S. W. 222. The fact that the holder of a corporate note is an officer of the corporation is not sufficient to put a purchaser upon inquiry. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058. Where the president of a corporation had authority to sign notes on its behalf, the fact that he signed such a note to a financial corporation of which he was also president, to borrow money to be used for his individual purposes, would not fix the payee corporation with knowledge of any improper purpose on the part of the president. Chestnut St. Trust & Savings Fund Co. v. Record Pub. Co., 227 Pa. 235, 75 Atl. 1067, 136 Am. St. Rep. 874. The fact that a note bore the indorsement of a former president of a company, who is transferring the same, is not notice to the purchaser of any infirmities which may exist, where the party at the time of the transfer has ceased to be president, although the transfer may be for the individual interest of the former president. Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650.

17. Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 S. E. 92; Jenkins v. Planters' & Mechanics' Bank (Okl.), 126 P. 757; Wheeling Ice & Storage Co. v. Conner, 61 W. Va. 111, 55 S. E. 982; Wisconsin Yearly Meeting of Freewill Baptists v. Babler, 115 Wis. 289, 91 N. W. 678.

18. Appendix, sec. 56.

19. Kipp v. Smith, 137 Wis. 234, 118 N. W. 848. The fact that the president and treasurer of a corporation who executed a note for the corporation were also members of a firm presenting the note for discount, and that the purchaser of the note knew this fact, was not notice nor a fact tending to give notice that the corporate note was made and being used for the accommodation of the firm. *In re* Troy v. Cohoes Shirt Co., 136 Fed. 420, affirmed 142 Fed. 1038.

come by the paper *bona fide* so as to bind the corporation.[20] But the fact that the payee of a corporate note was a director of the corporation is not notice to a purchaser of the note of any infirmity and did not put him upon any inquiry concerning the circumstances under which it was issued or came into the hands of the payee; a director does not individually make contracts in behalf of the corporation, as an officer does.[21]

§ 796. Story says that "it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder upon inquiry." [22] But this statement of the rule is not clear and satisfactory, for it means that if the circumstances are of such a nature as to cast a shade of suspicion upon the transaction (and it seems to us it can mean nothing less), it contradicts the principle laid down by the author in the same paragraph, that suspicious circumstances, and gross negligence as to inquiry into them, are not sufficient to impeach the holder's title. And it is remarkable that this very proposition of Story has been taken by one authority as concurrent with the view of Gill v. Cubitt, heretofore commented on; [23] while another follows it as adopting the very contrary precedent.[24] And the more correct opinion, as it seems to us, is, that the circumstances must be so pointed and emphatic as to amount to proof of *mala fides* in the absence of inquiry, or such as to be *prima facie* inconsistent with

20. Pelton v. Spider Lake Sawmill & Lumber Co., 132 Wis. 219, 112 N. W. 29, 122 Am. St. Rep. 963. When a cashier's check payable to the order of a corporation was indorsed in the name of the corporation by its president and general manager and delivered to a trust company in the payment of a note made by himself and another person, the form of the check was notice to the trust company that the indorser was using the property of the corporation of which he was president to pay the personal debt of himself and such other person in apparent violation of its rights; the effect of such notice was to put the trust company upon inquiry to see whether it was about to accept money from one to whom it did not belong in payment of its own claim. Ward v. City Trust Company, 192 N. Y. 61, 84 N. E. 585.

21. Orr v. South Amboy Terra Cotta Co., 98 N. Y. S. 1026, 113 App. Div. 103.

22. Story on Promissory Notes, § 197; Merrill v. Hole, 85 Iowa, 66, 52 N. W. 4; Whaley v. Neill, 44 Mo. App. 316; Hodson v. Eugene Glass Co., 156 Ill. 397, 40 N. E. 971, citing text.

23. Hamilton v. Marks, 52 Mo. 80 (1873). See *ante*, § 775. But see Horton v. Bayne, 52 Mo. 533 (note 35, *infra*), which seems inconsistent with the case above cited. Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373.

24. Greenaux v. Wheeler, 6 Tex. 526 (1851).

any other view than that there is something wrong in the title, and thus amount to constructive notice. In other words, we would say that if the circumstances are of such a character as to create such a distinct legal presumption and *prima facie* proof of fraud, or of some equity between prior parties, it would operate as legal information and constructive notice to the transferee. This rule fixes a criterion for judgment which is definite, and seems to us the one which should be adopted.[25] The proof of the existence of the circumstances amounting to implied notice must be clear. As said by Woodbury, J.: "It must clearly appear that the indorsee was apprised of such circumstances as would have avoided the note in the hands of the indorser." [26]

§ 797. The mere statement of the consideration in a bill or note does not put the holder upon inquiry whether or not it really passed, or has failed in any respect. It is rather assuring than otherwise, for it is evidence, if the note be genuine, that it was given for value; and the specification of what value can no more challenge the holder's investigation than the omission of such specification.[27] In legal effect it does not qualify the paper in any manner.[28] But in North Carolina,

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25. In Missouri it was said in the case of Horton v. Bayne, 52 Mo. 533, that "Unless there be such a combination of suspicious incidents as would in legal contemplation afford ground for the presumption that the purchaser of the paper was aware at the time of its acquisition of some equity between the original parties thereto," he would not be affected by them. Wildsmith v. Tracy, 80 Ala. 262, citing the text; Morton v. N. O. & Selma R. Co., 79 Ala. 617, citing the text; Tescher v. Merea, 118 Ind. 588, citing the text; Fealy v. Bull, 71 Hun, 402, 24 N. Y. Supp. 988; Stough v. Ponca Mill Co., 54 Nebr. 500, 74 N. W. 868; Lumber Co. v. Land Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186.

26. Perkins v. Challis, 1 N. H. 254; Lee v. Whitney (Mass.), 21 N. E. 948; First Nat. Bank v. The Security Nat. Bank, 34 Nebr. 71, 51 N. W. 652, 33 Am. St. Rep. 618; Central Nat. Bank v. Pipkin, 66 Mo. App. 592; Brown v. Hoffelmeyer, 74 Mo. App. 385; Hodson v. The Eugene Glass Co., 156 Ill. 397, 40 N. E. 971, quoting text.

27. Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Bank of Commerce v. Barrett, 38 Ga. 126; Doherty v. Perry, 38 Ind. 15; Heard v. Dubuque County Bank, 8 Nebr. 16; Kelley v. Whitney, 45 Wis. 110; Stevenson v. O'Neal, 71 Ill. 214. See *ante*, §§ 41, 51, 108, 110; Siegel v. Chicago Trust & Sav. Bank, 23 N. E. 417, citing the text. That a note to a building and loan association recited that it was in consideration of the erection of a building for the maker was not sufficient to put the indorsee on inquiry as to its validity. Houston v. Keith (Miss.), 56 So. 336.

28. Beardslee v. Horton, 3 Mich. 560; Doherty v. Perry, 38 Ind. 15; Ferris v. Tavel, 87 Tenn. 390, citing the text; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077, quoting text.

where the note was expressed to be for "the Rocky Swamp tract of land," those words were held to put the holder on inquiry, and to fix him with notice that it could not be collected, unless a title to the land were made. "In this way," said the court, "significance is given to the words referred to, otherwise they must be treated as idle and superfluous." [29] And it has been held that a party taking a note, knowing the consideration, is subject to any defense arising out of it.[30] But this cannot be, and has been held not to be law.[31] Where a note to an insurance company bears on its face the memorandum, "on policy, No. 33,386," it is nowise affected, although the policy contains a provision for allowance as set-off of notes due the company.[32] In New York, where the expressed consideration of a note was "one knitting machine, warranted," it was held that breach of a parol contract warranting the article could not be pleaded against a *bona fide* holder before maturity, Boardman, J., saying: "Giving to the words the broadest meaning possible they do not imply that there has been a breach of the warranty. They cannot be construed as notice to the purchaser of a defense to the note in the hands of the payee. If they do, it must be because the law will presume a breach wherever there is a warranty. That would be preposterous." [33] Notice that a note was given for a certain patent right has been held insufficient to put the purchaser on inquiry.[34] The requirement of a

29. Rand v. State, 77 N. C. 175. Though a note contains a recital that it was for the purchase money of land, a purchaser of an interest in the note is not a *bona fide* purchaser when he had notice before he purchased such interest that the purchasers of the land claimed that the land had been paid for. Edwards v. White (Tex. Civ. App.), 120 S. W. 914 (1909).

30. Thrall v. Horton, 44 Vt. 386. See Harris v. Nichols, 26 Ga. 414, as to case where party knows consideration to be doubtful.

31. Borden v. Clark, 26 Mich. 410; Sackett v. Kellar, 22 Ohio St. 554; Bank v. Penland, 101 Tenn. 445, 47 S. W. 693; Hudson v. Best, 104 Ga. 131, 30 S. E. 688; Biegler v. The Merchants' Loan & Trust Co., 164 Ill. 197, 45 N. E. 512. A recital in a note that it was given in part payment for the purchase price of certain land is no notice to an assignee that the payee's title to the property will fail. Dollar Savings & Trust Co. v. Crawford, 69 W. Va. 109, 70 S. E. 1089, citing text.

32. Taylor v. Curry, 109 Mass. 36. See §§ 41, 51.

33. Loomis v. Mowry, 8 Hun, 312 (1876).

34. Borden v. Clarke, 26 Mich. 412; Miller v. Finley, 26 Mich. 255, Campbell, J.: "Whatever may have been the experience of our people with itinerant patent vendors, it cannot be properly assumed as a fact that a patent regularly issued by the department lacks either novelty or utility. And as fraud can never be presumed without proof, the jury could not properly be charged upon any theory, supported by no evidence at all." An exception to the general rule is one following a statutory provision, under which, where notes are given for patent

statute that notes given for patent rights should express the fact on their face does not violate the Federal Constitution, which grants to Congress the power to grant patents; nor would a note given for a patent right without the required words be void in the hands of a *bona fide* holder without notice.[35] A party accepting in payment of a debt a note from a town treasurer, which was executed to the latter in his individual character for certain assessments, was held not to have been put upon inquiry, by the mere fact that he was dealing with a public officer.[36]

Under Negotiable Instrument statute.—Under the statute, where a note on its face is expressed to be for the purchase money of property, a defect of title is not available against an indorsee for value of the note, without notice.[37]

§ 798. Notice of maker's death at time of negotiation.—Where a check was made in contemplation of a partnership to be formed by the drawer and four other persons, and the drawer of the check died before the partnership was finally formed, the other four had no authority to indorse the check in the name of the partnership, and another could not acquire title to it by such indorsement.[38] The fact that one who takes a promissory note in good faith for value, and before maturity, knew that the maker was dead, but did not know it was made for accommodation, may recover on it against the maker's estate, even if the indorser for whose accommodation it was made, put it into circulation fraudulently as against the maker. And it will be assumed that he did not know it was made for accommodation.[39] A father who bought a note of his daughter, who told him that her betrothed had given it to her, has been held a *bona fide* holder.[40]

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rights and the consideration is expressed in the body of the note, the purchaser must inquire or take the risk; Simmons v. Council, 5 Ga. App. 386, 63 S. E. 238.

35. Haskell v. Jones, 86 Pa. St. 173.

36. Chapman v. Remington, 46 N. W. 34.

37. Appendix, sec. 3. Bank of Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308.

38. Dow v. State Bank, 88 Minn. 355, 93 N. W. 121.

39. Clark v. Thayer, 105 Mass. 217.

40. Benoin v. Paquin, 40 Vt. 199. And if a note be executed by one who has since died, the defendant cannot testify to what took place between the payee and himself surrounding the execution and consideration of the note, although the payee had assigned the note before his death, and his estate has no interest in the controversy. [This is under subsection 2, § 606 of the Civil Code of Kentucky.] See Hurry v. Kline, 93 Ky. 358, 20 S. W. 277.

§ 799. **Particular and general notice.**—It is quite clear and well settled that the purchaser need not have notice of the particular fraud, or equity or illegality, in order to be affected by it. It is sufficient that there be notice, actual or constructive, that there is some fraud, or equity or illegality affecting the original parties. "Thus, if when he took the bill he were told in express terms that there was something wrong about it, without being told what the vice was, or if it can be collected by a jury, from circumstances fairly warranting such an inference, that he knew, or believed, or thought that the bill was tainted with illegality or fraud, such a general or implicit notice will equally destroy the title." [41] So if he knows that the maker denies his liability or refuses to acknowledge it.[42]

§ 800. **Public records.**—Parties negotiating for negotiable instruments are not bound to take notice of public records, which would affect them with notice were they dealing with the subject-matter. And, therefore, when there is nothing on the face of the bill or note to give notice of any defects, the fact that a deed of trust securing its payment contains recitals which show that equities or offsets exist between the original parties does not weaken the position of a *bona fide* holder without actual notice.[43]

§ 800a. **Lis pendens; garnishment and trustee process.**—The purchaser of a bill, note, or other negotiable instrument for value

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41. Byles (Sharswood's ed.) [*119], 226, citing Oakley v. Ooddeen, 2 F. & F. 659; Henry v. Sneed, 99 Mo. 422, citing the text; Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141; Hankey v. Downey, 3 Ind. App. 325, 29 N. E. 606, quoting text; Lumber Co. v. Land Co., 120 Cal. 521, 52 Pac. 995, 65 Am. St. Rep. 186; Jackson v. Jones (Ark.), 127 S. W. 710, citing text; Perth Amboy Mut. Loan, etc., Assn. v. Chapman, 81 N. Y. S. 38, 80 App. Div. 556, affirmed 178 N. Y. 558; 70 N. E. 1104, quoting text. Where a purchaser of a note had been informed by an accommodation indorser that there was something wrong with the note and had been advised not to buy it, and at that time refused to purchase it, but subsequently bought it upon being informed by others that the indorser had concluded to stand by his indorsement, he cannot claim to be an innocent purchaser. Vette v. Sacher, 114 Mo. App. 363, 89 S. W. 360.

42. Jones v. Jackson, 86 Ark. 191, 110 S. W. 215; Old. Nat. Bank of Ft. Wayne v. Marcy, 79 Ark. 149, 95 S. W. 145; Boyce v. Geyer, 2 Mich. N. P. 71; Studebaker v. Man. Co., 70 Mo. 274; Johnson, etc., Co. v. Missouri Pacific Ry. Co., 72 Mo. App. 437.

43. Minell v. Read, 26 Ala. 736. As to the effect of conditions stated in mortgage securing notes, but not stated in the notes, see First Nat. Bank of Gadsden v. Sproull, 105 Ala. 275, 16 So. 879; Breneman v. Mayer, 24 Tex. Civ. App. 164.

and before maturity, is not, as a general rule, affected by any litigation to which he is not a party, which may then be pending, and in which the instrument is involved, nor will a decree or judgment, when rendered in such litigation, affect him, the doctrine of *lis pendens* having no application to negotiable instruments.[44] But if the instrument were overdue at the time of transfer, it would then be subject to the issue of the suit, as it is then subject to all equitable defenses.[45] And there is this to be specially noted: if, under the statutes and decisions of the State where the note is payable, the defendant is compelled, by due process of law, to pay the note to another party than the plaintiff, the latter, although a *bona fide* holder without notice, cannot recover. This result is sometimes reached when the maker of a negotiable note is compelled by garnishee or trustee process to pay the amount of the note to a creditor of the payee; and in such case an indorsee of the payee, as has been held, cannot recover of the maker notwithstanding that he acquired the note for value before maturity, and without notice.[46] The better doctrine, however, upon this subject is, that the maker of a negotiable note contracts to pay the holder, at maturity, whoever he may be; and that while it is current and negotiable in the full sense of the term, the maker cannot be charged

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44. County of Cass v. Gillett, 100 U. S. (10 Otto) 585; County of Warren v. Mavey, 97 U. S. (7 Otto) 106; Murray v. Lylburn, 2 Johns. Ch. 441; Kieffer v. Ehler, 18 Pa. St. 388; Hill v. Kraft, 29 Pa. St. 186; Day v. Zimmermann, 88 Pa. St. 188; Mayberry v. Morris, 62 Ala. 113; *Re* Great Western Tel. Co., 5 Biss. 363; Leitch v. Wells, 48 N. Y. 585, overruling same case in 48 Barb. 637; Mims v. West, 38 Ga. 18; Durant v. Iowa Co., 1 Woolw. 69; Stone v. Elliott, 11 Ohio St. 252; Wintons v. Westfeldt, 22 Ala. 560; Cheney v. Janssen, 20 Nebr. 128; Holland v. Smit, 11 Mo. App. 6; Railway Co. v. Lynde, 55 Ohio, 23, 44 N. E. 596; State of Kansas v. Board of County Comrs. of Wichita County, 59 Kan. 512, 53 Pac. 526; Matter of Clover, 8 App. Div. 556, 40 N. Y. Supp. 886; Gannon v. Northwestern Nat. Bank, 83 Tex. 274, 18 S. W. 573; Dodd v. Lee, 57 Mo. App. 167. But this case is based upon a State statute. Pickens Township v. Post, 41 C. C. A. 1, 99 Fed. 659; Reid, Murdoch & Co. v. Sheffy, 75 Ill. App. 136; State v. Wichita County, 59 Kan. 512, 53 Pac. 526; Kimbrough v. Hornsby, 113 Tenn. 605, 84 S. W. 613, quoting text.

45. Kellogg v. Fancher, 23 Wis. 21; Mayberry v. Morris, 62 Ala. 117 (*semble*); Mills v. Stewart, 12 Ala. 96; Holland v. Smit, *supra* where, under the circumstances of the case, this rule held not to apply. Somers v. Losey, 48 Mich. 294; Roblee v. Rankin, 11 Canada Sup. Ct. 137.

46. Simon v. Huot, 8 Hun, 378 (1876), construing laws of Florida. (But See Huot v. Ely, 17 Fla. 775.) Hull v. Blake, 13 Mass. 153 (1816), construing and applying law of Georgia; Mercam v. Rundlett, 13 Pick. 515 (1833). See Trubee v. Alden, 6 Hun, 75; 2 Parsons on Contracts (6th ed.) 606, 608; Levy v. Du Bose, 3 Tex. Civ. App. 68, 21 S. W. 932.

as garnishee of the payee at the suit of a creditor of the payee; and that, therefore, no judgment could be properly entered against the maker that would bind him to pay the amount of the note to any other person than the holder for value before maturity, if such holder there be. This view is cogently supported by Drake in his work on Attachment, and by many adjudicated cases; and the opposing decisions have been justly and sharply criticised.[47] The true principle and correct conclusion has been well stated by Drake to be that the maker of a negotiable note should not be charged as garnishee of the payee, unless it be affirmatively shown that before the rendition of the judgment the note had become due, and was then still the property of the payee.[48]

Under Negotiable Instrument statute.—The statute provides that an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.[49] Under the statute a promissory note continues to be

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47. Drake on Attachment, § 584 *et seq*; Wohl v. First Nat. Bank, 154 Ala. 332, 46 So. 231; Gatchell & Co. v. Foster, 94 Ala. 622, 10 So. 434; Mayberry v. Morris, 62 Ala. 113; Leslie v. Merrill, 58 Ala. 322; Gregory v. Higgins, 10 Cal. 339; Huot v. Ely, 17 Fla. 775; Long v. Johnson, 74 Ga. 5; Cadwalader v. Hartley, 17 Ind. 520; Junction R. Co. v. Cleneay, 13 Ind. 161; Cruett v. Jenkins, 53 Md. 217, overruling Somerville v. Brown, 5 Gill, 399, and Stuart v. West, 1 H. & J. 536; Serviss v. Washtenaw Circuit Judge, 116 Mich. 101, 74 N. W. 310, 72 Am. St. Rep. 507; Karp v. National Bank, 76 Mich. 679, applying the rule to the liability of a bank issuing a certificate of deposit payable to order; Button v. Trader, 75 Mich. 295; Littlefield v. Hodge, 6 Mich. 326; Hubbard v. Williams, 1 Minn. 54; Stone v. Dean, 5 N. H. 502; Myers v. Beeman, 9 Ired. 116; Kingsley v. Evans, 34 Ohio St. 158; Norton v. Norton (Ohio), 1 West. Rep. 524; Gaffney v. Bradford, 2 Bailey, 441; Brittian v. Anderson, 8 Baxt. 316; Willis v. Heath, 75 Tex. 125; Bassett v. Garthwaite, 22 Tex. 230; Iglehart v. Moore, 21 Tex. 501; Hinsdill v. Safford, 11 Vt. 309; Hutchins v. Evans, 13 Vt. 541; See Vermont cases and changes of statute law in Drake on Attachment, § 588 and notes; Howe v. Ould, 28 Gratt. 1 (*semble*); Davis v. Pawlette, 3 Wis. 300. The matter is now regulated in New Hampshire by statute. See Steer v. Dow, 78 N. H. 95, 71 Atl. 217; Amoskeag Mfg. Co. v. Gibbs, 8 Fost. 316. The decisions opposing the doctrine of the text may be found in Drake on Attachment, § 589 *et seq.*

48. Drake on Attachment, § 587; Kimbrough v. Hornsby, 113 Tenn. 605, 84 S. W. 613, quoting text. In the sense of the statutes on the subject of attachment, a check is ordinarily held to be property. See Wildman v. Van Gelder, 60 Hun, 443, 14 N. Y. Supp. 914. And likewise, are promissory notes, book accounts and other credits. See McCurdy v. Prugh, 59 Ohio St. 465, 55 N. E. 154. But when the payee has placed the note in the hands of the maker it has ceased to be current negotiable paper according to the law merchant, and it may be garnished. Hutcheson v. King, 37 Tex. Civ. App. 151, 83 S. W. 215.

49. Appendix, sec. 47.

negotiable after maturity, and is not subject to garnishment when a general statute provides that "debts secured by bills of exchange or negotiable promissory notes" are exempt from process.[50]

§ **801.** Notice of fraud, or defect of title, or of defense valid between prior parties may be derived from circumstances, and be as effectual as personal observation, or hearing of the facts in question. Thus, where the assignee of a note, at the time of assignment, requests and receives, as security from the transferrer, a conveyance of land for the purchase money of which the note is given, with a provision in the deed that the assignee is to comply with the terms of the contract of sale to the prior purchaser, the assignee will be chargeable with notice of the character of the note.[51] Mere proof of an advertisement in a newspaper cautioning parties against purchasing a bill or note, even when made in the place of residence of the purchaser, is not of itself sufficient to show notice to the purchaser of any fraud affecting its validity.[52]

§ **802. Notice to agent.**—It is a general principle of law that notice to an agent is notice to the principal, and, therefore, if the holder in taking the bill employs an agent, though he be unaffected with notice to himself personally, yet notice to the agent so employed, express or implied, is notice to the holder.[53] And notice to a sub-

50. Oakdale Mfg. Co. v. Clarke, 29 R. I. 192, 69 Atl. 681.

51. Packwood v. Gridley, 39 Ill. 383.

52. Kellogg v. French, 14 Gray, 354.

53. Wiley v. Knight, 27 Ala. 336; Morris v. Georgia Loan Co., 109 Ga. 12, 34 S. E. 378; Savings Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401; Geer v. Higgins, 8 Kan. 520; Henry v. Sneed, 99 Mo. 423; Livermore v. Blood, 40 Mo. 48; Patten v. Merchants' Ins. Co., 40 N. H. 375; Bank v. Whitehead, 10 Watts, 397; Blum v. Loggin, 53 Tex. 137; Lawrence v. Tucker, 7 Greenl. 195; *In re* Hopper-Morgan Co., 158 Fed. 351; Warum v. Milford, 4 McLean, 93; 2 Kent Com. (*630), 849; Angell and Ames on Corporations, 247; Byles on Bills (Sharswood's ed.) [*120], 226, 227; Stort on Agency, § 140. A principal cannot ratify the fraud of an agent by accepting a note, the fruit of such fraud, and claim to be a good-faith holder, because the agent failed to acquaint him with the circumstances under which he procured the note; the principal being led to believe that it was taken in the regular course of business. First Nat. Bank of Durand v. Shaw, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342. The fact that the purchaser of a note and mortgage from the payee told him that she had some money to lend, and, after he had told her that the mortgages offered were first mortgages, took his word for what they were and trusted his judgment and bought one, does not show that he was the purchaser's agent and that his knowledge of any infirmity was her knowledge. Thorpe v. Mindeman, 123 Wis.

agent whose appointment has been authorized by the principal is equally notice to the principal.[54] But this rule is subject to the qualification that the knowledge of the agent, in order to affect his principal, should either have been acquired in the same transaction, or at least so recently as that it may be presumed to have remained in his memory; and it must be knowledge of a fact material to the transaction, and which it would be the duty of the agent to communicate to his principal.[55] That the principal is bound by such knowledge or notice as his agent obtains in negotiating the particular transaction is everywhere conceded. Constructive notice to an agent is not to be extended.[56] Notice to the active managing officers of a corporation is notice to the corporation itself. It is immaterial what the official position may be if the person is actively engaged in the management of its interests.[57] The mere fact, however, that the

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149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003. The knowledge of the agent of the payee of facts surrounding the execution of the note, does not affect the rights of a purchaser of the note, as he was not the agent of the purchaser. Keenan v. Blue, 240 Ill. 177, 88 N. E. 553.

54. Boyd v. Vanderkemp, 1 Barb. Ch. 273. Where a subagent of an insurance company procured a note by fraudulent representations as to a policy, the general agent who appointed him is charged by law with notice of his agent's fraudulent conduct, though he acquired the note before maturity. Webb v. Moseley, 30 Tex. Civ. App. 311, 70 S. W. 349.

55. The Distilled Spirits, 11 Wall. 366 (1870); Kaufman v. Robey, 60 Tex. 308, 48 Am. Rep. 266; Le Neve v. Le Neve, 2 Lead. Cas. in Eq. 179. Justice Vann, citing the opinion of the court in Henry v. Allen, 151 N. Y. 1, said: "The general rule that notice to the agent, while acting within the scope of his authority, and in regard to a matter over which his authority extends, is notice to the principal rests upon the duty of disclosure by the former to the latter of all the material facts coming to his knowledge with reference to the subject of his agency, and upon the presumption that he has discharged that duty." [Citing authorities.] This presumption, however, does not always arise, for there are several exceptions well recognized by the authorities. Thus, when the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot, in reason, be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose. See also Shipman v. Bank of the State of New York, 126 N. Y. 318, 27 N. E. 410, 22 Am. St. Rep. 821; Union Square Bank v. Hellerson, 90 Hun, 262, 35 N. Y. Supp. 871; Merchants' Nat. Bank v. Tracy, 77 Hun, 443, 29 N. Y. Supp. 77; Knobelock v. Germania Co. Bank, 50 S. C. 259, 27 S. E. 962.

56. Wyllie v. Pollen, 32 L. J. Ch. 782; Wiggins v. Stevens, 33 App. Div. 83, 53 N. Y. Supp. 90.

57. National Bank v. Howe, 40 Minn. 390; New England Mortgage Co. v. Gay, 33 Fed. 636; Bank v. Penland, 101 Tenn. 445, 47 S. W. 693; Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 34 N. E. 910; Daniels v. The Empire State

cashier of a bank is a stockholder and director of a corporation which is the payee and indorser of a note, will not charge the bank with notice of equities against the corporation when it appears that the cashier has no duties to perform with reference to the note as director of the company, and no actual notice of such equities.[58] Notice to, or knowledge of, one member of a partnership is notice to all of its members.[59]

Sav. Bank, 92 Hun, 450, 38 N. Y. Supp. 580; Gibson v. National Park Bank of New York, 98 N. Y. 87; Merchants' Nat. Bank v. Clark, 139 N. Y. 314, 34 N. E. 910, 36 Am. St. Rep. 710; Le Duc v. Moore, 111 N. C. 516, 15 S. E. 888; Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141; Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350. Where a note was executed to secure a debt of the husband of the maker, which was barred by the statute of limitations, and made payable to a person individually who was president of a bank and knew of the consideration of the note, upon a sale of the note by the payee to the bank of which he was president, the note being accepted at a meeting of the directors at which he was not present, the bank became a *bona fide* purchaser. McDonald v. Randall, 139 Cal. 246, 72 Pac. 997, the court saying that a corporation is not chargeable with the knowledge of one of its officers or agents who is acting on his own behalf, and not for the corporation. Where the discount committee of the directors of a bank knew the circumstances under which notes were taken, the bank was charged with notice of any infirmities incident to their procurement, though its officers may have been without personal knowledge of the method pursued. State Bank of Indiana v. Menzer, 125 Iowa, 101, 100 N. W. 69. An agent and manager of a foreign insurance company is presumed to know of the company's failure to comply with the conditions precedent prescribed by statute to the right to do business, and when he has purchased a note taken by a solicitor in consideration of business done for the company, he is not a *bona fide* purchaser. Katz v. Herrick, 12 Idaho, 1, 86 Pac. 873 (1906). But notice to officer of bank in order to charge the bank, must be to the officer in his official capacity while in the discharge of bank business. Washington Nat. Bank v. Pierce, 6 Wash. 491, 33 Pac. 972.

58. First Nat. Bank v. Loyhed, 28 Minn. 396; Wilson v. Second Nat. Bank (Pa.), 6 Cent. 756; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 21 S. W. 825, 35 Am. St. Rep. 770; Morris v. Georgia Loan Co., 109 Ga. 12, 34 S. E. 378; Knobelock v. Germania Co. Bank, 50 S. C. 259, 27 S. E. 962. See First Nat. Bank v. Bevin, 72 Conn. 666, 45 Atl. 954; Benton v. German-American Nat. Bank, 122 Mo. 332, 26 S. W. 975; National Bank v. Fitze, 76 Mo. App. 356; Holm v. Atlas Nat. Bank, 28 C. C. A. 297, 84 Fed. 119.

59. Bigelow v. Henninger, 33 Kan. 362; McCosker v. Banks, 84 Md. 292, 35 Atl. 935. It is declared in this case that "While one member of a firm may be ignorant of defects in the origin of a promissory note, another member of the firm may have full knowledge of such defects, and since this knowledge of one would be sufficient to charge all with notice, the ignorance of one partner cannot be treated as ignorance of the others." Townsend v. Hagar, 19 C. C. A. 256, 72 Fed. 949, citing text. In Flynn v. Bank of Mineral Wells, 53 Tex. Civ. App. 481, 118 S. W. 848, it was held that the fact that after a check was drawn on a bank,

SECTION VI

WHEN PURCHASER OR HOLDER STANDS ON SAME FOOTING AS HIS TRANSFERRER

§ **802a.** There are two aspects in which the rule applies that the purchaser must stand on the title possessed by the transferrer. (1) The one is presented when the transferrer has a good title, in which case as a general rule he may transfer it. (2) The second arises when he has a bad title, and there are some cases of that kind in which he cannot by a transfer create a good title.

§ **803. (I) Holder with good title may transfer instrument to party having notice of infirmity.**—We have seen under what circumstances the purchaser of a negotiable instrument may acquire a better right and title than his transferrer. It is to be observed further, that, as a general rule, the purchaser can never be placed on a worse footing than his transferrer, although he himself could not in the first instance have acquired the vantage-ground occupied by such transferrer. And, therefore, even if he have notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that the consideration has failed between some anterior parties, or the paper be overdue and dishonored, he is, nevertheless, entitled to recover, provided his immediate indorser was a *bona fide* holder for value unaffected by any of these defenses. As soon as the paper comes into the hands of a holder, unaffected by any defect, its character as a negotiable security is established; and the power of transferring it to others, with the same immunity which attaches in his own hands, is incident to his legal right, and necessary to sustain the character and value of the instrument as property, and to protect the *bona fide* holder in its enjoyment.[60] To prohibit him from selling

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the bank through its president was notified by the drawer to refuse payment, did not imply notice of the dishonor of the check to a firm of which the president of the bank was a member, the managers of which had no notice that the president had been informed of its dishonor, as this was knowledge of a co-partner acquired in transactions outside the partnership business.

60. Gunnison County Bank v. Rollins, 173 U. S. 275 (255), 19 Sup. Ct. Rep. 390; Scotland Co. v. Hill, 132 U. S. 117; Porter v. Pittsburg Steel Co., 122 U. S. 267; Montclair v. Ramsdell, 107 U. S. 147; Commissioners v. Clark, 94 U. S. (4 Otto) 285; Cromwell v. County of Sac, 96 U. S. (6 Otto) 51; Hoffman v. Bank

as good a right and title as he himself has, would destroy the very object for which they are secured to him—would indeed be paradoxical. And it has been justly said that this doctrine "is indispensable to the security and circulation of negotiable instruments, and is founded on the most comprehensive and liberal principles of public

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of Milwaukee, 12 Wall. 181; Bondot v. Rogers, 39 C. C. A. 462, 99 Fed. 202; Pickens Township v. Post, 41 C. C. A. 1, 99 Fed. 659; Huges County v. Livingston, 43 C. C. A. 541, 104 Fed. 306, citing text; Board of Comrs. of Lake County v. Sutliff, 38 C. C. A. 167, 97 Fed. 270; Rollins v. Board of Comrs., 26 C. C. A. 91, 80 Fed. 692, citing text; Butterfield v. Town of Ontario, 32 Fed. 892; Braxton v. Braxton, 20 D. C. 355; Graham v. Larimer, 83 Cal. 179; Ketchum v. Packer, 65 Conn. 545, 33 Atl. 499; Weil v. Carswell, 119 Ga. 873, 47 S. E. 217; Hogan v. Moore, 48 Ga. 156; Wade v. Elliott (Ga. App.), 75 S. E. 989; Day v. Rogers, 7 Ga. App. 535, 67 S. E. 279; Matson v. Alley, 141 Ill. 284; Rodriguez v. Merriman, 133 Ill. App. 372; Hurst v. Pearce, 130 Ill. App. 251; Woodworth v. Huntoon, 40 Ill. 131; Wilcox v. Tetherington, 103 Ill. App. 404; Riley v. Schawhacker, 50 Ind. 592; Hereth v. Merchants' Nat. Bank, 34 Ind. 380; Hill v. Ward, 45 Ind. App. 458, 91 N. E. 38, quoting text; Mornyer v. Cooper, 35 Iowa, 257; Simonds v. Merritt, 33 Iowa, 537; Peabody v. Rees, 18 Iowa, 571; Hardy v. First Nat. Bank of Newton, 56 Kan. 493, 43 Pac. 1125; Bodley v. National Bank, 38 Kan. 61, citing the text; Hillard v. Taylor, 114 La. 883, 38 So. 594; Howell v. Crane, 12 La. Ann. 126; Cotton v. Sterling, 20 La. Ann. 282; Cook v. Larkin, 10 La. Ann. 507; Roberts v. Lane, 64 Me. 108; Woodman v. Churchill, 52 Me. 58; Hascall v. Whitmore, 19 Me. 102; Smith v. Hiscock, 14 Me. 449; Boyd v. McCann, 10 Md. 118; Symonds v. Riley, 188 Mass. 470, 74 N. E. 926 (as to checks); Suffolk Sav. Bank v. Boston, 149 Mass. 305; Shaw v. Clark, 49 Mich. 384; Wood v. Starling, 48 Mich. 592; Dispatch Printing Co. v. National Bank of Commerce, 109 Minn. 440, 124 N. W. 236 (as to checks); Crawford v. Johnson, 87 Mo. App. 478, citing text; First Nat. Bank of Cameron v. Stanley, 46 Mo. App. 440; Henley v. Holzer, 19 Mo. App. 248, citing the text; Jones v. Wiesen, 50 Nebr. 244, 69 N. W. 762; Ludlow v. Woodward, 102 N. Y. S. 647, 117 App. Div. 525; Bassett v. Avery, 15 Ohio St. 299; First Nat. Bank v. Smith *et al.*, 8 So. Dak. 7, 65 N. W. 437; Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632, text cited; Watson v. Flanagan, 14 Tex. 354; Hollimon v. Karger, 30 Tex. Civ. App. 558, 71 S. W. 299; Rotan v. Maedgen, 24 Tex. Civ. App. 558; Prentice v. Zane, 2 Gratt. 262; Donnerberg v. Oppenheimer, 15 Wash. 291, 46 Pac. 254; Prentiss v. Strand, 116 Wis. 647, 93 M. W. 816; Verbeck v. Scott, 71 Wis. 63; Kinney v. Kruse, 28 Wis. 190; Haly v. Lane, 2 Atk. 182; Booth v. Quinn, 7 Price, 193; Robinson v. Reynolds, 2 Q. B. 196; Lickbarrow v. Mason, 2 T. R. 63; Chalmers v. Lanier, 1 Campb. 383; Masters v. Iberson, 18 L. J. C. P. 348; 8 C. B. 100 (65 Eng. C. L.); Roscoe on Bills, § 111; Kyd, 277; Byles (Sharswood's ed.), 236, 255; Johnson on Bills, 80. See *ante*, §§ 396*a*, 726, 782, 786, and *post*, § 1503. A person holding in his possession and under his control, before maturity, a promissory note made to the order of the maker, and indorsed by him, may be presumed, as between the indorser and the public, the owner of the same, or as agent with full power to dispose of it; and a purchaser of such a note from the holder takes it as a *bona fide* purchaser. Theard v. Gueringer, 115 La. 242, 38 So. 979.

policy." [61] Nor is it a hardship to the maker or acceptor of the instrument. For, as said by Beck, C. J., in Iowa: "The maker of the note would be liable to the transferrer; his condition is made no harder by the note coming into the hands of one having notice of its infirmities." [62] Like principles prevail in courts of equity in respect to parties acquiring defective titles to estates.[63]

§ 804. Illustrations of doctrine that purchaser with notice of defect may acquire title from holder without notice.—As illustrations of this doctrine, it has been held in Louisiana, where the courts held that Confederate notes were an illegal consideration, that the purchaser for value of a negotiable note given for a loan of Confederate money, could recover against the maker, notwithstanding he knew the nature of the consideration when he took it—the party who transferred it to him having acquired it *bona fide*, and without such notice.[64] So in Indiana, the plaintiff, who knew when he acquired the note that the defendant was induced by fraud to give it for a worthless patent, was held entitled to recover, his immediate indorser not having possessed such knowledge when he acquired it.[65] So in Massachusetts. But where the holder with notice, acquired the note through an agent who had no knowledge of its defects, he was held not to be within the protection of the rule, and not entitled to recover.[66]

§ 805. Exception to general rule.—But this rule is subject to the single exception that if the note were invalid as between maker and payee, the payee could not himself by purchase from a *bona fide* holder become a successor to his rights; it not being essential to such *bona fide* holder's protection to extend the principle so far.[67]

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61. Story on Promissory Notes, § 191. See also Story on Bills, 188; 1 Parsons on Notes and Bills, 161.

62. Simonds v. Merritt, 33 Iowa, 537; Perry on Trusts, § 222; Ketchum v. Packer, 65 Conn. 556, 33 Atl. 499.

63. Story's Eq. Jur., §§ 409, 410.

64. Cotton v. Sterling, 20 La. Ann. 282; Braxton v. Braxton, 20 D. C. 355.

65. Hereth v. Merchants' Nat. Bank, 34 Ind. 380. Also held in Missouri. Griswold v. Buechle, 72 Mo. App. 53.

66. Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801.

67. Sawyer v. Wiswell, 9 Allen, 42; Kost v. Bender, 25 Mich. 516; Camp v. Sturdevant, 16 Nebr. 694; Chariton Plow Co. v. Davidson, 16 Nebr. 374; Eckert v. Ellis, 25 Hun, 665, citing the text; Tod v. Wick, 36 Ohio St. 387; Elwell v. Tatum, 6 Tex. Civ. App. 397, 24 S. W. 71, 25 S W. 434; Aragon Coffee Co. v. Rogers, 105 Va. 51, 52 S. E. 843; See *ante*, § 176.

And the like exception is made by courts of equity in determining the rights of persons having defective titles to estates.[68] If the payees of the note were the agents of the real party in interest they could not become the owners of the note so as to be held purchasers without notice of the transaction in which the defense inhered.[69]

Under Negotiable Instrument statute.—Declaratory of the rules above discussed, the statute provides that a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter.[70] This rule prevents a payee, who is so circumstanced that he cannot recover, from transferring it to an innocent third party for value and recovering thereon on subsequently purchasing it back for value.[71]

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68. In Story's Equity Jurisprudence, §§ 409, 410, it is said: "This doctrine in both of its branches has been settled for nearly a century and a half in England, and it arose in a case in which A. purchased an estate with notice of an incumbrance, and then sold it to B., who had no notice, and B. afterward sold it to C., who had notice, and the question was whether the incumbrance bound the estate in the hands of C. The then Master of Rolls thought that although the equity of incumbrance was gone while the estate was in the hands of B., yet it was revived upon the sale to C. But the Lord Keeper reversed the decision, and held that the estate in the hands of C. was discharged of the incumbrance, notwithstanding the notice of A. and C." Harrison v. Firth, Prec. Ch. 61.

69. Boit v. Whitehead, 50 Ga. 76.

70. Appendix, sec. 58. Bryan v. Harr, 21 App. D. C. 190; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; Jennings v. Carluci, 87 N. Y. S. 475; Comstock v. Buckley, 141 Wis. 228, 124 N. W. 414; Moyses v. Bell, 62 Wash. 534, 114 Pac. 193.

71. Andrews v. Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673. One who fraudulently sells a note and retains the proceeds in fraud of the rights of his principal, becomes a primary debtor, and cannot thereafter purchase the note so as to acquire a good title which the original transferee had by virtue of being a holder in due course. Comstock v. Buckley, 141 Wis. 228, 124 N. W. 414. In Moyses v. Bell, 62 Wash. 534, 114 Pac. 193, under secs. 52, 55 and 59, it was held that a payee who obtains a note without fraud or duress or other unlawful means for consideration of an agreement to furnish in the future water to irrigate the land of the maker, and who negotiates it before the time fixed to furnish water without being guilty of fraud, has a title which is not defective and the burden is not on the indorser or one claiming under him to show that they are holders in due course, though the second indorsee acquired it after maturity and with notice of the payee's failure to perform his contract to furnish water. In Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, it was held that when a drawer of a check handed it to another to be delivered to the payee, and such other fraudulently delivered it to the payee in payment of his own debt, the payee is a *bona fide* purchaser, under section 52.

§ 806. (II) As to the defenses against which a bona fide holder is not protected.—There are some defenses which are as available against a *bona fide* holder for value, and without notice, as against any other party. They are those which go to show that the instrument was absolutely and utterly void, and not merely voidable, (1) by reason of the incapacity of the party assuming to contract; or, (2) by reason of some positive interdiction of law; or, (3) by reason of the want of consent of the party sought to be bound to the particular contract.

§ 806a. Incapacity of maker.—Thus (1) if the maker of the note were an infant, a married woman, a lunatic, or a person under guardianship, the signature would impart no validity to it, and the *bona fide* holder could not recover against him, or her, however ignorant of the incapacity when he took the paper.[72]

§ 807. Statutory denunciation of instrument as void.—(2) So if the statute law pronounces the contract evidenced by the bill or note to be void, because made upon a gambling, usurious, or other illegal consideration, it is an absolute nullity; and, although in form negotiable, no currency in the market, and no degree of innocence or ignorance on the part of the holder can impart any validity to it,[73] though it has been held that a statute will not be construed so

72. Hosler v. Beard, 54 Ohio St. 398, 43 N. E. 1040, 56 Am. St. Rep. 720; The fact that a note is payable to any bank, and has passed into the hands of an innocent holder, does not estop a married woman from asserting that she executed the same as surety, and the consequent invalidity of the note as to her. See Leschen v. Guy, 149 Ind. 17, 48 N. E. 344.

73. Birmingham Trust & Sav. Co. v. Curry, 160 Ala. 370, 49 So. 319, 135 Am. St. Rep. 102; Merriman & Co. v. Knox, 99 Ala. 93, 11 So. 741; Hogg v. Thurman, 90 Ark. 93, 117 S. W. 1070; Texarkana & Fort Smith R. Co. v. Bemis Lumber Co., 67 Ark. 542, 55 S. W. 944, citing text; Western Nat. Bank v. State Bank of Rocky Ford, 18 Colo. App. 128, 70 Pac. 439; Weed v. Bond, 21 Ga. 195; Town of Eagle v. Kohn, 84 Ill. 292; Voereis v. Nussbaum, 131 Ind. 267, 31 N. E. 70; Sondheim v. Gilbert, 117 Ind. 76, citing the text; Aurora v. West, 22 Ind. 88; Bayley v. Taber, 5 Mass. 286; Gray v. Robinson, 95 Miss. 1, 48 So. 226; Burke v. Buck (Nev.), 99 Pac. 1078; Ramsdell v. Morgan, 16 Wend. 574; Vallet v. Parker, 6 Wend. 615; Hall v. Wilson, 16 Barb. 548; Faison v. Grandy, 128 N. C. 438, 38 S. E. 897, 83 Am. St. Rep. 693; Harper v. Young, 112 Pa. St. 419; Taylor v. Beck, 3 Rand. 316; Hurlburt & Sons v. Straub, 54 W. Va. 303, 46 S. E. 163; Hatch v. Burroughs, 1 Woods, 439; See *ante*, §§ 197, 198. Notes given for fertilizers, the bags containing which had not been tagged as required by law, cannot be sued on by a purchaser of the notes for value without notice. Alabama Nat. Bank v. C. C. Parker & Co., 146 Ala. 513, 40 So. 987. If a note is void under a

as to make a negotiable instrument void in the hands of a *bona fide* purchaser, unless the act specifically so declares.[74] But, although the party executing such bill or note cannot be bound even to a *bona fide* holder, the indorser will be liable upon his indorsement, which warrants its validity, and is a separate and independent contract.[75] And in many localities negotiable instruments executed upon gaming or usurious [76] considerations are upon the same footing as those executed for other illegal considerations—that is, void between the parties, but valid in the hands of a *bona fide* holder.

§ 808. Instances of instruments void only between original parties.—Sometimes the statute declares a note void only as between original parties, and in such cases the *bona fide* purchaser is not affected by the illegality; [77] and when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving *bona fide* ownership for value.[78] But a failure of consideration does not throw this burden upon him.[79] And in all cases where the statute does not declare the instrument void, *bona fide* ownership for value being proved, the holder is entitled to recover.[80]

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statute for having been given for an illegal consideration, a gambling contract, the maker is not estopped to plead the defense given to him by the statute, because he said to a purchaser of the note, before he purchased it, that it was not given for any illegal consideration. Kyser v. Miller, 144 Ill. App. 316.

74. Citizens' State Bank v. Nore, 67 Nebr. 69, 93 N. W. 160, 60 L. R. A. 737.

75. See *ante*, § 671 *et seq.*; Hart *et al.* v. Livermore Foundry & Machine Co., 72 Miss. 809, 17 So. 769.

76. Haight v. Joyce, 2 Cal. 64; Cheney v. Cooper, 14 Nebr. 415; Bovier v. McCarthy, 4 Nebr. (Unof.) 490, 94 N. W. 965; Lynchburg Nat. Bank v. Scott, 91 Va. 655, 22 S. E. 487, citing text. See *ante*, §§ 197, 198.

77. Birdsall v. Wheeler, 71 N. Y. S. 67, 62 App. Div. 625, affirmed 173 N. Y. 590, 65 N. E. 1114; Paton v. Coit, 5 Mich. (1 Cooley) 505; Lynchburg Nat. Bank v. Scott, 91 Va. 655, 22 S. E. 487, 50 Am. St. Rep. 860, citing text; Ash v. Clark, 32 Wash. 390, 73 Pac. 351. See *ante*, § 198.

78. Paton v. Coit, 5 Mich. (1 Cooley) 505; Wyat v. Campbell, 1 Moody & M. 80; Bailey v. Bidwell, 13 M. & W. 74; Northam v. Latouche, 4 Car. & P. 140; Harvey v. Towers, 6 Exch. 656; Smith v. Braine, 16 Q. B. 201; Fitch v. Jones, 32 Eng. L. & Eq. 134; Vallett v. Parker, 6 Wend. 615; Story on Bills, § 193; Doe v. Burnham, 11 Fost. 426; Johnson v. Meeker, 1 Wis. 436; Norris v. Langley, 19 N. H. 423; Bottomley v. Goldsmith, 36 Mich. 27.

79. Wilson v. Lazier, 11 Gratt. 478, and cases cited. See *ante*, §§ 165, 198, and *post*, § 810 *et seq.*

80. Williams v. Cheney, 3 Gray, 215; Hubbard v. Chapin, 2 Allen, 328; Story

Under Negotiable Instrument statute.—Under the provision declaring that the maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse,[81] it has been held that a negotiable promissory note in the hands of parties obtaining it for value, in good faith, before maturity, from a foreign corporation, payable to such foreign corporation, is valid as against the maker though such corporation, at the time of the execution and delivery of such note or subsequently, had not complied with the statute authorizing it to engage in business within the state, when the statute does not provide that a note given by such a corporation shall be invalid.[82]

§ 809. **When party has never consented to signature.**—(3) So where the party has never in fact signed the instrument as it then stands, as, for instance, where it was forged in its inception, and is not genuine,[83] or was subsequently materially altered.[84] In such cases the *bona fide* holder cannot enforce it, for the defendant has only to say: "This is not my contract," "*non hæc in fœdra veni.*" So if executed by one acting as agent of the principal, but exceeding his authority, the *bona fide* holder cannot recover unless the principal were in fault in inducing him to believe that the agent had authority.[85] So if the party signed under duress he would not be bound.[86]

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on Promissory Notes, § 192; Hart *et al.* v. Livermore Foundry & Machine Co., 72 Miss. 809, 17 So. 769; First Nat. Bank v. Smith *et al.*, 8 S. Dak. 7, 65 N. W. 437; Farmers' Nat. Bank v. Sutton Mfg. Co., 3 C. C. A. 1, 52 Fed. 191; Pope v. Hanke, 155 Ill. 617, citing text; Myers v. Kessler, 142 Fed. 730.

81. Appendix, sec. 60.

82. McMann v. Walker, 31 Colo. 261, 72 Pac. 1055. This statute, declaratory of the law of negotiable paper, clearly estops a corporation from pleading as a defense to the action a statute which makes void any contracts entered into by a foreign corporation doing business in the State in violation of law, in a case in which the officers and stockholders of such corporation made a negotiable promissory note to the corporation, and then acting as officers and agents of the corporation assigned the note to an innocent holder for value in the name of the corporation. Young v. Gaus, 134 Mo. App. 166, 113 S. W. 735.

83. See chapter XLII, on Forgery, vol. II; Indiana Nat. Bank v. Holtzclaw, 98 Ind. 85; Citizens' Bank v. Adams, 91 Ind. 281.

84. See chapter XLIII, on Alteration, vol. II.

85. Andover Bank v. Grafton, 7 N. H. 298; Weathered v. Smith, 9 Tex. 622; Fearn v. Filica, 7 M. & G. 514; The Floyd Acceptance, 7 Wall. 666.

86. See chapter XXVI, section VIII.

SECTION VII

THE BURDEN OF PROOF AS TO BONA FIDE OWNERSHIP

§ **810.** We come now to consider how the holder of a negotiable instrument must proceed to establish his right to a recovery against the parties thereto. And first, it is to be observed that as between him and his immediate predecessor, or party between whom and himself a privity exists, he stands upon the same footing as the payee of a note against the maker. Fraud, illegality, want or failure of consideration may be pleaded against him by such immediate party as freely as if the instrument were not negotiable; and the only difference is, that the negotiable instrument imports a valid consideration not only as between the original parties, but also as between the immediate parties to its transfer, and that the burden of proof devolves upon the party who impeaches such consideration.[87]

§ **811.** As to interior parties to the transfer of the instrument, the rule is, as between them on the one part and the holder on the other, altogether different. They are not in privity with him, and they cannot set up against him defenses which might be valid as between them and any party prior to him, unless he is affected by such defenses through *mala fides*, notice, or otherwise having taken the paper without value, or without the usual course of business; which circumstances have been already discussed. But still, circumstances of defense, valid as against prior parties, may affect his position in respect to the measure of proof necessary to establish that he is not affected by them. And the course of legal procedure in presenting such proof may be stated to be as follows:

§ **812. Possession with ostensible title makes prima facie case.**—*First:* The mere possession of a negotiable instrument, produced in evidence by the indorsee, or by the assignee where no indorsement is

87. See *ante*, chapter VII, on Consideration, section I; Kenny v. Walker, 29 Oreg. 41, 44 Pac. 501, citing text; Journal Printing Co. v. Maxwell, 1 Pennewill, 511, 43 Atl. 615; Shirk v. Mitchell, 137 Ind. 186, 36 N. E. 850; Sollenberger v. Stephens, 46 Kan. 386, 26 Pac. 690; Hoskinson v. Bagby, 46 Kan. 758, 27 Pac. 110; Brook v. Teague, 52 Kan. 119, 34 Pac. 347; First Nat. Bank v. Emmitt, 52 Kan. 603, 35 Pac. 213; First Nat. Bank of Gadsden v. Sproull, 105 Ala. 275, 16 So. 879; Press Co. v. City Bank, 7 C. C. A. 248, 58 Fed. 321.

necessary, imports *prima facie* that he acquired it *bona fide* for full value, in the usual course of business, before maturity, and without notice of any circumstances impeaching its validity; and that he is the owner thereof, entitled to recover the full amount against all prior parties. In other words, the production of the instrument and proof that it is genuine (where indeed such proof is necessary), *prima facie* establishes his case; and he may there rest it;[88] the burden of proving

88. Austen v. United States Nat. Bank, 174 U. S. 125, 19 Sup. Ct. Rep. 628; West St. Louis Sav. Bank v. Shawnee County Bank, 95 U. S. 557; Brown v. Spofford, 95 U. S. (5 Otto) 478; Collins v. Gilbert, 94 U. S. (4 Otto) 753; Commissioners v. Clark, 94 U. S. (4 Otto) 285; Pickens v. Post, 41 C. C. A. 1, 99 Fed. 659; Dawson Town & Gas. Co. v. Woodhull, 14 C. C. A. 464, 67 Fed. 451, citing text; Cheney v. Stone, 29 Fed. 886; Bank of British N. Am. v. Ellis, 6 Sawy. 98, citing the text; Cropley v. Eyster, 9 App. D. C. 373; First Nat. Bank of Gadsden v. Sproull, 105 Ala. 275, 16 So. 879; Nelson v. Larmer, 95 Ala. 300, 11 So. 294; Cobb v. Bryant, 86 Ala. 316; *In re* Tallahassee Mfg. Co., 64 Ala. 593; Bank of Paris v. Pearson, 66 Ark. 310, 50 S. W. 692, citing text; Caldwell v. Hall, 49 Ark. 509; Winship v. Merchants' Nat. Bank, 42 Ark. 22; Schwind v. Hall, 129 Cal. 40; Griffith v. Lewin, 125 Cal. 618, 58 Pac. 205; McCann v. Lewis, 9 Cal. 246; Reed v. First Nat. Bank, 23 Colo. 380, 48 Pac. 507; Perot v. Cooper, 17 Colo. 80, 28 Pac. 391, 31 Am. St. Rep. 258; Solomon v. Brodie, 10 Colo. App. 353, 50 Pac. 1045; Wyman v. Colorado Nat. Bank, 5 Colo. 32, citing the text; King v. Mecklenburg, 17 Colo. App. 312, 68 Pac. 984; Standard Cement Co. v. Windham Nat. Bank, 71 Conn. 668, 42 Atl. 1006; Arnold v. Lane, 71 Conn. 61, 40 Atl. 921; Ross v. Webster, 63 Conn. 64, 26 Atl. 476; First Nat. Bank of Etowah, Tenn., v. Messer, 71 S. E. 148, 136 Ga. 226; Parr v. Erickson, 115 Ga. 873, 42 S. E. 240; Day v. Rogers, 7 Ga. App. 535, 67 S. E. 279; South & Lane v. People's Nat. Bank, 4 Ga. App. 92, 60 S. E. 1087; Bothell v. Whitley Bros., 3 Ga. App. 755, 60 S. E. 371; Johnson v. Cobb, 100 Ga. 139, 28 S. E. 72 (see § 769*a* for comment); Hudson v. Equitable Mortgage Co., 100 Ga. 83, 26 S. E. 75; Merchants' & P. Nat. Bank v. Trustees, 62 Ga. 271; Warman v. First Nat. Bank, 185 Ill. 60, 57 N. E. 6, citing text; Keenan v. Blue, 240 Ill. 177, 88 N. E. 553; Peck v. Dyer, 147 Ill. 592, 35 N. E. 479; Newton v. Clarke, 235 Ill. 530, 85 N. E. 747; Matson v. Alley, 141 Ill. 284, 31 N. E. 419; Norlin v. Becker, 138 Ill. App. 488; Eldridge v. Kay, 124 Ill. App. 136; Palmer v. Nassau Bank, 78 Ill. 380; Tescher v. Merea, 118 Ind. 588, citing the text; Hall v. Allen, 37 Ind. 541; Halstead v. Woods (Ind. App.), 95 N. E. 429; Stouffer v. Stoy, 46 Ind. App. 180, 91 N. E. 250; Wilson v. National Fowler Bank, 47 Ind. App. 689, 95 N. E. 269; Crumrine v. Estate of Crumrine, 14 Ind. App. 641, 43 N. E. 322; Tolman v. Janson, 106 Iowa, 455, 76 N. W. 732; Graff v. Adams, 100 Iowa, 481, 69 N. W. 539; O'Keeffe v. First Nat. Bank of Frankfort, 49 Kan. 347, 30 Pac. 473, 33 Am. St. Rep. 370; Hoskinson v. Bagby, 46 Kan. 758, 27 Pac. 110; First Nat. Bank of Fort Scott v. Elliott, 46 Kan. 32, 26 Pac. 487; First Nat. Bank v. Emmitt, 52 Kan. 603, 35 Pac. 213; Mann v. National Bank, 34 Kan. 752, citing the text; Gafford v. Hall, 39 Kan. 169; Carnahan v. Lloyd, 4 Kan. App. 605, 46 Pac. 323; McCarty & Co. v. Louisville Banking Co., 100 Ky. 4; Owsley & Co. v. Louisville Banking Co., 100 Ky. 4, 37 S. W. 144; Hilliard v. Taylor, 114 La. 883, 38 So. 594; Pan-

that a holder did not acquire it *bona fide*, for value, and without notice, is on the defendant.[89] Bills and notes payable to bearer do not

handle Nat. Bank v. Alexander *et al.*, 49 La. Ann. 1590, 22 So. 813; Denton Nat. Bank v. Kenney, 116 Md. 24, 81 Atl. 227; Williams v. Holt, 170 Mass. 351, 49 N. E. 654; New York Iron Mine Co. v. First Nat. Bank, 39 Mich. 644; Cook v. Brown, 67 Mich. 474; Keim v. Vette, 167 Mo. 389, 67 S. W. 223; Lee v. Smith, 84 Mo. 304, 54 Am. Rep. 101; Johnson v. McMurry, 72 Mo. 282; Horton v. Bayne, 52 Mo. 531; Adams County Bank v. Hainline, 67 Mo. App. 483; Cloud v. Book & News Co., 23 Mo. App. 320; Reinhard v. Dorsey Coal Co., 25 Mo. App. 352; First Nat. Bank of Dubuque v. McKibben, 50 Nebr. 513, 70 N. W. 38; McDonald v. Aufdengarten, 41 Nebr. 41, 59 N. W. 762; Coakley v. Christie, 20 Nebr. 509; Claflin v. Farmers', etc., Bank, 25 N. Y. 293; Central Nat. Bank of Brooklyn v. Hammet, 50 N. Y. 158; Vallet v. Parker, 6 Wend. 615; Flour City Nat. Bank v. Grover, 88 Hun, 4, 34 N. Y. Supp. 496; Van Aernam v. Granger, 86 Hun, 476, 33 N. Y. Supp. 885; Rogers v. McGuire, 90 Hun, 455, 37 N. Y. Supp. 76; Shute v. Jones, 78 Hun, 99, 28 N. Y. Supp. 1072; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Triplett v. Foster, 115 N. C. 335, 20 S. E. 475; Jackson v. Love, 82 N. C. 405; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614, citing text; Vickery v. Burton, 6 N. D. 245, 69 N. W. 193; Davis v. Bartlett, 12 Ohio St. 544; Spreckles v. Bender, 30 Oreg. 577, 48 Pac. 418; Owens v. Snell, 29 Oreg. 483, 44 Pac. 827; Lamb v. Burke (Pa.), 20 Atl. 685; Holme v. Karsper, 5 Binn. 469; Third Nat. Bank v. Angell, 18 R. I. 1, 29 Atl. 500; Mumford v. Weaver, 18 R. I. 801, 31 Atl. 1; Hazard v. Spencer, 17 R. I. 563, 23 Atl. 729; Park v. Funderburk, 87 S. C. 76, 68 S. E. 963; Gibbes Machinery Co. v. Roper, 77 S. C. 39, 57 S. E. 667; First Nat. Bank v. Anderson, 28 S. C. 143; Mars v. Mars, 27 S. C. 133; Herman v. Gunter, 83 Tex. 66, 18 S. W. 428, 29 Am. St. Rep. 632, text cited; Guerin v. Patterson, 55 Tex. 124; Blum v. Loggins, 53 Tex. 136, approving text; Milmo Nat. Bank v. Cobbs (Tex Civ. App.), 128 S. W. 151; Buchanan v. Wren, 10 Tex. Civ. App. 560, 30 S. W. 1077, citing text, Blaney v. Pelton, 60 Vt. 275; Hawse v. First Nat. Bank of Piedmont, W. Va. (Va.), 75 S. E. 127; Lodge v. Lewis, 32 Wash. 191, 72 Pac. 1009; Citizens' Nat. Bank v. Wintler, 14 Wash. 558, 45 Pac. 38, 53 Am. St. Rep. 890; Poncin v. Furth, 15 Wash. 201, 46 Pac. 241; Brooks v. James, 16 Wash. 335, 47 Pac. 751; First Nat. Bank v. Johns, 22 W. Va. 524; Studebaker Bros. Mfg. Co. v. Langson *et al.*, 89 Wis. 200, 61 N. W. 773; Wayland University v. Boorman, 56 Wis. 660; See *ante*, §§ 573, 741, 781*a*, and *post*, §§ 1181*a*, 1191. See Causey v. Snow, 120 N. C. 279, 26 S. E. 775, wherein the court held that the plaintiff having produced the note on the trial, and the defendant having admitted its execution, the law raised the presumption that the plaintiff was the rightful owner, and this presumption was not rebutted by the defendant's denial in his answer. And this presumption will not be rebutted by evidence of an assignment to a third party signed by plaintiff, of all of plaintiff's claims and demands against the defendant and another, but not mentioning the note in suit, without evidence of the delivery of

89. Price v. Winnebago Nat. Bank, 14 Okl. 268, 79 Pac. 105; Houston v. Keith (Miss.), 56 So. 336. Except in cases where the instrument is shown to be tainted with fraud or illegality. Johnson County Savings Bank v. Capito, 47 Ind. App. 461, 94 N. E. 797. See *post*, § 815.

differ in this respect from others, and the bearer is entitled to all the presumptions that apply to an indorsee in his favor.[90] But the presumption of *bona fide* ownership does not apply where the instrument is not payable to bearer, unless it be indorsed specially to the holder, or in blank,[91] and when such indorsement is denied, the holder must prove the indorsement by the original payee in order to hold a presumption that he is an innocent purchaser.[92] And holder could not recover against subsequent parties, as his possession of the bill or note would be *prima facie* evidence that he had paid it to some

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the assignment or of the note to the person named as assignee in such assignment. See Trost v. Hinman, 68 Hun, 94, 22 N. Y. Supp. 612. When evidence is produced showing that another is entitled to the proceeds of a note, the burden is upon the holder to show that he is a *bona fide* holder for value. American Valley Co. v. Wyman, 92 Mo. App. 294. Where an agent of a principal is furnished with money to buy, and does buy up, claims against the latter, it is his duty, if he asserts a right to the claims, to show by the preponderance of testimony that the claims are his—therefore a tax collector of a county, having, by authority of the county, received coupons of county bonds in payment of taxes, brought suit against the county to recover on coupons of the same kind which he claimed to own, it was improper on the trial to instruct the jury that the possession of the coupons raised a presumption of his ownership. Threadgill v. Commissioners, 116 N. C. 616, 21 S. E. 425.

90. Faulkner v. Ware, 34 Ga. 498; Schulte v. Coulthurst, 94 Iowa, 418, 62 N. W. 770, citing text.

91. See chapter XXXVII, on Action, vol. II, section IV, § 1197; Dorn v. Parsons, 56 Mo. 601; Mayer v. Old, 51 Mo. App. 214; Bellis v. Lyons, 97 Mich. 398, 56 N. W. 770, text cited; Lyon, Potter & Co. v. Frist Nat. Bank, 29 C. C. A. 45, 85 Fed. 120, text cited; Bovard v. Dickinson, 131 Cal. 162, 63 Pac. 162.

92. Johnston v. Loar, 145 Ill. App. 443; James v. Blackman, 68 Kan. 723, 75 Pac. 1017; Dunlap v. Kelly, 105 Mo. App. 1, 78 S. W. 664; Payne v. Liebee, 3 Nebr. (Unof.) 448, 91 N. W. 851; Jones v. Wheeler, 23 Okl. 771, 101 Pac. 1112; Clymer v. Terry, 50 Tex. Civ. App. 300, 109 S. W. 1129. In an action by the indorsee of a negotiable note, upon a declaration on the note as indorsed and upon a general denial in the answer, the plaintiff is not required to prove the genuineness of the indorsement, under Rev. Laws, ch. 173, § 86. Whiddon v. Sprague, 203 Mass. 526, 89 N. E. 917. See also Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166. In an action on a note by an indorsee against the maker, the burden of establishing an agreement between the indorsee and the indorser that it should be held only as the note of the indorser, and that it should be paid from the collateral security which the indorsee held from the indorser, was upon the defendant. National Bank of Rondout v. Byrnes, 82 N. Y. S. 497, 84 App. Div. 100, affirmed 178 N. Y. 561, 70 N. E. 1103. The burden is on one claiming to own a note by assignment to prove the execution and delivery of the assignment, and the burden is on one charging that the assignment was void because obtained by fraud, duress and undue influence, to sustain that issue. McHay v. Peterson, 52 Tex. Civ. App. 195, 113 S. W. 981.

subsequent party, to whom he was liable. Therefore, where A. brought suit against B. on a note made by C. payable to A., and by A. indorsed to B., and by B. indorsed back to A., it was held A. could not recover against B.[93] But it has been held that special circumstances, showing that it had been indorsed back to A. for a valid consideration, would enable him to recover against B.[94] And if a prior indorser offered a note for discount on his own account, the transaction would import that the subsequent indorsement was made for the accommodation of the prior indorser, and the party discounting it could recover against him.[95] Possession of a note by the personal representative of the deceased payee, payable to the decedent, and unindorsed, would be evidence of ownership;[96] and so possession of a bill by a drawer payable to his own order.[97] Possession of a bill or note unindorsed by the payee would not be.[98]

Under Negotiable Instrument statute.—The statute, in various sections,[99] recognizes the rule that possession of a negotiable instrument imports *prima facie* that it was acquired *bona fide* before maturity, and for value. Section 59 declares that "Every holder is deemed *prima facie* to be a holder in due course," and the burden of proof is upon the party impeaching the instrument.[1]

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93. Palmer v. Whitney, 21 Ind. 61. See also Oberle v. Schmidt, 86 Pa. St. 221.

94. Palmer v. Whitney, 21 Ind. 61.

95. Mauldin v. Branch Bank, 2 Ala. 502.

96. Scoville v. Landon, 50 N. Y. 686. But in such case, in Pennsylvania, the ownership of the paper was held in question for the jury. Holohan v. Mix (Pa.), 19 Atl. 496. See as to possession by heir, King v. Gottschalk, 21 Iowa, 512; Fant v. Wickes, 10 Tex. Civ. App. 394, 32 S. W. 126; Brooks v. Holt, 65 Mo. App. 613.

97. Merritt v. Duncan, 7 Heisk. 156. See *ante*, §§ 753, 781.

98. Gibson v. Miller, 29 Mich. 355. See *ante*, § 781*a*; Durein v. Moeser, 36 Kan. 443, citing the text; Esau v. Green & Button Co., 94 Wis. 8, 68 N. W. 405.

99. Appendix, secs. 55, 56, 57, 59.

1. Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114; Beck v. Mailer, 115 N. Y. S. 596, 131 App. Div. 243; Joveshof v. Rockey, 109 N. Y. S. 818, 58 Misc. 559; McCormick v. Swem (Utah), 102 Pac. 626; Cole Banking Co. v. Sinclair, 34 Utah, 454, 98 Pac. 411. And until the defendant offers evidence sustaining a defense that the note was tainted with fraud in its inception or fraudulently put in circulation, the plaintiff is under no obligation to negotiate it or to assume the burden of showing that he is the holder in good faith and without notice. Cox v. Cline, 139 Iowa, 128, 117 N. W. 48. For further discussion of the effect of the statute on the question of burden of proof, see *post*, under §§ 814*a*, 819.

§ **813.** It is not competent for the defendant to deny that the plaintiff is the owner and holder of a note upon which he brings suit as such, without traversing the signature, the indorsement, or the delivery of the note; and in such case, evidence is inadmissible to prove that the plaintiff never owned the note, never employed counsel, and had no interest in the suit.[2] But where the holder sued under a blank indorsement in New York it was held that under the Code of that State it might be shown he was not the real party in interest, though the presumption would be that he was.[3] This subject is elsewhere more fully discussed.[4]

§ 814. Proof of want of consideration, or misapplication of instrument, does not shift burden of proof.—*Second:* Countervailing proof that the instrument was executed without consideration as between the original parties—as, for instance, that it was executed for accommodation as between them, or that the consideration, originally valid, has subsequently failed—does not impair the holder's superiority of position, and he may still rest his case upon the instrument itself, from which it will still be presumed that he acquired it in a manner entitling him to stand upon the vantage-ground of a *bona fide* holder for value,[5] nor will proof that it was given for the

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2. Way v. Richardson, 3 Gray, 412. See Schroeder v. Nielson, 39 Nebr. 335, 57 N. W. 993; Mayer v. Old, 51 Mo. App. 214.

3. Hays v. Hathorn, 74 N. Y. 488. See § 1192*a*.

4. § 1181 *et seq.*

5. Commissioners v. Clark, 94 U. S. (4 Otto) 285; Collins v. Gilbert, 94 U. S. (4 Otto) 757; Goodman v. Simonds, 20 How. 343; Bank of Pittsburg v. Neal, 22 How. 96; Murray v. Lardner, 2 Wall. 110; Tabor v. Merchants' Nat. Bank, 48 Ark. 454; McDonald v. Randall, 139 Cal. 246, 72 Pac. 997; Jones v. Evans, 6 Cal. App. 88, 91 Pac. 532; Credit Co. v. Howe Mach. Co., 54 Conn. 357; Johnson County Sav. Bank v. Wootten, 118 Ga. 927, 45 S. E. 705; Mathews v. Poythews, 4 Ga. 287; Bothell v. Whitley Brothers, 3 Ga. App. 755, 60 S. E. 371; Sheffield v. Johnson County Savings Bank, 2 Ga. App. 221, 58 S. E. 386; Hill v. Ward, 45 Ind. App. 458, 91 N. E. 38; Batesville Bank v. Lehner, 43 Ind. App. 457, 87 N. E. 990; Freittenberg v. Rubel, 123 Iowa, 154, 98 N. W. 624; Lynds v. Van Valkenburg, 77 Kan. 24, 93 Pac. 615; Kellogg v. Curtis, 69 Me. 212; Fletcher v. Cushee, 32 Me. 587; Baxter v. Ellis, 57 Me. 180; Ellicott v. Martin, 6 Md. 509; Cummings v. Thompson, 18 Minn. 252; National Bank of Rolla v. Romine, 136 Mo. App. 57, 117 S. W. 104; Hahn v. Bradley, 92 Mo. App. 399; Organ Co. v. Boyle, 10 Nebr. 409; Cropsey v. Averill, 8 Nebr. 157; Mechanics', etc., Bank v. Crow, 60 N. Y. 85; Harger v. Worrall, 69 N. Y. 370; Belmont Branch Bank v. Hoge, 35 N. Y. (8 Tiff.) 65 (overruling Pringle v. Phillips, 5 Sandf. 157); Magee v. Badger, 34 N. Y. (7 Tiff.) 247; Ross v. Bedell, 5 Deur, 462; Grocers' Bank v.

debt of another,[6] nor proof of mere misapplication of the instrument, where it has subserved its substantial purpose, shift the burden of

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Penfield, 7 Hun, 279; Bank of New Hanover v. Bridgers, 98 N. C. 67, citing the text; Flagg v. School District, 4 N. Dak. 30, 58 N. W. 499; Davis v. Bartlett, 12 Ohio St. 537; Sloan v. Union Banking Co., 67 Pa. St. 479; Knight v. Pugh, 4 Watts & S. 445; Holeman v. Hobson, 8 Humphr. 127; McCormick v. Kampmann (Tex. Civ. App.), 109 S. W. 492, affirmed 102 Tex. 215, 115 S. W. 24; Grenaux v. Wheeler, 6 Tex. 515; Johnson County Savings Bank v. Kemp Mercantile Co. (Tex. Civ. App.), 114 S. W. 402; Adams v. Bartell, 46 Tex. Civ. App. 349, 102 S. W. 779; Duerson's Admr. v. Alsop, 27 Gratt. 248; Wilson v. Lazier, 11 Gratt. 478; Cook v. Helms, 5 Wis. 107; Whitaker v. Edmonds, 1 Moody & R. 366; Mills v. Barber, 1 M. & W. 425; Low v. Chifney, 1 Bing. N. C. 267; Smith v. Braine, 16 Q. B. 244; Story on Bills (Bennett's ed.), § 193. See *ante*, § 165 *et seq.* The burden is upon the defendant to show that an indorsee of a note had actual knowledge of a defense made when he bought the note or had actual knowledge of such facts indicating the defense that his action in taking the note amounted to bad faith. Old Nat. Bank v. Marcy, 79 Ark. 149, 95 S. W. 145. In an action by an indorsee holding the note as collateral security, the note having been executed for the accommodation of the payee, the burden is on the plaintiff to show that he was a holder for value. Mercantile Guaranty Co. v. Hilton, 191 Mass. 141, 77 N. E. 312. And in an action by an indorsee of a note, wherein the defendant sets up a collateral written agreement between the maker and the payee that the note should not be transferred, and that it could not be collected save as satisfied by dividends from stock for the purchase of which the note was given, the burden is on the defendant to show that the indorsee had knowledge of such an arrangement when the note was transferred to him. State Bank of Indiana v. Cook, 125 Iowa, 111, 100 N. W. 72. In Vermont, however, it is held that upon a defense that the consideration for the note had failed, the burden is on the plaintiff to show that he took the note in good faith, and a statement that he bought it for value does not meet the requirement. Pierson v. Huntington, 82 Vt. 482, 74 Atl. 88, the court saying: "The production of a negotiable instrument, properly indorsed, is *prima facie* evidence of the holder's right to recover against the maker; but the maker may compel the holder to support his *prima facie* case with further evidence by showing a defense that would have been available against the payee. The defenses which have ordinarily been recognized as imposing this additional burden are illegality, procurement by fraud or duress, want of consideration, and an intervening theft or loss. This enumeration is in accord with the statements generally made in our own decisions. It was said, however, in Quinn v. Hard, 43 Vt. 375, 5 Am. Rep. 284, that it did not appear to be very clearly settled in what cases and to what extent the burden of proof would be thrown upon the plaintiff by the introduction of matters amounting to a defense against the payee. The more recent cases have apparently relieved the subject of some of its uncertainty, for the statement is now generally framed in terms that cover fraud in the inception of the note, and a subsequent failure of consideration as well as an original want of it."

6. Chicago & Northwestern R. R. Co., impleaded with George F. Cummin v. Edson, 41 Mich. 673.

proof, as has been already indicated;[7] though in New York it is otherwise considered.[8]

§ **814a.** This, however, is to be observed: if the instrument be payable to bearer, and there be no indorsement upon it, there is nothing upon its face to indicate whether the holder is the original payee or a transferee by delivery. If he is the original payee, proof of want or failure of consideration is a complete defense; if a transferee the defense of want or failure of consideration will not affect him unless he had notice. When there is nothing in the case but the production of the paper, payable to bearer on the one side, and proof of want or failure of consideration on the other, what presumption arises? Is it to be presumed that the holder is the original payee, or that he is a transferee? The general burden of proof is upon the plaintiff in all cases; and presumptions of fact are simply presumptions that certain facts have occurred as the natural and usual consequence of a fact proved. The original payee and possessor of the paper cannot be presumed to have transferred it, unless it be presumed that owners of such instruments more generally part with their property than retain it. This is too vague and uncertain a presumption to rely upon; and if the holder be a transferee, and, therefore, entitled to recover notwithstanding want or failure of consideration, he should bear the burden of showing his superior position to exist.[9]

Under Negotiable Instrument statute.—The effect of the Negotiable Instrument statute on the question of the burden of proof in this con-

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7. *Ante*, §§ 790, 791; Holme v. Karsper, 5 Binn. 469; Tilghman, Ch. J., saying: "In the first instance, it is presumed that every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion, before the plaintiff is expected to do anything more than produce the note on which he founds his action. But this being done, it is reasonable that the holder should be called on to rebut the suspicions. All that is asked of him is to show that he acted fairly, and paid value." Bunzel v. Maas & Schwarz, 116 Ala. 68, 22 So. 568.

8. See *ante*, § 791. A failure or want of consideration, notice of which is brought home to the holder for value, is a good defense against the latter. See Scott v. Scott, 2 App. Div. 241, 38 N. Y. Supp. 613.

9. Bissell v. Morgan, 11 Cush. 198. Article of Stephen H. Tyng, of the Boston Bar, Am. Law Review, May, 1881, vol. XV, p. 354; Terry v. Taylor, 64 Iowa, 36, in which case the mere allegation of such fraud without proof, held insufficient to shift the burden of proof as to *bona fide acquisition* of the paper. Holden v. Phœnix Rattan Co., 168 Mass. 570, 47 N. E. 241; Zink v. Dick, 1 Ind. App. 269, 27 N. E. 622.

nection, may be considered under several sections of the statute.[10] Section 59 declares that "Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course," and section 52 defines "a holder in due course." The conflict of authority on the question whether on proof of having paid value for the instrument the plaintiff must also show good faith or whether the defendant must prove notice, is generally considered settled by the statute in favor of the former rule. It is therefore generally held that to sustain the burden of proof to show that he acquired title as a holder in due course, under the statutory definition, a purchaser from one whose title was defective must show not only that he acquired the note before maturity and for value, but also that he took the same in good faith, and that at the time the instrument was negotiated to him he had no notice of any infirmity therein or defect of title.[11] And so, a showing by the defendant that there was a want or failure of consideration,[12] or that the consideration was illegal,[13] or that the in-

10. Appendix, secs, 52, 55, 56, 59, 61.

11. Lucker v. Iba, 66 N. Y. S. 1019, 54 App. Div. 566; Singer Mfg. Co. v. Sinners, 143 N. C. 102, 55 S. E. 522; Keene v. Behan, 40 Wash. 505, 82 Pac. 884. In Leavitt v. Thurston (Utah), 113 Pac. 77, on the question of the burden of proof as distinguished from the burden of proceeding, the court said: "If evidence is given by him tending to show that he was such a holder in due course, that does not then shift the burden of proof to the defendant to establish the fact that he, or the person from whom he acquired title, had notice or knowledge of the fraud, or that no value was paid for the note, or that it was purchased overdue, but merely the duty of proceeding in the production of evidence if he desires to meet or overcome the effect or weight to be given the evidence so adduced by the holder." See also Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588, wherein the court said that under section 59 of the statute, "burden of proof" is used in the strict sense, and not in the sense of "burden of evidence." Proof that the note in suit was given by the corporate defendant's treasurer to pay his own individual debt, without authority of the corporation would destroy the existing presumption that the plaintiff indorsee was "holder in due course" and throw upon him the burden of proving that fact, or of overcoming the proof of the defendant that the note was given for the treasurer's personal debt and that his act in making it was not authorized. Louis De Jonge & Co. v. Woodport Hotel & Land Co. (N. J.), 72 Atl. 439. Compare Standing Stone Nat. Bank v. Walser (N. C. Spring Term, 1913).

12. Shellenberger v. Nourse, 20 Idaho, 323, 118 Pac. 508; Johnson County Sav. Bank v. Mills, 143 Mo. App. 265, 127 S. W. 425; Jobes v. Wilson (Mo. App.), 124 S. W. 548.

13. *In re* Hill, 187 Fed. 214; O'Connor v. Kleiman, 143 Iowa, 435, 121 N. W.

strument had been lost or stolen,[14] imposes the burden on the plaintiff to show that he or someone under whom he claims title was a holder in due course, as thus defined.[15]

§ 815. Proof of fraud, illegality or loss shifts burden of proof.— *Third:* There may be at this juncture a shifting of the burden of proof from the defendant to the plaintiff, for the principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument; or if the circumstances raise a strong suspicion of fraud or illegality the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that an instrument so issued would be quickly transferred to another; and unless he gave value, which could be easily proved if given, it would perpetrate great injustice, and reward fraud to permit him to recover.[16] In an action by a partner-

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1088; Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805; Matlock v. Sheuerman, 51 Oreg. 49, 93 Pac. 823, 17 L. R. A. (N. S.) 747; Simpson v. Hefter, 87 N. Y. S. 243, 42 Misc. 482.

14. Warren v. Smith (Utah), 100 Pac. 1069, holding in an action to recover the proceeds of a check alleged to have been stolen from or lost by the payee, that when the plaintiff proved that the check was stolen from him, the burden shifted to the defendant to prove that he, or some person under whom he claims, acquired title as a holder in due course.

15. As to the effect of a showing of fraud, see *post*, under § 819.

16. Commissioners v. Clark, 94 U. S. (4 Otto) 285; Collins v. Gilbert, 94 U. S. (4 Otto) 761; Smith v. Sac County, 11 Wall. 139; McClintick v. Cummins, 2 McLean, 98; Simons v. Fisher, 5 C. C. A. 311, 55 Fed. 905; Fisher v. Simons, 12 C. C. A. 125, 64 Fed. 311; Shain v. Goodwin, 46 Fed. 564; Winter & Loeb v. Pool, 100 Ala. 503, 14 So. 411; Giman v. New Orleans R. Co., 72 Ala. 582; Reid v. Bank of Mobile, 70 Ala. 210; Mayor of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Ross v. Drinkard, 35 Ala. 434; Thompson v. Armstrong, 7 Ala. 256; Boyd v. McIvor, 11 Ala. 822; Union Collection Co. v. Buckman, 150 Cal. 159, 88 Pac. 708; Jordan v. Grover, 99 Cal. 194, 33 Pac. 889, citing text; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873; Redington v. Wood, 45 Cal. 406; Sperry v. Spaulding, 45 Cal. 544; Fuller v. Hutchings, 10 Cal. 526; Le Tourneux v. Gillis, 1 Cal. App. 546, 82 Pac. 627; Merchants' & P. Nat. Bank v. Trustees, 62 Ga. 271; Sheffield v. Johnson County Savings Bank, 2 Ga. App. 221, 58 S. E. 386; Vaughn v. Johnson, 20 Idaho, 669, 119 Pac. 379, 37 L. R. A. (N. S.) 816; Hodson v. The Eugene Glass Co., 156 Ill. 397, 40 N. E. 971, citing text; Merchant Loan & Trust Co. v. Welter, 205 Ill. 647, 68 N. E. 1082; Finegan v. Green, 130 Ill. App. 445; Citizens' Bank v.

ship bank on a note fraudulent in its inception, taken by it as collateral, the partnership must show that all its members were at the

Leonhart, 126 Ind. 206, 25 N. E. 1099; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281; Eichelberger v. Bank, 103 Ind. 402; Mitchell v. Tomlinson, 91 Ind. 168; Baldwin v. Shuter, 82 Ind. 560; Harbison v. Bank of Indiana, 28 Ind. 133; Harbison v. Bank, 72 Ind. 133; Hill v. Ward, 45 Ind. App. 458, 91 N. E. 38; Batesville Bank v. Lehner, 43 Ind. App. 457, 87 N. E. 990; Bowser v. Spiesshofer, 4 Ind. App. 349, 30 N. E. 942; Zink v. Dick, 1 Ind. App. 269, 27 N. E. 622; State Bank of Indiana v. Cook, 125 Iowa, 111, 100 N. W. 72; Galbraith v. McLaughlin, 91 Iowa, 399, 59 N. W. 338; Smith v. Eals (Iowa), 46 N. W. 1110, citing the text; McLaren v. Cochran, 46 N. W. 408; Bank of Monroe v. Mining Co., 65 Iowa, 701; Frank v. Blake, 58 Iowa, 750; Kelly v. Ford, 4 Iowa, 140; Tredick v. Walters, 81 Kan. 828, 106 Pac. 1067; Abmeyer v. First National Bank, 76 Kan. 877, 92 Pac. 1109; Kennedy v. Gibson, 68 Kan. 612, 75 Pac. 1044; Brook v. Teague, 52 Kan. 119, 34 Pac. 347, citing text; Morris v. Case, 4 Kan. App. 691, 46 Pac. 54; Christina v. Cusimans, 129 La. 873, 57 So. 157; Wing v. Ford, 89 Me. 140, 35 Atl. 1023; Kellogg v. Curtis, 69 Me. 212; Roberts v. Lane, 64 Me. 108; Cuttle v. Cleaves, 70 Me. 256; Perrin v. Noyes, 39 Me. 384; Griffith v. Shipley, 74 Md. 591, 22 Atl. 1107; Rhinehart v. Schall, 69 Md. 355; Crampton v. Perkins, 65 Md. 24; McCosker v. Banks, 84 Md. 292, 35 Atl. 935; Christian Feigenspan v. McDonald, 201 Mass. 341, 87 N. E. 624; Regester's Sons Co. v. Reed, 185 Mass. 226, 70 N. E. 53; Savage v. Goldsmith, 181 Mass. 420, 63 N. E. 918; National Revere Bank v. Morse, 163 Mass. 383, 40 M. E. 180; Merchants' Nat. Bank of Lowell v. Haverhill Iron Works, 159 Mass. 158, 34 N. E. 93; Bill v. Stewart, 156 Mass. 508, 31 N. E. 386; Sistermans v. Field, 9 Gray, 331; Merchants' Nat. Bank v. Wadsworth, 166 Mich. 528, 131 N. W. 1108; Stouffer v. Fletcher, 146 Mich. 311, 109 N. W. 684; Glines v. State Sav. Bank, 132 Mich. 638, 94 N. W. 195; Conley v. Winsor, 41 Mich. 253; Cochran v. Stein (Minn.), 136 N. W. 1037; Park v. Winsor, 115 Minn. 256, 132 N. W. 264; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Askegaard v. Dalen, 93 Minn. 354, 101 N. W. 503; Robbins v. Swinburne Printing Co., 91 Minn. 491, 98 N. W. 331, 867, citing text; Merchants' Exchange Bank v. Luckow, 37 Minn. 542; Cummings v. Thompson, 18 Minn. 246; Campbell v. Hoff, 129 Mo. 317, 31 S. W. 603; Henry v. Sneed, 99 Mo. 422, citing the text; Johnson v. McMurry, 72 Mo. 282; Horton v. Bayne, 52 Mo. 531; Devlin v. Clark, 31 Mo. 22; Carson v. Porter (Mo.), 4 West. Rep. 883; National Bank of Rolla v. Romine, 136 Mo. App. 57, 117 S. W. 104, citing text; Penfield Inv. Co. v. Bruce, 132 Mo. App. 257, 111 S. W. 888; New Madrid Banking Co. v. Poplin, 129 Mo. App. 121, 108 S. W. 115; Stewart & Co. v. Andes, 110 Mo. App. 243, 84 S. W. 1134; Hahn v. Bradley, 92 Mo. App. 399, citing text; Smith v. Mohr, 64 Mo. App. 39, citing text; Ern v. Rubinstein, 72 Mo. App. 337; Adams County Bank v. Hainline, 67 Mo. App. 483; Goodin v. Buhler, 65 Mo. App. 288; Harrington v. Butte & Boston Mining Co., 19 Mont. 411, 48 Pac. 758; Lahrman v. Bauman, 76 Nebr. 846, 107 N. W. 1008; Bolen v. Wright, 89 Nebr. 116, 131 N. W. 185; Kelman v. Calhoun, 43 Nebr. 157, 61 N. W. 615; Suiter v. National Bank, 35 Nebr. 372, 53 N. W. 205; Thompson v. West, 59 Nebr. 677; National Bank v. Miller, 51 Nebr. 156, 70 N. W. 933; McDonald v. Aufdengarten, 41 Nebr. 41, 59 N. W. 762; Fawcett v. Powell, 43 Nebr. 437, 61 N. W. 586; Kelman v. Calhoun, 43 Nebr. 157, 61 N. W. 615; Violet v. Rose, 39 Nebr. 660, 58 N. W. 216; Colby v. Parker,

time of the purchase ignorant of the fraudulent character of the note.[17] And it if be shown that the original owner lost the bill or

34 Nebr. 510, 52 N. W. 693; Perkins v. Prout, 47 N. H. 387; American Exch. Nat. Bank v. New York Belting & Packing Co., 148 N. Y. 698, 43 N. E. 168; Pelly v. Naylor, 139 N. Y. 598, 65 N. E. 317; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 202, 25 N. E. 402; Vosburg v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, 16 Am. St. Rep. 836; Woodhull v. Holmes, 10 Johns. 231; Miller v. Boyer, 79 Hun, 131, 29 N. Y. Supp. 479; Hay v. Jaeckle, 90 Hun, 114, 35 N. Y. Supp. 605; Flour City Nat. Bank v. Grover, 88 Hun, 4, 34 N. Y. Supp. 496; Donai v. Lutjens, 21 App. Div. 254, 47 N. Y. Supp. 659; Pelly v. Onderdonk, 61 Hun, 314, 15 N. Y. Supp. 915; Triplett v. Foster, 115 N. C. 335, 20 S. E. 475; Bank v. Burgwyn, 108 N. C. 62, 12 S. E. 952, 23 Am. St. Rep. 49, citing and approving the text; Tamlyn v. Peterson, 15 N. D. 488, 107 N. W. 1081; McKesson v. Stanberry, 3 Ohio (N. S.), 156; Lerch Hardware Co. v. Columbia Bank, 109 Pa. St. 240; Sloan v. Union Banking Co., 67 Pa. St. 470; Smith v. Popular Loan & Bldg. Assn., 93 Pa. St. 20; Hutchinson v. Bogg, 28 Pa. St. 294; Citizens' Trust & Savings Bank v. Stackhouse (S. C.), 74 S. E. 977; First Nat. Bank v. Harvey (S. D.), 137 N. W. 365; Union Nat. Bank of Columbus, Ohio v. Mailloux (S. D.), 132 N. W. 168; Mee v. Carlson, 22 S. D. 365, 117 N. W. 1033; Rochford v. Barrett, 22 S. D. 83, 115 N. W. 522; McGill v. Young, 16 S. D. 360, 92 N. W. 1066; Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856; Elgin City Banking Co. v. Hall, 119 Tenn. 548, 108 S. W. 1068; Taylor v. Trussell (Tex. Civ. App.), 139 S. W. 660; Churchill v. Bielstein, 9 Tex. Civ. App. 445, 29 S. W. 392; Capital Savings Bank & Trust Co. v. Montpelier Savings Bank & Trust Co., 77 Vt. 189, 59 Atl. 827; Piedmont Bank v. Hatcher, 94 Va. 231, 26 S. E. 505, citing text; Duerson v. Alsop, 27 Gratt. 248; Wilson v. Lanier, 11 Gratt. 477; Vathir v. Zane, 6 Gratt. 246; Duerson v. Alsop, 27 Gratt. 249; Gottstein v. Simmons, 59 Wash. 178, 109 Pac. 596; City Nat. Bank of Lafayette v. Mason, 58 Wash. 492, 108 Pac. 1071; Cedar Rapids Nat. Bank v. Myhre Bros., 57 Wash. 596, 107 Pac. 518; Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Fuller v. Green, 64 Wis. 169; Fitch v. Jones, 32 Eng. L. & Eq. 134; Smith v. Braine, 3 Eng. L. & Eq. 380, 16 Q. B. 244; Hall v. Featherstone, 3 H. & N. 284; Bailey v. Bidwell, 13 M. & W. 73; Story on Bills, § 193; Byles on Bills (Sharswood's ed.) 222. In the case of the Spring Brook Chemical Co. v. Dunn, the Appellate Division of the Supreme Court of New York laid down the proposition that "the burden is with a bank claiming to be a *bona fide* holder for value, to establish all the facts necessary to give it that character," citing Grant v. Walsh, 145 N. Y. 502, 40 N. E. 209, 45 Am. St. Rep. 626. Grant v. Walsh not only does not support the proposition above announced, but the decision is exactly to the contrary. It is there held that when evidence is furnished tending to show fraud in the inception of the contract, that the burden shifts from the defendant to the plaintiff, and it then becomes the duty of the plaintiff to show that he acquired title to the instrument *bona fide* and for value, etc. "Fraud in the procurement of the note," as used in Civ. Code, 1895, § 3696, which declares that the holder of a note is presumed to be such *bona fide* and for value, but "such presumption is negatived by proof of any fraud in the procurement of the note," means the fraud of the holder thereof, and has no reference to

17. Commercial Bank of Essex v. Paddick, 90 Iowa, 63, 57 N. W. 687.

note, then, also, the burden of proof is upon the holder to prove his title.[18]

§ 815a. "In the nature of things," it is remarked by Staples, J., in a Virginia case, "it is impossible to lay down any fixed, unvarying rule as to the circumstances which will be deemed sufficient to throw upon the holder the burden of showing that he has given value for the note. The courts must determine in each whether the transaction is of such a character as to rebut the presumption usually arising from the possession of the instrument." Long delay, which continued until the death of an indorser whose estate was sought to be charged, coupled with a variety of peculiar circumstances, was held in the particular case to rebut the presumption in the holder's favor, and to require of him proof that he gave value.[19]

§ 815b. The holder is not bound, however, to show that he acted cautiously in inquiring into the history of the instrument in proving his *bona fides.* If the defendant plead that the paper was made on an illegal consideration, and that the plaintiff gave no value, and the plaintiff put the whole plea in issue, it will be sufficient for the defendant to prove the illegality, and the plaintiff must then prove

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fraud in the contract out of which the note arose, or fraud of an intervening indorser. Harrell v. National Bank, 128 Ga. 504, 57 S. E. 869 (1907). If the maker proves there was fraud or illegality in the inception of the instrument and a total want of consideration therefor, then the maker would be entitled to show the grossly inadequate price paid by the purchaser for the note, as a circumstance which would create a presumption that he knew the facts that would impeach its validity. Hogg v. Thurman, 90 Ark. 93, 117 S. W. 1070. In an action by an indorsee of a bank check wherein the defendant alleged that the check was obtained by an indorsee from the payee by fraud and by him indorsed to the plaintiff without consideration, the burden was upon the defendant to prove that the check was obtained from the payee by fraud, and the burden was upon the subsequent indorsee to show by a preponderance of evidence that he was a *bona fide* holder for value. Harrington v. Butte & B. Min. Co., 27 Mont. 1, 69 Pac. 102. In an action by an indorsee of a note made by a corporation for accommodation, the burden is upon the plaintiff to prove that he purchased without notice that it was accommodation paper. National Bank of Newport v. H. P. Synder Mfg. Co., 102 N. Y. S. 478, 117 App. Div. 370. When the defense of fraud is not submitted, the burden is upon the defendant to show that the plaintiff is not an innocent holder. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942.

18. Walden v. Downing Co., 4 Ga. App. 534, 61 S. E. 1127; Union Nat. Bank v. Barber (Iowa), 9 N. W. 809; Thamling v. Duffey, 14 Mont. 567, 37 Pac. 363, 43 Am. St. Rep. 658; Robinson v. Powers, 63 Mo. App. 290. See *infra*, § 1471.

19. Duerson's Admr. v. Alsop, 27 Gratt. 249.

the consideration. And in case of fraud, the burden will be equally cast upon the plaintiff of proving consideration, if the defendant prove so much of the plea as alleges that he, the defendant, was defrauded of the bill.[20]

§ 816. Illustrations of false representation, shifting burden of proof.—In Virginia,[21] it appeared that J. R. Johnson met Platoff Zane in Philadelphia, and induced him to purchase certain lots situated in South St. Louis, an addition to the city of St. Louis, Missouri. Johnson represented them to be of great value, and likely to become a part of that city, and that he could make an unincumbered title to the purchaser. Confiding in these representations, Zane executed his promissory notes for about $14,000, and Johnson assigned one of said notes for $652.40 to John L. Vathir, who brought suit upon it, and recovered judgment against Zane. Zane obtained an injunction to this judgment; and it appeared that Johnson's representations as to the value of the lots were false; and besides that, he could make no title to them, it having reverted to the city of St. Louis in default of his payment of the purchase money. Said Allen, J.: "As a general rule, the indorsement of a negotiable note is of itself *prima facie* evidence that the indorsee has paid value for it. But when the payee has procured the note by fraud, this general presumption is rebutted, and the holder cannot recover without proving that he has paid value. The reason on which this exception to the general rule rests is briefly stated by Parke, B., in Bailey v. Bidwell, 13 M. & W. 73: 'It certainly,' he says, 'has been the universal understanding since the later cases, that if the note were proved to have been obtained by fraud, or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of some other person to sue upon it; and that such proof casts upon the holder the burden of showing that he was a *bona fide* holder for value.' "[22]

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20. Byles on Bills, 223. See *ante*, §§ 775, 795 *et seq.*; Thamling v. Duffey, 14 Mont. 567, 37 Pac. 263, 43 Am. St. Rep. 658; Schroeder v. Nielson, 39 Nebr. 335, 57 N. W. 993; Horrigan v. Wyman, 90 Mich. 121, 51 N. W. 187; First Nat. Bank of Cameron v. Stanley, 46 Mo. App. 440; Whaley v. Neill, 44 Md. App. 316; Ganz v. Weisenberger, 66 Mo. App. 110; The Hide & Leather Nat. Bank v. Alexander, 184 Ill. 416, 56 N. E. 809.

21. Vathir v. Zane, 6 Gratt. 246.

22. See Monroe v. Cooper, 5 Pick. 412; Rogers v. Morton, 12 Wend. 484; Holme v. Karsper, 5 Binn. 469. In the Bank v. Looney, 99 Tenn. 278, 42 S. W. 149, 63 Am. St. Rep. 830, it was held, "That the maker of a note was induced

"Nor is the requisition for such proof confined to cases in which the note was put into circulation by fraud, as where it was lost or stolen. In the case of Rogers v. Morton, 12 Wend. 484, the note was voluntarily given for an assumed balance, on a settlement of accounts. The balance was in part made up by a charge for a draft, of which the creditor was never holder; and proof of this fraud committed on the makers at the time the note was given, was held sufficient to throw upon the plaintiffs the burden of showing that they were *bona fide* holders for value." [23] It was held incumbent on Vathir to give proof according to this view.

§ **817.** In another case it appeared that Rector sold to Wilson & Mills, with general warranty, real estate in Washington county, Ohio, and received in part payment the note of Wilson, which he transferred as a gift to the trustees of Rector College, in Taylor county, Virginia. Previous to the assignment, Rector had mortgaged the real estate aforesaid to the Ohio Life and Trust Company, and it had been sold, and so the consideration had entirely failed.

The trustees of the college assigned the note to Wright & Baldwin, who sold it to William Lazier, who indorsed it to another party, and was sued upon, and paid it. The bill prayed that the contract for the sale of the land might be rescinded, and the note canceled. Daniel, J., said: "There is no evidence of fraud in the origin or negotiation of the note; and the mere failure of consideration does not impose on the innocent holder the onus of showing the consideration he gave for the note." In note to Chitty on Bills (10th Am. ed.), p. 648, we have a report of the case of Whitaker v. Edmonds, 1 Moody & R. 366. In that case, Patterson, J., said: "Since the decision of Heath v. Sansom, 2 B. & Ad. 291 (22 Eng. C. L. 78), the consideration of the judges has been a good deal called to the subject; and the prevalent opinion among them is that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show that there has been something of fraud in the previous steps of the transfer of the instrument, that throws upon the plaintiff the necessity of showing under what circumstances he

to execute it by false representations as to the value and income and the incumbrances on property for an interest in which it was given, does not avoid the note where the misrepresentations were not made by the vendor, or by his authority or procurement, but by parties associated with the maker in a syndicate for the purchase of the property."

23. See also Thomas v. Newton, 2 Car. & P. 606.

became possessed of it. So far I acceded to the case of Heath v. Sansom, for there were, in that case, circumstances raising a suspicion of fraud; but if I added on that occasion that, even independently of these circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill, I am now decidedly of opinion that such doctrine was incorrect." [24]

In England it has been held, that where the drawer of a bill, which he indorsed in blank, delivered it to W. to get it discounted for him, and W. went off with the bill promising to get and bring him the money, but never returned with the bill or the money, and the drawer never heard of the bill until called upon by H. to pay it, it was held that H. must prove that he gave value in order to recover on the bill.[25]

§ **818.** It is to be observed, however, that the fraud which shifts the burden of proof upon the holder of the note, and renders it necessary for him to establish *bona fide* ownership for value, must be fraud committed upon the maker; and fraud against the payee or any intermediate holder is insufficient.[26]

§ **819. Prima facie case of holder restored by proving that he gave value in due course; defendant must prove notice of fraud.**— *Fourth:* That when the holder responds by showing that he did acquire the instrument *bona fide*, for value, in the usual course of business, while it was current, and under circumstances which do not operate as constructive notice of the facts which impeach the original validity, the defendant must then prove that he had actual notice of such facts; otherwise the holder's right to a recovery against him is perfected. This principle is obviously correct, for to require the plaintiff to show absolutely that he had knowledge of facts would be to burden him with the necessity of proving an impossible negative.[27]

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24. Wilson v. Lazier, 11 Gratt. 478.

25. Hall v. Featherstone, 3 H. & N. 284; Duerson v. Alsop, 27 Gratt. 249.

26. Kinney v. Kruse, 28 Wis. 183. See Atlas Bank v. Doyle, 9 R. I. 76.

27. Young v. Lowry, 192 Fed. 825; Woodall & Son v. People's Nat. Bank, 153 Ala. 576, 45 So. 194; First Nat. Bank v. Dawson, 78 Ala. 71, citing the text; Bank of Monette v. Hale (Ark.), 149 S. W. 845; Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322; Walden v. Downing Co., 4 Ga. App. 534, 61 S. E. 1127 (as to a note stolen or otherwise appropriated); Howell v. Merchants' T. & S. Co., 134 Ill. App. 467; Dewey v. Merrit, 106 Ill. App. 156; Harbison v. Bank, 72 Ind.

He makes out a *prima facie* case by proving that the instrument was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith without notice of the fraud, because it is not likely that he would give full value for a note which he believed to be fraudulent, taking the hazard upon himself, and because it would be difficult to prove good faith

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133; Bank v. Sargent, 85 Me. 350, 29 Atl. 192, 35 Am. St. Rep. 376; Kellogg v. Curtis, 69 Me. 214; Keim v. Vette, 167 Mo. 389, 67 S. W. 223; Henry v. Sneed, 99 Mo. 422, citing the text; Johnson v. McMurry, 72 Mo. 282; Hayes v. Blaker, 138 Mo. App. 24, 119 S. W. 1004; Third Nat. Bank v. Tinsley, 11 Mo. App. 498; Smith v. Mohr, 64 Mo. App. 39; Jones v. Burden, 56 Mo. App. 199; Canajoharie Nat. Bank of Diefendorf (N. Y.), 25 N. E. 404, citing the text; Hay v. Jaeckle, 90 Hun, 114, 35 N. Y. Supp. 600; American Exch. Nat. Bank v. N. Y. Belting Co., 74 Hun, 446, 26 N. Y. S. 822; Bank v. Burgwyn, 110 N. C. 267, 14 S. E. 623, citing text; Tod v. Wick, 36 Ohio St. 390; Battles v. Laudenslager, 84 Pa. St. 446; Seymour Opera House Co. v. Thurston, 18 Tex. Civ. App. 417, 45 S. W. 810; First Nat. Bank v. Moore, 148 Fed. 953. Evidence of fraud in procuring the execution of a negotiable instrument shifts the burden of proof as to the good faith of a purchaser thereof before maturity and is admissible for that purpose, but of itself in no way tends to establish bad faith on the part of such purchaser. Vaughn v. Johnson, 119 P. 879, 20 Idaho, 669, 37 L. R. A. (N. S.) 816. In Davis v. Bartlett, 12 Ohio St. 541, Sutliff, C. J., said: "The case of Monroe v. Cooper, 5 Pick. 412, is also relied upon by the defendants in this case as an authority. That was an action by the indorsee upon a negotiable note against the members of a partnership company, by whom the note purported to be made. Two of the three partners appeared, and pleaded the general issue, and, on the trial, offered to prove that the note was made by the other partner, who had made default in the case, for his own benefit, and not for the benefit or on account of the company or with the knowledge of the other partners; but as the defendants did not offer to prove, also, that the note was due when indorsed to the plaintiff, or that he had knowledge of the facts, the judge, on the trial of the case, was of the opinion that the facts so proposed to be proved did not amount to a defense, and excluded the proof. The Supreme Court, in revising this opinion, by Wilde, J., held that the defendants had the right to prove, if they could, that fraud was practiced in the inception of the note, or that it was fraudulently put in circulation. And the Judge adds: 'This fact being established, will throw upon the plaintiff the burden of proof, to show that he came by the possession of the note fairly and without any knowledge of the fraud.' There can be no doubt that the judgment of the Supreme Court, in this case also, was strictly correct; and by the burden of proof to show possession of the note fairly and without knowledge of the fraud, he only meant that upon the defendants proving the note to have been fraudulently executed and put in circulation, that it was incumbent upon the plaintiff to prove that he received the negotiable paper before due in the usual course of trade, upon a valuable consideration, the remark of Judge Wilde is strictly correct and consonant with the authorities to which he refers; but if this remark is to be understood, as intimating that the rule in such a case imposes any further burden upon the plaintiff than to prove he purchased and received the transfer

in any better way.[28] These, at least, are the conclusions of well-considered decisions which rest, as we think, on sound reasoning, but in others the courts have indicated a more stringent rule and a disposition not to relieve the plaintiff of the burden of proof by mere proof that he gave value.[29] Unless there were circumstances which seem to bring home to him notice of the fraud or illegality imputed, the requirement of further proof than the giving of fair value seems unreasonably harsh and exacting.

Under Negotiable Instrument statute.—The effect of the statute on the question of the burden of proof has been heretofore discussed.[30] In accordance with what is considered as the effect of the statute, it has so far been generally held that on a showing of fraud on the part of the payee or of any one who has negotiated the instrument,[31]

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of the negotiable paper before due, in the usual course of trade, *bona fide*, and upon a valuable consideration it is not only not sustained by, but is opposed to, the authorities to which he refers.

28. Harbison v. Bank, 72 Ind. 133; Kellogg v. Curtis, 69 Me. 214; *ante*, § 780. See Wortendyke v. Meehan, 9 Nebr. 229, where holder who gave value was defeated, the circumstances being thought sufficient to put him on inquiry, and he did not deny knowledge of illegal consideration. In an action on a note to which a defense of fraud in procuring the note is set up, a slip which had been detached from the note before assignment and which shows consideration for which the note was given, may be admitted in evidence. Ireland v. Scharpenberg, 54 Wash. 558, 103 Pac. 801. In Scandinavian American Bank v. Johnston, 63 Wash. 187, 115 Pac. 102, the court said that when the payee is shown to have procured the note by fraud the burden devolves upon the holder to show that he is a *bona fide* holder; but after he has introduced evidence, not in any manner contradicted or disputed, showing him to be such a holder, and no circumstance appears suggesting bad faith on his part, it then devolves upon the maker to show that the holder was guilty of some neglect or wrongful act amounting to bad faith.

29. Tilden v. Barnard, 43 Mich. 376, Marston, C. J.; Giberson v. Jolley, 120 Ind. 304; Bunting v. Mick, 5 Ind. App. 289, 31 N. E. 378, 1055; Arnold v. Lane, 71 Conn. 73, 40 Atl. 921, where the court held an instruction wrong that if fraud were shown on the acceptance of a note, the law presumes the holder knew it; and was not fully remedied by adding that the presumption might be rebutted by plaintiff's showing that he bought for value and in due course. Landauer v. Sioux Falls Improvement Co., 10 S. Dak. 205, 72 N. W. 467; Eames v. Rosier, 101 Cal. 260, 35 Pac. 873, citing text.

30. See *ante*, under § 814*a*.

31. Johnson County Savings Bank v. Greeg (Colo.), 117 Pac. 1003; Shellenberger v. Nourse, 20 Idaho, 323, 118 Pac. 508; Arnd v. Alyesworth, 145 Iowa, 185, 123 N. W. 1000; City Nat. Bank v. Jordan, 139 Iowa, 499, 117 N. W. 758; City Deposit Bank v. Green, 138 Iowa, 156, 115 N. W. 893; Keegan v. Rock, 126 Iowa, 39, 102 N. W. 805; Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114; Wilson v. Kelso, 115 Md. 162, 80 Atl. 895; Link v. Jackson, 139 S. W. 588, 158 Mo. App. 63; Bank of Ozark v. Hanks (Mo. App.), 125 S. W. 221; Jobes

or that it has been negotiated in breach of faith,[32] the plaintiff must sustain the burden of proof that he is not only a holder for value and before maturity, but also without notice. This seems clearly to be required by the statutory definition of "a holder in due course." [33] But while the burden is upon the plaintiff to show that he or some person under whom he claims acquired title as a holder in due course, it has been held that there is a *prima facie* case of taking the instrument in good faith when he proves that a full consideration was paid for the paper.[34]

When, however, fraud was not committed upon the maker, but there has been a transfer of the instrument fraudulent as to the payee or intermediate holder, the defendant has the burden of proving want of good faith on the part of the purchaser in accepting the note from the fraudulent transferrer.[35]

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v. Wilson (Mo. App.), 124 S. W. 548; Midwood Park Co. v. Baker, 128 N. Y. S. 954, affirmed 129 N. Y. S. 1135; Eisengerg v. Lefkowitz, 127 N. Y. S. 595, 142 App. Div. 569; Beck v. Maller, 115 N. Y. S. 596, 131 App. Div. 243; Consolidation Nat. Bank v. Kirkland, 91 N. Y. S. 353, 99 App. Div. 121; German-American Bank v. Cunningham, 89 N. Y. S. 836, 97 App. Div. 244; Mitchell v. Baldwin, 84 N. Y. S. 1043, 88 App. Div. 265; Sutherland v. Mead, 80 N. Y. S. 504, 80 App. Div. 103; Chadwick v. Kirkman, 159 N. C. 259, 74 S. E. 968; American Nat. Bank v. Fountain, 148 N. C. 590, 62 S. E. 738; Walters v. Rock (N. D.), 115 N. W. 511; Kerr v. Anderson, 16 N. D. 36, 111 N. W. 614; Second Nat. Bank of Pittsburg v. Hoffman, 78 Atl. 1002, 229 Pa. St. 429; Schultheis v. Sellers, 223 Pa. St. 513, 72 Atl. 887, 22 L. R. A. (N. S.) 1210; Cook v. American Tubing & Webbing Co., 28 R. I. 41, 65 Atl. 641, 9 L. R. A. (N. S.) 193; Ireland v. Scharpenberg, 54 Wash. 558, 103 Pac. 801; Wells v. Duffy (Wash.), 124 Pac. 907. The statute is not an invasion by the legislature in the field of the judicial power, but simply regulates the manner of introducing relevant evidence. Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 Atl. 132. An accommodation note, made on false representations by the payee as to his intended use thereof, is obtained by fraud, within section 55, rendering its title defective, so that an indorsee, suing the maker, has the burden of proving that he is the holder for value, as required by section 59. Kennedy v. Spilka, 129 N. Y. S. 390, 72 Misc. Rep. 89.

32. Iowa Nat. Bank v. Carter, 144 Iowa, 715, 123 N. W. 237; McKnight v. Parsons, 136 Iowa, 397, 113 N. W. 858, 125 Am. St. Rep. 265; Freittenberg v. Rubel, 123 Iowa, 154, 98 N. W. 624. Ginsberg v. Shurman, 128 N. Y. S. 653, 71 Misc. Rep. 463; National Bank of Barre v. Foley, 103 N. Y. S. 553, 54 Misc. 126. But compare Crosley v. Reynolds, 196 Fed. 640.

33. See appendix, sec. 52.

34. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

35. Appendix, last sentence of sec. 59. Voss v. Chamberlain, 139 Ia. 569, 117 N. W. 269. This provision of the statute seems to codify the rule stated in § 818 of the text, on the authority of Kinney v. Kruse, 28 Wis. 183. But see Parsons v. Utica Cement Co., 82 Conn. 333, 73 Atl. 785, 135 Am. St. Rep. 278, 80 Conn. 58, 66 Atl. 1024.

CHAPTER XXV

HOLDER OF BILLS AND NOTES TRANSFERRED TO HIM AS COLLATERAL SECURITY; AND HOLDER OF BILLS AND NOTES SECURED BY MORTGAGE.

SECTION I

RIGHTS AND DUTIES OF HOLDER OF A NEGOTIABLE INSTRUMENT AS COLLATERAL SECURITY FOR A DEBT

§ **820**. Bills and notes are frequently transferred, and pledged as collateral securities for debts of the pledgor, and many questions have arisen as to the rights of the various parties concerned in such transactions. And whether or not the indorsee or pledgee becomes a *bona fide* holder, and is protected against defenses which would be available against the indorser or pledgor, is often difficult to determine. Great contrariety of opinion is found in the decisions on the subject. But by keeping in view a few well-fixed principles, we think that every case which can arise may be satisfactorily solved.

§ **821.** In the *first* place, it should be determined whether or not the party holding the instrument has the form of the legal title. If the instrument be transferable by delivery (by being payable to bearer, or bearing an indorsement in blank), he is then its *prima facie* proprietor and owner. If it be payable to order and unindorsed, he then holds only the equitable title, and cannot claim the rights of an indorsee.[1]

§ **822.** In the *second* place, if the holder be an indorsee, or a transferee by delivery of a bill or note payable to bearer, let it be ascertained whether or not he is merely the agent of the real owner or has himself an interest in the instrument; whether or not he has a bare authority, or an authority coupled with an interest. If he were only authorized to collect the proceeds for the indorser, or transferrer

1. See *ante*, § 741 *et seq.*; Bank of Chadron v. Anderson, 6 Wyo. 520, 48 Pac. 197.

by delivery, and then to apply the proceeds to the payment of a debt due to himself, this would not give him an interest in the paper itself. It would be much the same as if he were to apply the proceeds to the payment of some other debt due from the principal; nor could he have the rights of a principal instead of agent, unless there has been an actual assignment to him.[2] For if he is agent of the owner, any defense available against the owner is available against him, and this even in the case where the owner owes his agent more than the amount of the paper.[3]

§ 823. If it turn out that the holder is agent, the principal may revoke that agency at any time and recall the paper from his hands. And he cannot set up then, as we have seen, any better right than his principal. The test question, then, is simply this: has there been a change in the legal rights of the parties? If so, the transfer is irrevocable without the holder's consent. If so, there has been a consideration for the transfer—either of damages to the holder, or of benefit to the transferrer. And if so, the holder is a pledgee and *bona fide* proprietor of the paper, and is entitled to recover upon it even against those who might have made a defense against his pledgor—at least to the extent of the debt of which the instrument is collateral security.[4]

In California, where, by the provisions of the law in force, the right to proceed against a debtor by attachment was forfeited by taking such a collateral, the pledgee of a negotiable instrument was held to be, by that circumstance—if none other—a holder for value, and protected against equitable defenses.[5]

We will now enter more minutely into the various ramifications which this question assumes, applying the test above stated.

§ 824. (1) In the first place, as to collateral for debt contracted

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2. 2 Parsons on Notes and Bills, 42, 43. See Best v. Crall, 23 Kan. 482.

3. Solomons v. Bank of England, 13 East, 135, note; Lowndes v. Anderson, 1 Rose, 99. See Loewen v. Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489. Where a pledgee had notice that the pledgor had no right to pledge or dispose of the bonds for his personal account, the pledgee could not hold them as a *bona fide* holder for an advance made to the pledgor as against the real owner. Perth Amboy Mut. Loan, etc., Assn. v. Chapman, 81 N. Y. S. 38, 80 App. Div. 556, affirmed 178 N. Y. 558, 70 N. E. 1104.

4. Wyman v. Colorado Nat. Bank, 5 Colo. 34, citing the text; State v. Fitzpatrick, 1 Houst. 385 (*dictum*); Humble v. Curtis, 160 Ill. 193, 43 N. E. 749.

5. Naglee v. Lyman, 14 Cal. 455; Payne v. Bensley, 8 Cal. 260.

at the time.—When the bill or note of a third party, payable to order, is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is a *bona fide* holder for value in the usual course of business, and is entitled to protection against equities and offsets and other defenses available between antecedent parties—provided, of course, that the bill or note transferred as collateral security is itself at the time not overdue. And the same principle applies where the collateral bill or note is payable to bearer, and is transferred to the creditor by delivery. This doctrine rests upon clear grounds. There is an evident present consideration for the transfer of the collateral bill or note; a present change in the legal rights of the parties. And the text-writers, supported by an almost unbroken train of decisions, agree that the indorsee is entitled to protection to the extent of the debt secured.[6]

§ 825. (2) In the second place, as to collateral for debt not yet due.—When the debt is not yet due and the collateral bill or note is indorsed as security and there is an agreement for delay until the

6. Thompson v. Maddux, 117 Ala. 468, 23 So. 157 (or in pursuance of a previous agreement, made at the time the debt was contracted); Miller v. Boykin, 70 Ala. 476; Patridge v. Williams, 72 Ga. 808; Exchange Bank v. Butner, 60 Ga. 654; Humble v. Curtis, 160 Ill. 193, 43 N. E. 749; Slotts v. Byers, 17 Iowa, 303; National Bank of St. Joseph v. Dakin, 54 Kan. 656, 39 Pac. 180, 45 Am. St. Rep. 299; Best v. Crall, 23 Kan. 482; State Savings Assn. v. Hunt, 17 Kan. 532; McPherson v. Boudreau, 48 La. Ann. 431, 19 So. 550; Mechanics' Assn. v. Ferguson, 29 La. 549; Louisiana State Bank v. Gaennie, 21 La. Ann. 551; Williams v. National Bank of Baltimore, 72 Md. 441, 20 Atl. 191, citing text; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40; Crump v. Berdan, 97 Mich. 293, 56 N. W. 559, 37 Am. St. Rep. 345, text cited; Stewart v. Givens, 128 Mo. App. 389, 107 S. W. 422; Monett State Bank v. Eubanks, 124 Mo. App. 499, 101 S. W. 687; Jones v. Wiesen, 50 Nebr. 244, 69 N. W. 762; Helmer v. Commercial Bank, 44 N. W. 482; Connecticut Trust & Safe Deposit Co. v. Fletcher, 61 Nebr. 166, 85 N. W. 59; Connecticut Trust & Safe Deposit Co. v. Trumbo, 2 Nebr. (Unof.) 850, 90 N. W. 216; American Exch. Nat. Bank v. New York Belting & Packing Co., 148 N. Y. 698, 43 N. E. 168; Bank of New York v. Vanderhorst, 32 N. Y. 553; Watson v. Cabot Bank, 5 Sandf. 423; Ferdon v. Jones, 2 E. D. Smith, 106; Williams v. Smith, 2 Hill, 301; Second Nat. Bank v. Werner (N. D.), 126 N. W. 100; Munn v. McDonald, 10 Watts, 270; Dearman v. Trimmer, 26 S. C. 510; Bank v. Stockell, 92 Tenn. 252, 21 S. W. 523, citing and approving text; Texas Banking Co. v. Turnley, 61 Tex. 369, citing the text; Noyes v. Landon (Vt.), 10 Atl. 342; Griswold v. Davis, 31 Vt. 390; Samson v. Ward, 147 Wis. 48, 132 N. W. 629; Bowman v. Van Kuren, 29 Wis. 219; Lyon v. Ewing, 17 Wis. 70; Curtis v. Mohr, 18 Wis. 619; Jenkins v. Schaub, 14 Wis. 1; Greenway v. Orthwein, etc., Co., 29 C. C. A. 330, 85 Fed. 536.

collateral shall mature, such agreement by the creditor constitutes a consideration and makes him a holder for value.[7]

§ 825a. No presumption of agreement for delay when collateral matures later than debt secured.—If the collateral had its maturity fixed at a time later than the maturity of the debt, there would be no implied agreement for delay, because the occasion for delay would not have arisen. And the presumption would be that the indorsement of the collateral was merely intended to add by its security to the assurance that the debt would be paid. This presumption would be all the stronger if the collateral matured before the debt. And it has led to the opinion that such an indorsee would not be a holder for value. "If," says Redfield, C. J., in Atkinson v. Brooks,[8] one holds a debt due six months hence, and his debtor, as a mere volunteer service, indorses a current note or bill as collateral security, the collateral being due in three months, it could not be made to appear that such transaction, before the indorsee had been at any pains in the matter, was a contract upon consideration. The prior debt not being due, the creditor could forego nothing, and the debtor receive no advantage from the transaction. And the agreement to apply the collateral upon a debt not yet due—being without consideration—would probably, in the first instance, be revocable at will; and so also as long as the parties remained in the same situation."

§ 826. This reasoning is strong, but, withal, does not seem to us conclusive. If it is the intention of the debtor to transfer the title to and property in the instrument at the time when he so makes it collateral security, we should say that the pre-existing indebtedness would be a sufficient consideration. It is well established that a transfer of a bill or note in payment of a pre-existing debt is upon a sufficient consideration if made when the debt is due, and we can see

7. On the other hand, if the debt is due and there is no agreement for delay, the holder will not be protected against equities. Bone v. Tharp, 63 Iowa, 224; Union Nat. Bank v. Barber, 56 Iowa, 561. In Farmers' Bank of Lyons v. Dixon, (Nebr.), 136 N. W. 845, it was held that if a negotiable promissory note is transferred to a bank as collateral security to an indebtedness to the bank substantially equal to the amount of the note, and the note is so taken by the bank in the regular course of business and without notice of any defense thereto, the bank becomes an innocent holder, and the note is not subject to the defenses that may have existed as against the original payee.

8. 26 Vt. 564 (1854). See also Bowman v. Van Kuren, 29 Wis. 218.

no good ground for distinguishing the two cases. When the indorsee receives title to the collateral, he has imposed upon him the strict responsibilities and duties of a holder. If he fails to take due steps for the collection of the paper by making prompt demand, and giving notice of dishonor, the indorsers are discharged, and the loss *pro tanto* of the debt secured devolves upon him.[9] Besides, he is in the nature of things lulled into security by possession of the collateral, and after transferring it to him we do not think it would be in the power of the indorser to recall it. A debt barred by limitation is a good consideration for a new promise to pay it; a retraction of that promise cannot be made. And a debt still current should be esteemed as well a good consideration for a conditional appropriation to its payment by anticipation. Nor is it true that the creditor could forego nothing, and the debtor receive no advantage from the transaction. The latter receives the advantage of shifting the duties and responsibilities of holder on the indorsee, and the former, if indeed he actually foregoes nothing, is certainly under inducement to forego that watchfulness and concern about his debtor which he would otherwise exercise —and even if he foregoes nothing, the advantage to the debtor is sufficient. Prior parties cannot justly complain when suit is brought that defenses available against the payee or prior holder are excluded. By the very form of their contract they have put it on the world to circulate like cash—barring the gates behind it and shutting out such defenses. And if the creditor has taken them by their word, they—not he—should suffer. The question seems to us simply one of intent. If the holder takes the paper only as an agent, he simply steps in the shoes of his transferrer; but if he takes it as the proprietary holder, he takes its burdens and benefits in full.[10]

§ **827. (3) In the third place, when pre-existing debt is novated, or other securities surrendered.**—In the next place, when a pre-existing debt has matured, and the creditor surrenders securities formerly held and receives the collateral bill or note in their stead; or the debtor renews the debt by executing a new bill or note and transfers the collateral bill or note as security to the creditor—then the latter receives it in the usual course of business upon a present consideration, and is a *bona fide* holder in the full sense of the term. A leading case on this point is that of Goodman v. Simonds.[11] There

9. Jennison v. Parker, 7 Mich. 355.

10. See the New York cases on this question, § 831*c*.

11. 20 How. 343; reaffirmed in Oates v. National Bank, 100 U. S. (10 Otto)

it appeared that upon a settlement of a pre-existing debt prior securities were surrendered, and the collateral bill transferred as security for two new notes, at sixty and seventy-five days respectively, their maturity being twelve or fifteen days before the maturity of the bill. Clifford, J., said: "When the settlement was made the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitely fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already overdue, and a forbearance to enforce remedies for its recovery; and the implication is very strong that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor, and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient and valid consideration.[12] The surrender of other instruments although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute.[13]

"It seems now to be agreed, that if there was a present consideration at the time of the transfer, independent of the previous indebtedness, that a party acquiring a negotiable instrument before its maturity as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete so that it will be unaffected by any prior equities between other parties—at least to the extent of the previous debt for which it is held as collateral.[14] And the better opinion seems

247; Bank of Commerce v. Wright, 63 Ark. 604, 40 S. W. 81; Zollman v. Jackson Trust & Savings Bank, 238 Ill. 290, 87 N. E. 297; Des Moines Nat. Bank v. Chisholm, 71 Iowa, 679; First Nat. Bank v. Bentley, 27 Minn. 87; Park Bank v. Watson, 42 N. Y. 490; Ayrault v. McQueen, 32 Barb. 305; Kingsland v. Pryor, 33 Ohio St. 19; Beckhaus v. Commercial Bank (Pa.), 12 Atl. 72; Linnard's App. (Pa.), 2 Cent. 840. See also *post*, §§ 831*a*, 831*c*.

12. Etting v. Vanderlyn, 4 Johns. 237; Morton v. Burn, 7 Ad. & El. 19; Baker v. Walker, 14 M. & W. 465; Jennison v. Stafford, 1 Cush. 168; Walton v. Mascall, 13 M. & W. 453; Wheeler v. Slocum, 16 Pick. 62; Judy v. Louderman, 48 Ohio St. 562, 29 N. E. 181; Allen v. Harris, 79 Mo. App. 490.

13. First Nat. Bank v. Johnston, 97 Ala. 655, 11 So. 690; Dupeau v. Waddington, 6 Whart. 220; Hornblower v. Prond, 2 B. & Ald. 327; Rideout v. Bristow, 1 Cromp. & J. 231; Bank of Salina v. Babcock, 21 Wend. 499; Youngs v. Lee, 12 N. Y. 551. See *ante*, § 826.

14. White v. Springfield Bank, 3 Sandf. 222; New York M. Iron Works v.

to be in respect to parol contracts, as a general rule, that there is but one measure of the sufficiency of a consideration, and consequently whatever would have given validity to the bill as between the original parties is sufficient to uphold a transfer like the one in this case. We are not aware that the principle, as thus limited and qualified, is now the subject of serious dispute anywhere, and that is amply sufficient for the decision of this cause. Whether the same conclusion ought to follow where the transfer was without any other consideration than what flows from the nature of the contract at the time of delivery and such as may be inferred from the relation of debtor and creditor in respect to the pre-existing debt, is still the subject of earnest discussion, and has given rise to no small diversity of judicial decision. It seems it is regarded as sufficient in England, according to a recent case.[15] A contrary rule prevails in New York, according to several decisions, also in Tennessee, in Pennsylvania, and in Maine. It is settled that is a sufficient consideration in Massachusetts, Vermont, and New Jersey; and such was the opinion of the late Justice Story, in Swift v. Tyson, and in his valuable treatise on 'Bills of Exchange.'"[16]

§ **828.** In an English case,[17] where the defendant indorsed to the plaintiff a bill, of which he was indorsee, as collateral security for a debt of greater amount, then due, the residue of which he paid in cash, and the plaintiff failed to make presentment or to give notice it was held that he had lost recourse upon his indorser, both upon the bill and upon the original debt. Byles, J., said: "That as they had the rights, so they had the duties of holders." Willis, J., said: "The bill may be taken for or on account of the debt, but with an understanding that the party receiving it is to have the option of suing for the debt before the maturity of the bill."

Smith, 4 Duer, 362; Miller v. Pollock, 99 Pa. St. 202; Keokuk County State Bank v. Eunice Hall, 106 Iowa, 540, 76 N. W. 832; McPherson v. Boudreau, 48 La. Ann. 431, 19 So. 550; Randall v. Rhode Island Lumber Co., 20 R. I. 627; Westinghouse v. German Nat. Bank, 196 Pa. St. 249, 46 Atl. 380.

15. In Poirier v. Morris, 20 Eng. L. & Eq. 103, Lord Campbell, C. J., said: "There is nothing to make a difference between this and a common case where a bill is taken as security for a debt, and in that case an antecedent debt is a sufficient consideration." Crampton, J., said: "Whether the bill was a collateral security, or whether it has the effect of suspending the payment of the antecedent debt, is quite immaterial."

16. See *post*, §§ 831*a*, 831*d*, 831*c*.

17. Peacock v. Purcell, 14 C. B. (N. S.) 728. See §§ 971, 1276; Betterton v. Roope, 3 Lea, 220.

Adopting the view of Byles, J., we might say as well, that "as the indorsee has the duties, so he has the rights of a holder." And as those duties, as indicated by Willis, J., do not depend upon whether or not there is a suspension of the original debt, neither should the rights of the holder turn upon that question.

§ 829. (4) In the fourth place, when there is no novation of pre-existing debt, and no securities surrendered.—When the pre-existing debt has fallen due, and there is no novation of it by the execution of a new security, and no surrender of other securities held for its payment, the question whether or not the bill or note then transferred as collateral is received upon a consideration in the usual course of business, may be more difficult of solution.

§ 829a. When there is express agreement for delay.—If there is, then, an express agreement on the part of the creditor to forbear suit until the collateral should mature, or until he should have endeavored to realize from it, there is no doubt that the case would then come within the principle of Goodman v. Simonds, and that the agreement to delay would constitute the transferee a holder for value in the usual course of business. And it has been so held in many cases,[18] and recognized as a sound principle in others.[19] As said by Redfield, C. J.: [20] "The transaction possesses both the cardinal ingredients of a valuable consideration; it is a detriment to the promisee, and an advantage to the promisor. And it is no satisfactory answer to say that the party who takes such a bill or note is in the same condition he was before. This is by no means certain. He has for the time foregone the collection of his debt, and in such matters time is of the essence of the transaction. And the debtor thereby gains time—it may be more or less—but of necessity, some time is thereby gained; and in such matters this is always accounted an advantage, and is

18. Farmer v. First Nat. Bank, 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79; Mix v. National Bank, 91 Ill. 20; Worcester Nat. Bank v. Cheney, 87 Ill. 602; Manning v. McClure, 36 Ill. 498; Decre v. Marsden, 88 Mo. 512; Paulette v. Brown, 40 Mo. 54; Farmers' Nat. Bank v. McCall, 25 Okl. 600, 106 Pac. 866; Atkinson v. Brooks, 26 Vt. 574. See *ante*, § 827. In Reid v. Bank of Mobile, 70 Ala. 210, and Fenonille v. Hamilton, 35 Ala. 319, it was held that one who takes negotiable paper as collateral security for the payment of a pre-existing or antecedent debt, is not a purchaser for value in the usual course of trade, though indulgence or forbearance is granted.

19. Swift v. Tyson, 16 Pet. 1 (1842).

20. Atkinson v. Brooks, 26 Vt. 574.

often of the most vital consequence to the debtor." The doctrine was enunciated with great force by Story, J., in Swift v. Tyson,[21] though the question was not there distinctly presented, as it is in the case just quoted.

§ 830. When collateral is given for overdue debt, is there implied agreement for delay until collateral matures?—But when the collateral bill or note is simply indorsed by the debtor to the creditor, who holds his overdue paper, and no express agreement is entered into, the question whether or not the indorsee is a holder for value has been thought to turn upon the question whether or not there is an implied suspension of the prior debt until the collateral should become due.[22] If there is an agreement for forbearance of the prior debt, it is as binding when implied as when expressed in terms; and in the United States, as well as in England, the doctrine is settled that the indorsee of the bill or note of a third party, who takes it on account of a precedent debt, takes it by implication as conditional payment, and the antecedent debt is not extinguished, but suspended until the bill or note given in conditional payment has fallen due.[23]

21. 16 Pet. 1.

22. Manning v. McClure, 36 Ill. 489. See also Pitts v. Foglesong, 37 Ohio St. 679; Hotchkiss v. Plaster Co., 41 W. Va. 357, 23 S. E. 576, text cited.

23. See chapter XXXIX, on Conditional and Absolute Payment, vol. II, § 1269 *et seq.*; Blanchard v. Stevens, 3 Cush. 168 (1849). The court thought that the note was taken in payment of a pre-existing debt, but said, per Dewey, J.: "If, however, the case had been one of a note taken as collateral security, it is difficult for us to perceive any sound reason for a different result. All of the cases, those of the New York court inclusive, concur in this, that if the party receiving the note parts with anything valuable, he is entitled to enforce the payment of the note, irrespective of the equities as between the original parties. But may you not as well show a legal consideration by showing forbearance to act as by showing an act done? A damage to the promisee is all that is necessary to show a consideration for a promise; and ought not the same rule to apply in protection of a note transferred to him? If the party had not received the note as collateral security, he might have pursued other remedies to enforce the security or payment of his debt. He might have obtained other securities or perhaps payment in money. It is a fallacy to say that, if the plaintiffs are defeated in their attempt to enforce the payment of these notes, they are in as good a situation as they would have been if the notes had not been transferred to them. That fact is assumed, not proved, and, from the very nature of the case, is matter of entire uncertainty. The convenience and safety of those dealing in negotiable paper seem to require and justify the rule that when a person takes a negotiable note not overdue or apparently dishonored, and without notice, actual or otherwise, of want of consideration or other defense thereto, whether in payment of a precedent debt, or as collateral security for a debt, the holder would have the legal right

When the new bill or note so received falls due, the creditor may bring suit upon the original debt, or upon the new bill or note, or upon both, at his election; so that the new bill or note is a collateral in any case unless there be an express agreement or a special usage, as in some of the States, that the acceptance of the new bill or note shall, *prima facie*, extinguish the debt.

§ 831. When agreement for delay cannot be inferred.—But this

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to enforce the same against the parties thereto, notwithstanding such defense might not have been effectual as between the original parties thereto." In Manning v. McClure, 36 Ill. 498, Lawrence, J., said: "It is said that the position of the indorsee, in cases of this kind, is not different from that of a general assignee for the benefit of creditors. What we have already said shows wherein, in our opinion, the difference consists. In the case of a general assignment, there is no ground for presuming forbearance as one of the objects, or any implied agreement to forbear on the part of the creditors. Indeed, these general assignments are ordinarily made without the wish or knowledge of the creditors, and where the object is not fraud it is generally to secure an equal distribution of the assets. The assignee is a mere trustee, to collect what may be due the assignor for the benefit of his creditors. We have stated why, in our opinion, the equity is with the indorsee, to wit, that by the almost universal usage of the world of commerce, a transaction of this sort is understood by the parties to imply further forbearance on the pre-existing debt, and thus the indorsee is lulled into a false security by means of an instrument which the person sought to be held liable has made and put in circulation. We have only to add, that the line of decisions which we follow contributes to that stability in negotiable paper which is so important a consideration in a mercantile community. To accomplish this has been the constant tendency of judicial decisions, from the time of Chief Justice Holt to the present day. The value of this stability to commerce is acknowledged by all courts, and by all writers upon mercantile law. It is easy to see how much it strengthens credit and facilitates the multitudinous transactions of a commercial people. We are led then by what we consider the equities between the parties, and by the acknowledged policy of giving stability to negotiable paper, to hold that the indorsee of such paper, before its maturity, taking it as payment or security for a pre-existing debt, and without any express agreement, shall be deemed a holder for a valuable consideration, in the ordinary course of trade, and shall hold it free from latent defenses on the part of the maker." See also Worcester Nat. Bank v. Cheney, 87 Ill. 602, approving the text; Bank of Commerce v. Wright, 63 Ark. 604, 40 S. W. 81; Benton v. German American Nat. Bank, 45 Nebr. 850, 64 N. W. 227. *Contra*, Bowman v. Van Kuren, 29 Wis. 220, Dixon, C. J.: "We forbear to express any opinion further than that the mere transfer of the collateral raises no presumption of a stipulation for further time to pay a pre-existing debt, which will operate to defeat the equities of the maker or indorser, as the same existed before the transfer was made; which is all it is necessary to decide in this case." In Tennessee it is held that the transfer of negotiable paper before maturity as collateral for a matured debt, is not in the due course of trade, and that if it were paid before such transfer, the holder cannot recover.

implication, that the precedent debt is suspended until the maturity of the collateral bill or note, only arises in cases where the latter is equal [24] or greater in amount than the debt which it is given to secure.[25] And, therefore, where the collateral is less in amount, there cannot be any inferred consideration of forbearance or delay to constitute the holder, on that ground, a holder for value.

§ 831a. Becoming a party to the instrument transferred as collateral for pre-existing debt alone as protecting transferee as a bona fide holder.—When there is no novation of the pre-existing debt or surrender of other securities, nor any express or implied agreement for forbearance and delay as to the pre-existing debt, the transferee of the collateral cannot be regarded as a *bona fide* holder for value within the law merchant, unless simply becoming a party to the bill or note transferred as collateral security for the debt, and the existence of the debt, are sufficient to create that relation. Many cases deny that it is.[26] The general and better rule, however, would seem to be

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24. See Michigan State Bank v. Leavenworth, 28 Vt. 209.

25. See Redfield & Bigelow's Lead. Cas. 203; Hotchkiss v. Plaster Co., 41 W. Va. 357, 23 S. E. 576, text cited.

26. Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Miller v. Boykin, 70 Ala. 476; Wagner v. Simmons, 61 Ala. 143; Cullum v. Branch Bank, 4 Ala. 21; Bertrand v. Barkman, 8 Eng. (Ark.) 150; Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331; Noteboom v. Watkins, 103 Iowa, 580, 70 N. W. 766; Nutter v. Stover, 48 Me. 169; Bramhall v. Beckett, 31 Me. 205; Smith v. Bibber (Me.), 19 Atl. 89; Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051; First Nat. Bank v. Strauss (Miss.), 6 So. 233; Brainard v. Davis, 2 Mo. App. 490; Leslie v. Bassett, 129 N. Y. 523, 29 N. E. 834; Coddington v. Bay, 20 Johns. 637; Stalker v. McDonald, 6 Hill, 93; Prentiss v. Graves, 33 Barb. 621 (see further as to New York cases, *post*, § 831c); Pitts v. Foglesong, 37 Ohio St. 679; Roxborough v. Messic, 6 Ohio St. 448; Schaeffer v. Fowler, 111 Pa. St. 458; Carpenter v. National Bank of the Republic, 106 Pa. St. 171; Maynard v. National Bank, 98 Pa. St. 250; Pennsylvania Bank v. Frankish, 91 Pa. St. 339; Ferris v. Tavel, 87 Tenn. 391; Goslin v. Griffin, 85 Tenn. 737; Napier v. Elam, 5 Yerg. 108; Prentice v. Xane, 2 Gratt. 262 (as to defenses against the person from the holder received it); Cook v. Helms, 5 Wis. 107. In Loewen v. Forsee, 137 Mo. 29, 38 S. W. 712, 59 Am. St. Rep. 489, this rule was reaffirmed, following Goodman v. Simonds, 19 Mo. 107, and repudiating Grant v. Kidwell, 30 Mo. 455. See also Fitzgerald v. Barker, 96 Mo. 665. The rule was applied to a warehouse receipt. See Wright v. Mississippi Valley Trust Co., 144 Mo. App. 640, 129 S. W. 407, and Conrad v. Fisher, 37 Mo. App. 413. It was so held in Porter v. Andrus, 10 N. D. 558, 88 N. W. 567, the court saying that a different question would have been presented had the transferees acquired the note by guaranty or indorsement, where prior indorsements had been made of the note, as the duty

that adopted by the Supreme Court of the United States,[27] and followed in a number of the States, declaring that a holder should be considered a holder for value, though there may have been no other consideration than a transfer of the instrument as collateral security for an antecedent debt.[28] It is to be noticed, however, that the rulings

would have devolved upon the plaintiffs to see that such prior indorsers were duly charged by demand and notice, and the note protested in case of nonpayment.

27. *See post*, § 831*b*.

28. Payne v. Bensley, 8 Cal. 260; Murphy v. Gumaer, 12 Colo. App. 472, 55 Pac. 951; Walden v. Downing Co., 4 Ga. App. 534, 61 S. E. 1127; Rockville Nat. Bank v. Citizens' Gas Light Co., 72 Conn. 581, 45 Atl. 361; Mann v. Merchants' Loan & Trust Co., 100 Ill. App. 224, Proctor v. Baldwin, 82 Ind. 376; Straughan v. Fairchild, 80 Ind. 598; Black v. First Nat. Bank, 96 Md. 399, 54 Atl. 88; Stoddard v. Kimball, 6 Cush. 469; Blanchard v. Stevens, 3 Cush. 162; Chicopee Bank v. Chaplin, 8 Metc. (Mass.) 40; First Nat. Bank v. Busch, 102 Minn. 365, 113 N. W. 898; Allaire v. Hartshorne, 1 Zabr. 665; Brook v. Vannest, 59 N. J. L. 163, 59 Am. St. Rep. 578; Fretwell v. Carter, 78 S. C. 531, 59 S. E. 639; Third Nat. Bank of Springfield, Mass., v. Nat. Bank of Commerce (Tex. Civ. App.), 139 S. W. 665; State Bank of Chicago v. Holland (Tex. Civ. App.), 128 S. W. 435; Martin v. German American Nat. Bank (Tex. Civ. App.), 102 S. W. 131; Watzlavzick v. Oppenheimer, 38 Tex. Civ. App. 306, 85 S. W. 855; Alexander v. Bank, 19 Tex. Civ. App. 620, 47 S. W. 840, citing text; May v. Martin, 32 Tex. Civ. App. 132, 73 S. W. 840; Atkinson v. Brooks, 26 Vt. 569; American Saving Bank & Trust Co. v. Helgesen, 64 Wash. 54, 116 Pac. 837; Mercantile Bank v. Boggs, 48 W. Va. 289, 37 S. E. 587; Hotchkiss v. Plaster Co., 41 W. Va. 357, 23 S. E. 576, citing text. Palmer v. Richards, 1 Eng. L. & Eq. 529; Story on Bills, § 192. In Birkett v. Elward, 68 Kan. 295, 74 Pac. 1100, 64 L. R. A. 568, 104 Am. St. Rep. 405, the court said: "The rule in the Federal courts as well as in those of England and Canada is that the holder of a negotiable note taken as collateral security for a pre-existing debt is a holder for value in due course of business, and as such is protected against all latent equities of third parties. The State courts that have passed upon the question are in irreconcilable conflict. The cases are collected in volume IV of the American and English Encyclopedia of law, second edition, pages 209 to 293 and in volume VII of the Cyclopedia of Law and Procedure, pages 932 to 935. The lists there given indicate with substantial, but not absolute correctness the line of cleavage. * * * A careful examination of the cases cited in the lists referred to discloses that in the following states the rule of the federal courts has been adopted, although in California and Nevada the matter is affected by statutory provisions that the acceptance of the security forfeits a right to attach: California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Rhode Island, South Carolina, Texas, Vermont, and West Virginia. Nebraska also is now committed to this doctrine: Lashmett v. Prall, 2 Nebr. (Unof.) 284, 96 N. W. 152. Such citations further show that in the following states the rule has been denied: Alabama, Arkansas, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, New Hampshire, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Virginia, and Wisconsin. North Carolina also should now be placed in this list, but there as

discussed in the preceding sections, holding that a holder receives a negotiable instrument for value on being taken as collateral security, when some other consideration has entered into the transfer, does not necessarily mean that in the absence of such other consideration, the holder would take the instrument subject to defenses. For instance, in a recent Arkansas case,[29] the court referred to previous cases decided in that State,[30] and said that the transfers in those cases were accompanied by other transactions or promises, which the court held to constitute a new consideration, and, considering the question herein discussed as squarely presented for the first time in that court, held that a transferee of a note merely as collateral security, is a holder for value in due course of business.[31]

well as in Tennessee and in Virginia, the recent adoption by the legislature of a complete code relating to negotiable instruments is held to have changed the rule." See *infra*, under Negotiable Instrument statute.

29. Exchange Nat. Bank v. Coe, 94 Ark. 387, 127 S. W. 453.

30. Farmer v. First Nat. Bank, 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79; Bank of Commerce v. Wright, 63 Ark. 604, 40 S. W. 81.

31. In Maitland v. Citizens' Nat. Bank, 40 Md. 540; Alvey J., after quoting Swift v. Tyson and the New York cases, said: "Subsequently the doctrine has been mooted in the Supreme Court of the United States, upon the theory that the case of Swift v. Tyson did not call for the decision of the broad and comprehensive question, whether the holder of a negotiable note, received simply as collateral security for a pre-existing debt, should be regarded as a holder for value, and, if received *bona fide*, protected against antecedent equities. In the case of Goodman v. Simonds, 20 How. 343, the question was much discussed, and though the facts of that case did not require the expression of a direct opinion upon the subject, yet it is not difficult to perceive the inclination of the court in favor of the principle of their former decision; as they take care to fortify it by showing that it is in accordance with the decisions in England, and in many of the States of this country. In the later case of McCarty v. Roots, 21 How. 432, 439, which arose on the indorsement of an accommodation bill, and where the defendant pleaded that the bill has been delivered to the plaintiff by the indorser as collateral security for a pre-existing liability of the indorser, and for no other consideration, upon demurrer to the plea, and the demurrer being sustained by the court below, the Supreme Court held the demurrer properly sustained, and expressly declared that the delivery of the bill to the plaintiff as collateral security for a pre-existing debt, under the decision of Swift v. Tyson, was legal, and consequently the plaintiff was entitled to recover. The principle, therefore, may be taken to be established in the Supreme Court, and, indeed, in the entire Federal jurisdiction of the country; as upon commercial questions the State adjudications are not accepted by the Federal courts as binding rules of decision. In this State there has been no decision of the appellate court, going to the extent of maintaining fully the doctrine of the cases in the Supreme Court, to which we have referred. In the case of the Cecil Bank v. Heald *et al.*, 25 Md. 563, this court held that a *bona fide* holder of negotiable paper, for value, without notice, will be protected against the antece-

Under Negotiable Instrument statute.—It is generally conceded that the conflict of authority discussed in the preceding sections of the text has been settled in those states which have adopted the statute,

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dent equities existing between the original parties, and that such holder is entitled to protection where he has received the paper in payment of an antecedent debt, regarding such debt as a valuable consideration; and the case of Swift v. Tyson was so far approved, as it declared that the receiving of negotiable paper in payment of a pre-existing debt is according to the known usual course of trade and business. The court, however, declined expressing any opinion upon the right of a holder of a negotiable instrument received by him as security for a pre-existing debt. The case of Miller v. The Farmers' & Mechanics' Bank of Carroll County, 30 Md. 392, has been relied on by the counsel of defendants, as maintaining a doctrine somewhat in variance with that maintained in Swift v. Tyson. But we are not of that opinion. The case of Miller v. The Bank was the ordinary case of a bank asserting its lien upon security in its hands for the payment of balances due from its customers. According to the law of the land, the bank, a kind of factor in pecuniary transactions, was entitled to a lien upon all the securities for money of its customers in its hands for its advances to such customers, in the ordinary course of business, without reference to the true ownership of such securities, if the bank was without knowledge upon the subject (Davis v. Bowsher, 5 T. R. 488; Collins v. Martin, 1 Bos. & P. 648; Barnett v. Brandao, 6 M. & Gr. 630); and the question was, whether the bank had received the note from its customers in its usual course of dealing without notice of the true ownership, and whether any credit had been given on the faith of it. There being, then, no adjudication in the State to restrict the application of the principle as maintained in the decisions of the Supreme Court to which we have referred, we have no hesitation in giving to it our full approval; believing it to be supported by reason and the usual and ordinary course of dealing in the commercial community, as well as by a decided preponderance of judicial authority. Indeed, so well established is the principle, as applicable to accommodation paper, that we find Mr. Parsons, in his works on Notes and Bills, vol. I, p. 226, stating that it is universally conceded, that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it, either in payment or as collateral security for an antecedent debt, and the maker will have no defense. See also Lord v. Ocean Bank, 20 Pa. St. 384. Applying the principle just stated to the case before us, there can be no doubt of the sufficiency of the consideration for the transfer of the note to the plaintiff, whether it was as collateral security for a pre-existing or a contemporaneous debt, or to secure future discounts or advances, or all combined. In either case, the consideration would be valuable in the sense of the rule which protects the holder of negotiable paper, and the plaintiff be entitled to the full benefit of the security, unless *mala fides*, or notice of such facts as will impeach its title to the note, be shown." If the holder obtained notes from the owner by fraud and used them as collateral to secure a debt of such holder, it devolved upon the pledgee to show that he took them in good faith, for value, before maturity, and in the usual course of business; but if the owner parted with the possession of the papers to the holder knowingly and voluntarily, and thereby enabled him to inflict a loss either upon the owner or pledgee, the pledgee's possession would be *prima facie* evidence of title, and he would be presumed to have acquired the notes in good faith, for value,

so that it is the rule in those states, in view of the several provisions of the statute,[32] that one who takes a note merely as collateral security for a pre-existing debt is regarded as a holder for value.[33]

§ 831b. In the United States Supreme Court the question under consideration was fairly presented, and it was called on to determine whether the transfer of a negotiable note, *merely*, as collateral security for a pre-existing debt, was such a negotiation as excluded defenses which were available between anterior parties. In the case referred to, it appeared that the Brooklyn City and Newtown Railroad Company executed and delivered to H. & J. a certain note for the purpose only of raising money for the company; and that H. & J. indorsed it in blank, and transferred it as security for a call loan to the National Bank of the Republic. The court sustained the right of the bank to recover the railroad company, notwithstanding the fact that the transaction was in New York, in which State the decisions of the courts are in principle, opposed to such right. And the opinions of Judges Harlan, Clifford, and Bradley are most learned and able expositions of the subject in all of its ramifications.[34]

before maturity, in the usual course of business, and without notice. Kittler v. Studbaker, 113 Ill. App. 342.

32. Appendix, secs. 25, 26, 27, 30, 52, 191.

33. Melton v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166; *In re* Hopper-Morgan Co., 154 Fed. 249; State Bank of Halstad v. Bilstad (Iowa), 136 N. W. 204; Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331; Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114; Wilkins v. Usher, 123 Ky. 696, 97 S. W. 37; National Bank of Commerce in St. Louis v. Morris, 156 Mo. App. 43, 135 S. W. 1008; Milino v. Kauffmann, 93 N. Y. S. 669, 104 App. Div. 442; Petrie v. Miller, 67 N. Y. S. 1042, 57 App. Div. 17, affirmed 173 N. Y. 596, 65 N. E. 1121; Brewster v. Shrader, 57 N. Y. S. 606, 26 Misc. 480; Brooks v. Sullivan, 129 N. C. 190, 39 S. E. 822; Payne v. Zell, 98 Va. 294, 36 S. E. 379. To the extent of the amount due him. Graham v. Smith, 155 Mich. 65, 118 N. W. 726. *See post*, under § 832*a*. The fact that a demand note was payable to a bank did not prevent its becoming a holder for value as against an accommodation maker. Lowell v. Biskford, 201 Mass. 543, 88 N. E. 1. An agreement to extend the time for payment of a debt is ample consideration within sections 25 and 27 of the statute for an agreement in a collateral note that notes pledged may be held to secure any other debt. American Nat. Bank v. J. S. Minor & Son, 135 S. W. 278, 142 Ky. 792. This rule is not affected by section 54 of the statute. Felt v. Bush (Utah), 126 Pac. 688. One who has advanced to the payee of a check the full amount of the check, is entitled to a lien upon the paper for the full amount thus advanced, and under the statute must be deemed to be a holder for value to the extent of the lien. Blairsville Nat. Bank v. Crabbs, 44 Pa. Super. Ct. 454.

34. Railroad Co. v. National Bank 102 U. S. (12 Otto) 25 (1880), Harlan,

§ 831c. New York decisions.—In the leading case in New York, on the question under consideration, it was held that to constitute the transferee of a negotiable instrument, a purchaser "for value," in the sense of the law merchant, so as to protect him against defenses available against his transferrer, he must pay something in money or property; some subsisting debt must be satisfied or suspended, or some new responsibility must be incurred; and that the mere transfer of the paper as collateral security for an antecedent debt or liability does not, *per se*, place the transferee upon the superior footing of a holder for value.[35] Many phases of the question are

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J., pursuing the views set forth in sections 828, 831, and saying: "We are of opinion that the undertaking of the bank to fix the liability of prior parties, by due presentation for payment, and due notice in case of nonpayment—an undertaking necessarily implied by becoming a party to the instrument—was a sufficient consideration to protect it against equities existing between the other parties, of which it had no notice. It assumed the duties and responsibilities of a holder for value, and should have the rights and privileges pertaining to that position. * * * Our conclusion, therefore, is, that the transfer before maturity of negotiable paper, as security for an antecedent debt, *merely, without other* circumstances, *if the paper be so indorsed that the holder becomes a party to the instrument*, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in the payment of such debt." Clifford, J., said: "Bills and notes of the kind indorsed in blank, *or payable to bearer*, when transferred to an innocent holder, create the same liability as if indorsed at the time of the transfer." Bradley, J., said: "Security for the payment of a debt actually owing, is a good consideration, and sufficient to support a transfer of property. When such transfer is made for such purpose it has due effect as a complete transfer, according to the nature and incidents of the property transferred. When it is a promissory note or bill of exchange it has the effect of giving absolute title and of cutting off prior equities, provided the ordinary conditions exist to give it that effect. If not transferred before maturity, or in due course of business, then, of course, it cannot have such effect. But I think it is well shown in the principal opinion that a transfer for the purpose of securing a debt is a transfer in due course." While the courts of Tennessee hold *contra* on the main proposition, yet in that State it has been held that the transfer of notes is for value when made as collateral security for a pre-existing debt, upon consideration of the grant of a definite extension of the time for the payment of such debt. Atlanta Guano Co. v. Hunt, 100 Tenn. 89, 42 S. W. 482. See also Scherer & Co. v. Everest, 168 Fed. 822.

35. Bay v. Coddington, 5 Johns. Ch. 54 (1821); affirmed in Coddington v. Bay, 20 Johns. 637; approved in Francia v. Joseph, 3 Edw. Ch. 182 (1838); Stalker v. McDonald, 6 Hill, 93 (1848); Phœnix Ins. Co. v. Church, 81 N. Y. 222 (1880); Rosa v. Brotherton, 10 Wend. 85 (1833); Ontario Bank v. Worthington, 12 Wend. 600 (1834); Payne v. Cutler, 13 Wend. 605 (1835); Wardell v. Howell, 9 Wend. (N. Y.) 173; Laurence v. Clark, 36 N. Y. 128 (1867); Rochester Printing Co. v. Loomis, 45 Hun, 93. See Burnham v. Merchants' Bank, 92 Wis. 277, 66 N. W.

presented in the cases in that State; and the transferee has been declared to be entitled to protection as a *bona fide* holder for value in the following instances: (1) Where the collateral note was taken for a loan contracted on the faith of its transfer;[36] (2) where the transferee of the note surrendered a security for the antecedent debt;[37] (3) where he received the note in payment of a previous note which was surrendered and canceled;[38] (4) where he received the note as absolute payment of pre-existing debt and not merely as security;[39]

510; Leslie v. Bassett, 129 N. Y. 523, 29 N. E. 834. See the new Negotiable Instrument Law of New York, § 51, which declares that "An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time."

36. Williams v. Smith, 2 Hill, 301 (1842); Bank of New York v. Vanderhorst, 32 N. Y. 553 (1865); Bookheim v. Alexander, 64 Hun, 459, 19 N. Y. Supp. 776.

37. Bank of Salina v. Babcock, 21 Wend. 499 (1839), Nelson, Ch. J.: "The court ought not to speculate about the probability of reviving these canceled securities in case the paper upon the strength of which they were canceled turn out to be unavailable." Park Bank v. Watson, 42 N. Y. 490 (1870); Phœnix Ins. Co. v. Church, 81 N. Y. 222; Goodwin v. Conklin, 85 N. Y. 21 (1881); Ayrault v. McQueen, 32 Barb. 305. In Stettheim v. Myer, 33 Barb. 215, a security was surrendered and part cash paid. Farrington v. Frankfort Bank, 24 Barb. 554.

38. Pratt v. Coman, 37 N. Y. 440 (1868); Brown v. Leavitt, 31 N. Y. 113 (1865); Clothier v. Adriance, 51 N. Y. 326 (1873); some security seems to have been surrendered with the old one. Youngs v. Lee, 12 N. Y. 551. Held, holder for value to extent of note surrendered. Day v. Sanders, 1 Abb. Ct. App. Dec. 495; Paddon v. Taylor, 44 N. Y. 371 (1871). The acceptance of a letter of credit in payment of an indebtedness, for which he had receipted in full, and had thereupon relinquished his then right to legally enforce his claim for such indebtedness, constitutes such a party a *bona fide* holder for value, and the defense that the letter of credit had been obtained by the original payee upon false and fraudulent representations, cannot avail against such holder for value. See Johannessen v. Munroe, 9 App. Div. 409, 41 N. Y. Supp. 586; Tompkins County Nat. Bank v. Bunnell & Eno Co., 8 App. Div. 90, 40 N. Y. Supp. 411.

39. Bank of Sandusky v. Scoville, 24 Wend. 115 (1840), Bronson, J.; Bank of St. Albans v. Gilliland, 23 Wend. 311 (1840), Nelson, Ch. J.; Phœnix Ins. Co. v. Church, 81 N. Y. 226 (1880), Andrews, J., saying: "That the actual extinguishment and discharge of a prior debt upon the transfer of a note of a third person by the debtor to the creditor is a parting with value by the former, was held in Bank of St. Albans v. Gilliland, and Bank of Sandusky v. Scoville. If these cases are in any respect inconsistent with prior or subsequent decisions of the court, the inconsistency is to be found in the conclusion that the prior debts were extinguished by the transactions in those cases: a conclusion which it may be thought was reached upon evidence which, if the dealings had been between individuals, would not, according to other cases, have been sufficient to establish an extinguishment." Gould v. Segee, 5 Duer, 260; Mayer v. Mode, 14 Hun, 155 (1878). In New York Marbled Iron Works v. Smith, 4 Duer, 377 (1855), Oakley, Ch. J., said: "Since our judgment in White v. Springfield Bank, 3 Sandf. 7,

(5) where he received the note with a valid agreement for extension of time, or with an agreement not to sue upon a pre-existing debt; [40] (6) where he received the note, paying part cash, and applying residue in payment of a pre-existing debt; [41] (7) where he received the note in part payment of the pre-existing debt, surrendering old notes and taking new note for balance; [42] (8) and where he received the note, and discontinued proceedings upon an execution.[43]

And the transferee has been held not entitled to protection as a purchaser for value: (1) Where the note transferred was hypothecated as security for a pre-existing debt; [44] (2) where the note was transferred as collateral security, and there was an agreement for forbearance and the surrender of a collateral note previously held; [45] (3) where the note was transferred on account of a precedent debt (and a dishonored check surrendered), with no indication that it was taken in absolute payment beyond that of a receipt for it in payment; [46] (4) where a time draft was fraudulently diverted in payment

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justified as it is by the prior decisions of the Supreme Court in the Bank of Salina v. Babcock, 21 Wend. 499; Bank of Sandusky v. Scoville, 24 Wend. 115, and Bank of St. Albans v. Gilliland, 23 Wend. 311, the law, at least in this court, must be considered as settled, that the satisfaction of a precedent debt is as truly a valuable consideration for the transfer of a negotiable bill or note as the advance in cash of its amount at the time of the transfer."

40. Merchants' & Farmers' Bank v. Wexson, 42 N. Y. 438 (1870). In Grocers' Bank of Penfield, 7 Hun, 279 (1876), it was held that suspending pre-existing debt and extending time protected the transferee as a purchaser for value.

41. Mechanics' & Traders' Nat. Bank v. Crow, 60 N. Y. 85 (1875).

42. Chrysler v. Renois, 43 N. Y. 209 (1870); Weems v. Shaughnessy, 70 Hun, 175, 24 N. Y. Supp. 271.

43. Boyd v. Cummings, 17 N. Y. 101 (1858).

44. Stalker v. McDonald, 6 Hill, 93 (1848). See also Webster v. Van Steenburgh, 46 Barb. 312; Chesbrough v. Wright, 41 Barb. 28; Ontario Bank v. Worthington, 12 Wend. 600.

45. Francia v. Joseph, 3 Edw. Ch. 182 (1838).

46. Phœnix Ins. Co. v. Church, 81 N. Y. 218 (1880); Potts v. Mayer, 74 N. Y. 594 (1878). In Payne v. Cutler, 13 Wend. 605 (1835), the note was charged up in an account as payment, but the transferee was held not to be a holder for value. In Buhrman v. Baylis, 14 Hun, 608 (1878), the note was taken in payment of a pre-existing debt, but the transferee was held not a *bona fide* holder for value, partly upon the ground, as it would seem, that he was chargeable with notice of circumstances affecting its validity. In Schepp v. Carpenter, 51 N. Y. 602 (1873), Johnson, Comr., said: "The existence of the debt from Church to the plaintiff was a sufficient consideration between them to sustain a promise to pay it or a transfer of property to secure its payment, and according to the doctrine which has prevailed in this State for many years, to sustain the transfer of a note made for the debtor's accommodation and general benefit. When, however, an accom-

of a past-due debt;[47] (5) where the note was indorsed by the debtor of a call loan, with agreement for a little delay, but with no definite extension of time;[48] (6) and where the note was taken in conditional payment, and suit on pre-existing debt dismissed.[49] To reconcile the New York decisions is impossible.

§ 832. When instrument is transferred in absolute payment.—There is no doubt, we think, that if the paper be indorsed in payment of a pre-existing debt, the purchaser is protected against equities,[50] though there are authorities which hold otherwise.[51]

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modation note is made for a specific purpose, and has been diverted to some other purpose, the rule is different, and the party asserting a title to it must show himself to be a *bona fide* holder."

47. Moore v. Ryder, 65 N. Y. 438 (1875).

48. Atlantic Nat. Bank v. Franklin, 55 N. Y. 235 (1873).

49. Wardell v. Howell, 9 Wend. (N. Y.) 173 (1832). In Rosa v. Brotherton, 10 Wend. 85 (1833), Savage, Ch. J., giving the opinion of the court, said: "The holder of a note, negotiable upon its face, who receives it in payment of a precedent debt, or responsibility incurred, takes it subject to all the equities existing between the original parties." But this is no longer the rule in New York, as will be seen from more recent decisions already cited.

50. See *ante*, § 184. Swift v. Tyson, 16 Pet. 1; Haden v. Lehman, 83 Ala. 243; Marks v. First Nat. Bank, 79 Ala. 550; Reid v. Bank of Mobile, 70 Ala. 210; Mayberry v. Morris, 62 Ala. 116; Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Barney v. Earle, 13 Ala. 106; Tabor v. Merchants' Nat. Bank, 48 Ark. 454, citing the text; Rockville Nat. Bank v. Citizens Gas Light Co., 72 Conn. 581, 45 Atl. 361; Brush v. Scribner, 11 Conn. 388; Bush v. Peckard, 3 Harr. 385; Harrell v. National Bank of Commerce, 128 Ga. 504, 57 S. E. 869; Mix v. National Bank, 91 Ill. 20; Worcester Nat. Bank v. Cheney, 87 Ill. 602; Manning v. McClure, 36 Ill. 490; McKnight v. Kinsley, 25 Ind. 336; Draper v. Cowles, 27 Kan. 484; May v. Quimby, 3 Bush, 96; Norton v. Waite, 20 Me. 175; Holmes v. Smyth, 16 Me. 177; Buchanan v. Savings Institution, 84 Md. 430, 35 Atl. 1099; Burroughs v. Ploof, 73 Mich. 607; Hanold v. Kays, 64 Mich. 446; Bostwick v. Dodge, 1 Doug.413; Woodworth & Co. v. Carroll, 104 Minn. 65, 112 N. W. 1054; Pollock & Bernheimer *et al.* v. Simmons Bros. *et al.*, 76 Miss. 198, 23 So. 626 citing text; Emanuel v. White, 34 Miss. 56; Fitzgerald v. Barker, 96 Mo. 665; Crawford v. Spencer (Mo.), 4 S. W. 713, citing the text; Hodges v. Black, 8 Mo. App. 389 (semble); Yellowstone Nat. Bank v. Gagnon, 19 Mont. 402, 48 Pac. 762; Second Nat. Bank v. Snoqualmie Trust Co., 83 Nebr. 645, 120 N. W. 182; Smith v. Thompson, 67 Nebr. 527, 93 N. W. 678; Mechanics' Bank v. Chardavoyne, 69 N. J. L. 256, 55 Atl. 1080, 101 Am. St. Rep. 701; Mayer v. Heidelbach (N. Y.), 25 N. E. 416, citing text; Youngs v. Lee, 18 Barb. 187, 12 N. Y. 511; Brown v. Leavitt, 31 N. Y. 113; Reddick v. Jones, 6 Ired. 107; Dunham v. Peterson, 5 N. Dak. 414, 67 N. W. 293, citing text; Carlisle v. Wishart, 11 Ohio, 172; Struthers v. Kendall, 5 Wright, 214;

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51. Buhrman v. Baylis, 14 Hun, 608; Weaver v. Borden, 49 N. Y. 293. See New York cases, *ante*, § 831c.

Under Negotiable Instrument statute.—Under the statutory declaration that "an antecedent or pre-existing debt constitutes value," [52] it is generally held that the conflict of authority is settled in favor of the rule that the extinguishment or part satisfaction of an antecedent debt in consideration of the transfer of negotiable paper constitutes the transferee a holder for value.[53]

Bradley v. Deep, 88 Pa. St. 420; Bank of Republic v. Carrington, 5 R. I. 515; Vatterlien v. Howell, 5 Sneed. 441 (but see ante, § 830, and note); King v. Doolittle, 1 Head, 77; Wormley v. Lowry, 1 Humphr. 468; Trezevant & Cochran v. R. H. Powell & Co. (Tex. Civ. App.), 130 S. W. 234; Rowe v. Gohlman, 44 Tex. Civ. App. 315, 98 S. W. 1077; Dixon v. Dixon, 21 Vt. 450; Heath v. Silverhorn Lead Min. Co., 39 Wis. 147; Knox v. Clifford, 38 Wis. 651; Kellogg v. Faucher, 23 Wis. 21; Stevens v. Campbell, 13 Wis. 35. But not when purchased before maturity at a judicial sale. Tipton v. Christopher, 153 Mo. App. 619, 116 S. W. 1125. Where the claim was for an antecedent debt, which was not released on receiving the notes, the indorsees were not *bona fide* holders for value. Carpenter v. Hoadley, 123 N. Y. S. 61, 138 App. Div. 190. Where the president of a bank was the treasurer, director and a stockholder of a manufacturing corporation, and the cashier was the secretary and a stockholder of the corporation, and it was the daily custom of these corporations that notes of the manufacturing corporation were discounted by the bank, where a note held by the corporation was discounted by the bank at the time there was a large overdraft by the corporation on the bank, the question whether the proceeds of the discounted note were used in discharge of the overdraft in good faith and without notice is a question for the jury, in view of the interest of such officers in both corporations, and this notwithstanding the testimony was not contradicted. Iowa Nat. Bank v. Sherman & Bratager, 19 S. D. 238, 103 N. W. 19, 117 Am. St. Rep. 941, modifying on rehearing 17 S. D. 396, 97 N. W. 12, 106 Am. St. Rep. 778.

52. Appendix, sec. 25.

53. Campbell v. Fourth Nat. Bank, 137 Ky. 555, 126 S. W. 114; Reeves v. Letts, 143 Mo. App. 128, 128 S. W. 246; Albert v. Hoffman, 117 N. Y. S. 1043, 64 Misc. 87; Mindlin v. Appelbaum, 114 N. Y. S. 908, 62 Misc. 300; Ward v. City Trust Co., 102 N. Y. S. 50, 117 App. Div. 130, reversed on another ground, 192 N. Y. 61, 84 N. E. 585; Petrie v. Miller, 67 N. Y. S. 1042, 57 App. Div. 17, affirmed 173 N. Y. 596, 65 N. E. 1121; Singer Mfg. Co. v. Summers, 143 N. C. 102, 55 S. E. 522. But in Harris v. Fowler, 110 N. Y. S. 987, 59 Misc. Rep. 523, the court said that this statute must be construed to mean that in order to constitute value, which will support an action against an accommodation maker of a check which has been fraudulently diverted, the antecedent debt must have been canceled and discharged on the acceptance of the check, or the time of payment extended. The creditor must have parted with something, either the debt itself or the right to sue upon it for some determinate period by the extension of the time of payment. Under section 52 of the statute, it has been held that check received by the payee named, in payment of a debt due from the remitter of a check, makes the payee a holder in due course within this section. Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426.

§ 832a. Amount and mode of recovery.—When it appears that the bill or note was acquired by the holder as collateral security for a debt, and he is deemed entitled to recover upon it, he is still limited to the amount of the debt which it secures, if there be a valid defense against his transferrer, being regarded as, at all event, a *bona fide* holder, and entitled to stand upon a better footing only *pro tanto*.[54] Thus such a holder could recover against an accommodation party no more than the consideration actually advanced; [55] but in the absence of proof he will be deemed to have advanced the full amount of the

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54. Bank of the University v. Tuck, 96 Ga. 456, 23 S. E. 467; Hatcher & Co. v. Ind. Nat. Bank of Phila., 79 Ga. 59, citing text; Vallette v. Mason, 1 Smith, 89; First Nat. Bank v. Werst, 52 Iowa, 684; Farmers' State Bank of Solomon City v. Blevins, 46 Kan. 536, 26 Pac. 1044; Buchanan v. Savings Institution, 84 Md. 430, 35 Atl. 1099, citing text; Fisher v. Fisher, 98 Mass. 303; Stoddard v. Kimball, 6 Cush. 469; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40; Baker, Admr. v. Burkett, 75 Miss. 89, 21 So. 970; Yellowstone Nat. Bank v. Gagnon, 19 Mont. 402, 48 Pac. 762, 61 Am. St. Rep. 520, citing text; Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.) 1057; Barmby v. Wolfe, 44 Nebr. 77, 62 N. W. 318; Duncan & Sherman v. Gilbert, 30 N. J. L. (5 Dutch.) 527; Allaire v. Hartshorne, 21 N. J. L. 665; Continental Nat. Bank v. Bell, 125 N. Y. 38, 25 N. E. 1070; White v. Springfield Bank, 3 Sandf. 222; Youngs v. Lee, 12 N. Y. 551; N. Y. M. I. W. v. Smith, 4 Duer, 362; Kaminski v. Schefer, 46 App. Div. 170, 61 N. Y. Supp. 771; Williams v. Smith, 2 Hill, 301; Handy v. Sibley, 46 Ohio St. 15; First Nat. Bank v. Fowler, 36 Ohio St. 524; Kingsland v. Pryor, 33 Ohio St. 19; Beckhaus v. Commercial Nat. Bank (Pa.), 12 Atl. 72; Memphis Bethel v. Bank; 101 Tenn. 130, 45 S. W. 1072; Canadian Bank of Commerce v. John J. Sesnon Co. (Wash.), 123 Pac. 602; Union Nat. Bank v. Roberts, 45 Wis. 373. Story on Notes (7th ed.), § 195, note. Where a debtor to a bank executed a note for the amount of the debt and the cashier pledged the note as collateral security for money borrowed by it, and on the maturity of the note he executed a renewal note, and the cashier promised to return the original but instead pledged the second note to secure another loan to the bank, the maker of the notes is liable to each pledgee, but each of them should be required to exhaust first its other collateral before requiring the maker of the notes to pay to both of them anything more than the amount of the debt for which the original note was given and interest. Citizens' Bank v. Bank of Waddy, 126 Ky. 169, 103 S. W. 249, 11 L. R. A. (N. S.), 598, 128 Am. St. Rep. 282.

55. Duncan & Sherman v. Gilbert, 30 N. J. L. (5 Dutch.) 527; Atlas Bank v. Doyle, 9 R. I. 276; Maitland v. Citizens' Nat. Bank, 40 Md. 540; Mechanics', etc., Bank v. Barnett, 27 La. Ann. 177; Brown v. Callaway, 41 Ark. 420, citing the text; Bell v. Bean, 75 Cal. 87; Beacon Trust Co. v. Robbins, 173 Mass. 261, 53 N. E. 868. The same principle applies to case of subpledge where subpledgee has knowledge that the party from whom he received the paper held it simply as a pledge, in which event subpledgee could only recover the amount due to the ordinary pledgee. See Security Bank v. Kingsland, 5 N. Dak. 263, 65 N. W. 697; Berkeley v. Tinsley, 88 Va. 209. See *ante*, § 757 *et seq.*

paper.[55] In Maryland, however, it has been said in respect to an accommodation note, which was transferred as collateral security merely: "Such being the case, it was clearly incumbent upon the plaintiff to show what debts were embraced by the security, and the amount due thereon."[57] Although the debts secured by the collateral be less in amount, yet if there be no defense to the collateral note, the holder may in general recover the full amount, holding the balance as a trustee.[58] If the paper has been pledged to a *bona fide*

56. Duncan & Sherman v. Gilbert, 30 N. J. L. (5 Dutch.) 527. "And oral evidence is admissible to show that such a transaction, however absolute in form, is merely a pledge; and the consideration and purpose of the transaction may be shown in the same way." Riley v. Hampshire County Nat. Bank, 164 Mass. 482, 41 N. E. 679; Bank of Edgefield v. Farmers' Co-operative Mfg. Co., 2 C. C. A. 637, 52 Fed. 98, citing text.

57. Maitland v. Citizens' Nat. Bank, 40 Md. 540 (1874), Alvey, J.; Webb City Lumber Co. v. Mining Co., 78 Mo. App. 676. "If a policy of insurance is pledged as security for the debt of assured and the pledgee pays the premiums in order to keep the policy alive, the beneficiary, who joined with the assured in pledging the policy, is entitled to redeem the policy, only upon paying, in addition to the amount of the debt with interest thereon, the amount of the premiums paid by the pledgee, with interest from the time of such payment." See Kendall v. Equitable Life Assurance Society, 171 Mass. 568, 51 N. E. 464. It has been recently decided in New York that where an agreement in printed form of note furnished by the bank and signed by a customer on obtaining a loan for the amount of the note, by which the customer pledged certain property as collateral security for the payment of the note, "or any other liability or liabilities of the undersigned to the said bank, due or to become due, or which may hereafter be contracted or existing," is properly construed in accordance with the reasonable intention of the parties, as referring only to liabilities of the customer to the bank in the ordinary course of its banking business, and the bank is not entitled to retain pledged property for the purpose of applying it upon a note of the customer to a third party, which, although drawn payable at the customer's bank, was not paid by, or charged to, the customer's account, but was dishonored and then purchased by the bank. Gillet v. Bank of America, 160 N. Y. 549, 55 N. E. 292. See also Tracy v. First Nat. Bank of Syracuse, 48 App. Div. 285, 62 N. Y. Supp. 657.

58. McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068; Tooke v. Newman, 75 Ill. 215; Jefferson v. Century Sav. Bank, 143 Iowa, 83, 120 N. W. 308; Benton v. Sikyta, 84 Nebr. 808, 122 N. W. 61, 24 L. R. A. (N. S.), 1057; Martin v. German American Nat. Bank (Tex. Civ. App.), 102 S. W. 131. A pledgee may properly bring an action on a promissory note for the full amount thereof, no matter what his interest in the note may be; the maker may urge any defense against the note which would be good against the original payee, and, if successful, limit the plaintiff's recovery to his interest in the pledge. Gold Glen Mining, Milling & Tunneling Co. v. Dennis (Colo. App.), 121 Pac. 677. Whether the pledgee, after collecting the note, has made proper application of the proceeds, does not concern the maker. Johnson v. Gulledge, 115 Ga. 981, 42 S. E. 354.

pledgee in fraud of the true owner, as the pledgee has only a lien for the amount of his debt, the true owner may, by paying that debt, and discharging the lien, repossess himself of the instrument.[59]

Under Negotiable Instrument statute.—Under the statutory provisions,[60] a holder of a paper as collateral security may enforce payment to the extent of his lien,[61] and where a third person received from the payee a note as collateral security to save him against loss as surety for the payee, the maker of the note is liable only to the amount the third person must pay as surety.[62]

§ 833. How holder of negotiable collaterals may enforce them.—The remedy of an accommodation indorser of a note secured by collaterals, is to pay the note and enforce the collaterals for his own benefit. He cannot require a *bona fide* holder of the paper to exhaust the collaterals before realizing from him.[63] In ordinary cases of pledges as collateral security for debts, the pledgee may file a bill in chancery to have a judicial sale, and this has been frequently done in the case of stocks, bonds, plate, and other chattels; or he may himself sell upon giving reasonable notice to the debtor to redeem, and of the time and place of sale.[64] Commercial paper pledged as collateral security is an exception to this rule in part, that is to say, the holder is not authorized to sell such paper so pledged in the absence of a special power for that purpose, at either a public or private sale; but he is bound to hold and collect such paper as it falls due, and apply

59. Stoddard v. Kimball, 6 Cush. 469; Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40.

60. Appendix, secs. 27, 52–57.

61. Mersick v. Alderman, 77 Conn. 634, 60 Atl. 109; Voss v. Chamberlain, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331.

62. Jett v. Standafer, 137 S. W. 513, 143 Ky. 787.

63. First Nat. Bank v. Wood, 71 N. Y. 405; Third Nat. Bank v. Shields, 32 N. Y. Super. Ct. 276; Olvey v. Jackson, 106 Ind. 286; Lindenschmidt v. Vallee, 23 Mo. App. 595; Lormer v. Bain, 14 Nebr. 179; Grable v. Beatty, 56 Nebr. 642, 77 N. W. 49.

64. Alexandria, Loudoun, etc., R. Co. v. Burke, 22 Gratt. 261; Goldsmidt v. First M. Church, 25 Minn. 202; 2 Story Eq. Jur., § 1008; 2 Kent. Comm. [*582]; First Nat. Bank v. Woolery, 6 Wash. St. 215, 33 Pac. 357. Held in the last case that where one chattel mortgage is given to secure three promissory notes to different parties, and the holder of one of the notes, under the power of sale contained in the mortgage, has the entire property sold without the holders of the other notes being made parties thereto, the entire title to the property passes to the purchaser, and all the mortgagees are entitled to share *pro rata* in the proceeds of the sale. Greer v. Lafayette, 128 Mo. 559, 30 S. W. 319.

the money to the payment of the debt.[65] It has been held that he may, if he chooses, file a bill in chancery to have it sold under the

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65. Wheeler v. Newbould, 16 N. Y. 392, 5 Duer, 29; Alexandria, etc., R. Co. v. Burke, 22 Gratt. 262; Goldsmidt v. First M. Church, 25 Minn. 202; Joliet Iron Co. v. Scioto F. B. Co., 82 Ill. 548; Manton v. Robinson, 19 R. I. 405, 34 Atl. 148. And if the pledgee takes possession of the pledged property and makes sale of it, it operates as a payment of the note secured by the collateral. See German-Am. Bank v. Scribner Lumber Co., 81 Hun, 140, 30 N. Y. Supp. 740. And when special power is given in the collateral agreement to sell the security, the terms and conditions specified must be complied with. And accordingly it has been held in Georgia, that where in a promissory note, the payment of which was secured by the deposit of specified collaterals, it was stipulated that in case of the nonpayment of the note at maturity, the payee might sell the collaterals after giving at least ten days' notice to the maker of the note, and the creditors sold the collaterals without giving such notice, the act of sale was a conversion, and especially so when the seller also became himself the purchaser of the securities. Waring v. Gaskill, 95 Ga. 731, 22 S. E. 659; Beacon Trust Co. v. Robbins, 173 Mass. 261, 53 N. E. 868. Held, "The maker of a promissory note, who has notified the holder of it as a pledgee that it was given for accommodation only, is entitled to require the holder, before resorting to the note, first to credit actual payments upon other notes for which this was held as collateral, and also the amount of any other collateral security, which he has surrendered without the defendant's consent after knowledge that he was merely a surety." But an indorsement in blank underneath a printed form of transfer and a power of attorney to make a transfer, has been held to constitute a power of sale of the stock certificate pledged as collateral. Taft v. Church, 162 Mass. 527, 39 N. E. 283; Bank v. Chattanooga Pulley Co., 97 Tenn. 308, 37 S. W. 8. A promissory note, secured by collaterals, provided that "if recourse is had to collaterals, any excess of collaterals upon this note, shall be applicable to any other note or claim held by said holder against the maker or makers hereof." Held, that "recourse to collaterals," meant an actual sale thereof and that a tender of the amount due on note before sale of the collaterals, superseded authority to sell and redeemed the collaterals, leaving no right to have any excess in their value applied on other claims. See Winkler v. Madgeburg, 100 Wis. 421, 76 N. W. 332. If the pledge empowers pledgee to sell collateral without notice to pledgor, and pledgee thereafterward waives the right to sell the collateral without notice to pledgor, and a sale without such notice is illegal, and such act constitutes a conversion, the pledgee is liable in damages to the pledgor. See Toplitz v. Bauer, 161 N. Y. 325, 55 N. E. 1059. And if pledgee without authority makes sale of the collateral (stock) it is a conversion, and the pledgor is entitled to recover to the defendant, as a measure of damages, the highest price which the collateral reached within a reasonable time after the illegal sale. See Smith v. Savin, 141 N. Y. 315, 36 N. E. 338. A power of attorney in the collateral agreement, authorizing the pledgee to sell collateral, does not necessarily require him to do so, and ordinarily the pledgee is not liable in damages to the pledgor for a loss sustained by him, consequent upon failure by the pledgee to sell the article pledged. See Howell v. Dimock, 15 App. Div. 102, 44 N. Y. Supp. 271. Where pledgee has power to sell, he may do so without waiting for favorable condition of the market. See Franklin

directions of the court.[66] But on the other hand it has been decided that he has a complete and adequate remedy at law by suit on the paper itself, and, therefore, cannot go into equity.[67] Without some special circumstance existing, the latter seems to be the correct conclusion; but such circumstances may exist, and should be dealt with according to the general principles of equity jurisdiction.[68] Where defendant was sued as an indorser upon a note containing a statement that the maker had deposited with the payee certain collaterals with authority to the latter to sell, without notice, in case of nonpayment, and these collaterals came to plaintiff's hands when it became the holder, it was held that the maker was entitled to the return of the collaterals when payment was demanded; and that a presentment to him of the note for payment by a notary, who was not in readiness to procure or surrender the collaterals, in response to the maker's demand for them, was insufficient to charge an indorser.[69]

Nat. Bank v. Newcombe, 1 App. Div. 294, 37 N. Y. Supp. 271; Fisher v. Briscoe, 10 Mont. 124, 25 Pac. 30; Boswell v. Thigpen, Admr., 75 Miss. 308, 22 So. 823; Richardson v. Ashby, 132 Mo. 238, 33 S. W. 806; Rumsey v. People's Ry. Co., 154 Mo. 215, 55 S. W. 615; Thompson-Houston Electric Co. v. Capital Electric Co., 12 C. C. A. 643, 65 Fed. 341.

66. Donohoe v. Gamble, 38 Cal. 314. But *quære?* See Brown v. Ward, 3 Duer, 660; Atlantic, etc., M. Ins. Co. v. Boies, 6 Duer, 583; Wheeler v. Newbould, 16 N. Y. 392, 5 Duer, 29. But see Powell v. Patison, 100 Cal. 236, 34 Pac. 677.

67. Whitteker v. Charleston Gas Co., 16 W. Va. 717; Reed v. First Nat. Bank, 23 Colo. 384, 48 Pac. 507, citing text with approval; McDaniel v. Climski, 23 Tex. Civ. App. 504. The holder of a note as collateral security is not liable for mere delay in enforcing the collateral, especially where there has been no demand upon him to sue the maker of the note. Johnson, Berger & Co. v. Downing, 76 Ark. 128, 88 S. W. 825.

68. In Donohoe v. Gamble, 38 Cal. 354, the court sustained equity jurisdiction on the ground that the pledgor resided in New York and it did not appear that he had estate in California, and thought that the pledgees should not be subjected to the hardship of pursuing with legal process in New York, which would "equally demand that they should follow him to Europe, South America, or any other foreign country." See also Whitteker v. Charleston Gas Co., 16 W. Va. 717; Nelson v. Wellington, 5 Bosw. 178; Brookman v. Metcalf, 5 Bosw. 429; Wheeler v. Newbould, 16 N. Y. 392, 5 Duer, 29.

69. Ocean Nat. Bank v. Faut, 50 N. Y. 474. If the collateral agreement provides that the collaterals may be held for the payment of the note and for "any general balance due or to become due," the borrower has no right to withdraw the collaterals without the consent of the bank, on payment or tendering payment of the note only, if the bank is the holder of other just demands against the maker not then fully secured. Merchants' Nat. Bank of Savannah v. Demere, 92 Ga. 735, 19 S. E. 38; Romero & Bayard v. Newman, 50 La. Ann. 80, 23 So. 493. See Gage v. McDermid, 150 Ill. 596, 37 N. E. 1026.

It has been held that the holder of a note, executed to him as collateral security for the payment of a note which he has indorsed, may enforce it against the maker, though the latter note is still outstanding and unpaid, and such accommodation indorser's liability thereon unenforced.[70]

SECTION II

HOLDER OF NEGOTIABLE INSTRUMENTS SECURED BY MORTGAGE

§ 834. There is no doubt that a mortgage, or any other security given for the payment of a bill or note, passes by a transfer of the bill or note to the transferee.[71] The doctrine has been laid down by a number of cases, and is stated by Mr. Hilliard, in his treatise on Mortgages, that if a mortgage is given to secure a negotiable note,

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70. Hapgood v. Wellington, 136 Mass. 217; Merchants' & Manufacturers' Bank v. Cumings, 149 N. Y. 360, 44 N. E. 173; Ryan v. Holliday, 110 Cal. 335, 42 Pac. 891. See also Emerson v. Paine, 176 Mass. 391, 57 N. E. 667, as to proving a note given as collateral against the insolvent estate of the deceased maker.

71. See *ante*, § 784, and *post*, § 1281; Hagerman v. Sutton, 91 Mo. 520; Boatman's Sav. Bank v. Grewe, 84 Mo. 477; Johnson v. Johnson, 81 Mo. 331; Kuhns v. Bankes, 15 Nebr. 92, citing the text. And if there are two or more notes, secured by one mortgage, the assignees of said notes are entitled to share *pro rata*, without regard to the time the several notes mature. First Nat. Bank v. Andrews, 7 Wash. 261, 34 Pac. 913, 38 Am. St. Rep. 885. Upon the same principle, it has been held that one who purchases a note secured by a general guaranty, is entitled to the benefits of such guaranty, though he buys in ignorance thereof. See Savings Bank v. Libbey, 101 Wis. 193, 77 N. W. 182, 70 Am. St. Rep. 907; Brewing Co. v. Manasse, 99 Wis. 99, 74 N. W. 535, 67 Am. St. Rep. 854; Nashville Trust Co. v. Smythe, 94 Tenn. 513, 29 S. W. 903, 45 Am. St. Rep. 748; Kernohan v. Manss, 53 Ohio St. 118, 41 N. E. 258; Demuth v. Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322; Mutual Benefit Life Ins. Co. v. Huntington, 57 Kan. 744, 48 Pac. 19; Robinson v. Campbell, 60 Kan. 60, 55 Pac. 276. Held, in the last case that the assignment of a note ordinarily operates as an assignment of a mortgage made to secure the note, and where it so operates, an irregularity in the assignment of the mortgage is immaterial. Perkins Bros. *et al.* v. Gumbel *et al.*, 49 La. Ann. 653, 21 So. 743; Keith, Davis & Co. v. Blanton, 71 Miss. 821, 15 So. 132; Tilden v. Stilson, 49 Nebr. 382, 68 N. W. 478. In Whipple v. Fowler, 41 Nebr. 676, 60 N. W. 15, it is held that in Nebraska the transfer of one of several notes maturing at different times and secured by a mortgage, operates as an assignment *pro tanto* of the mortgage, and upon sale of property the notes should share *pro tanto* in the proceeds of sale. Gamble v. Wilson, 33 Nebr. 270, 50 N. W. 3; Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878; Adler v. Sargent, 109 Cal. 42, 41 Pac. 799; Fountain v. Bookstaver, 141 Ill. 461, 31 N. E. 17.

and both the mortgage and the note are transferred before maturity to a *bona fide* indorsee, such indorsee takes the benefit of the mortgage as well as of the note, clear of any equities between the original parties.[72] It is the debt which gives character to the mortgage, and gives the rights and remedies of the parties under it, and not the mortgage which determines the nature of the debt." [73]

But this doctrine is denied on the ground that the mortgage is simply a chose in action, and is taken subject to the accounts between mortgagor and mortgagee; and while it is an incident to the

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72. Hilliard on Mortgages, 526, § 49*a*; Carpenter v. Longan, 16 Wall. 273; Sawyer v. Prickett, 19 Wall. 166; Burkhaus v. Hutcheson, 25 Kan. 631; Kelley v. Whitney, 45 Wis. 110; Reeves v. Scully, Walker Ch. 248; Croft v. Bunster, 9 Wis. 503; Cornell v. Hichens, 11 Wis. 353; Fisher v. Otis, 3 Chand. 49; Martineau v. McCollum, 4 Chand. 153; Cicotte v. Gagnier, 2 Mich. 381. But it is said in Michigan that this effect is given to the transfer only "because the two papers are bound together by such references as identify the one as collateral to the other. Generally speaking every assignee of a mortgage takes it subject to existing equities." Cooper v. Smith, 75 Mich. 254. See also McKenna v. Kirkwood, 50 Mich. 545, deciding that the assignee takes subject to equities though he has no actual notice of the claims. Merchants' Nat. Bank v. Abernathy, 32 Mo. App. 222, citing the text; Hagerman v. Sutton, 91 Mo. 520; Blumenthal v. Jassoy, 29 Minn. 177; Mundy v. Whitmore, 15 Nebr. 647; Updegraft v. Edwards, 45 Iowa, 515; Preston v. Morris, 42 Iowa, 549; Farmers' Nat. Bank v. Fletcher, 44 Iowa, 256; Clasey v. Sigg, 51 Iowa, 372; Duncan v. Louisville, 13 Bush, 385; Dutton v. Ives, 5 Mich. 515; Kelmer v. Krolick, 36 Mich. 373; Judge v. Vogel, 38 Mich. 568. In Murray v. Jones, 50 Ga. 109, held, that *bona fide* holder of the note, without notice, was protected against defense, that the mortgage was made by the debtor in anticipation of bankruptcy, to defraud creditors. Central Trust Co. v. New York Equipment Co., 87 Hun, 421, 34 N. Y. Supp. 349. A mortgage given to secure the payment of a note must be construed together with the note as a part of one transaction or contract, the same as if they were a part of the same instrument. See Cabbell v. Knote, 2 Kan. App. 68, 43 Pac. 309; Kansas Loan & Trust Co. v. Gill, 2 Kan. App. 488, 43 Pac. 991; Thompson v. Maddux, 117 Ala. 468, 23 So. 157; Brewer v. Atkeison, 121 Ala. 410, 25 So. 992, 77 Am. St. Rep. 64; Bank v. Rohrer, 138 Mo. 369, 39 S. W. 1047; Humrod v. Gillman, 147 Ill. 293, 35 N. E. 373; Hunter v. Clarke, 184 Ill. 158, 75 Am. St. Rep. 160, 56 N. E. 297.

73. Croft v. Bunster, 9 Wis. 510; Davis v. Erickson, 3 Wash. 654, 29 Pac. 86, citing text; Hawkins, Receiver, v. Fourth Nat. Bank, 150 Ind. 117, 49 N. E. 957, citing the text; Hussey v. Hill, 119 N. C. 318, 25 S. E. 1023; Pullen v. Ward, 60 Ark. 90, 28 S. W. 1084, citing text; Hutchinson v. Benedict, 49 Kan. 545, 31 Pac. 147; Britton & Koontz v. Harvey *et al.*, 47 La. Ann. 259, 16 So. 747, citing text; Keys v. Lardner, 55 Kan. 331, 40 Pac. 644, *contra*; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438; Campbell, etc., Mfg. Co. v. Roeder, 44 Mo. App. 324; Hawes v. Mulholland, 78 Mo. App. 493; Ryan v. Holliday, 110 Cal. 335; Lawson v. Spencer, 81 Mo. App. 169; Babcock v. Young, 117 Mich. 155, 75 N. W. 302.

debt, the benefit of which, so far as the assignor is concerned, passes with it, the assignee cannot rely on the privileged character of the note to insure him the advantage of the mortgage.[74] The doctrine stated by Mr. Hilliard seems to us equitable and just, especially in cases where the mortgage uses such terms as show an intention to secure the note to the holder. The security of the mortgage may impart to the paper its marketable value, as in the case of corporation coupon bonds, which rests mainly upon the basis of such security for their payment. And to sever the basis of credit from the obligation to pay would most frequently defeat the negotiation of these, or similar instruments, at anything like their par value. A different rule applies to mortgages made to secure nonnegotiable instruments.[75]

§ 834a. In Massachusetts, where note and mortgage were upon illegal consideration and void, it was held that as a *bona fide* holder without notice could enforce the note, he could also enforce the mortgage assigned with it, Metcalf, J., saying: "We know of no principle which makes the mortgage less valid than the note in the plaintiff's hands."[76] In a case before the United States Supreme Court where failure of consideration between maker of a note secured by mortgage, was pleaded against enforcement of the mort-

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74. Johnson v. Carpenter, 7 Minn. 183 (1862); Walker v. Dement, 42 Ill. 278; Heller v. Meis, 2 Cin. (Ohio) 287; Petillon v. Noble, 73 Ill. 567 (1874); Bryant v. Vix, 83 Ill. 14 (1867); Melendy v. Keen, 89 Ill. 395; United States Mortgage Co. v. Gross, 93 Ill. 483; C. D. & V. R. Co. v. Loewenthal, 93 Ill. 451; Barrett v. Hinckley, 124 Ill. 40; Towner v. McClelland, 112 Ill. 549; Mutual Mill Ins. Co. v. Gordon (Ill.), 12 N. E. 747; McIntire v. Yates, 104 Ill. 497. But the doctrine of these cases is held in Illinois not to apply to deeds of trust given to secure railroad coupon bonds intended to be thrown upon the market and circulated as commercial paper, and to be used as securites for permanent investments. Peoria, etc., R. Co. v. Thompson, 103 Ill. 205, disapproving in part C. D. & V. R. Co. v. Loewenthal, *supra*. It is there held, also, not to apply to accommodation paper, secured on real estate, transferred to another as collateral security. Miller v. Larned, 103 Ill. 579; Morris v. White, 28 La. 855 (1876); Johnson v. Vickers, 31 La. Ann. 943; New England Mtge. Sec. Co. v. Casebier, 3 Kan. App. 741; Savings Bank v. Schott, 135 Ill. 655, 26 N. E. 640, 25 Am. St. Rep. 401.

75. Van Keuren v. Corkins, 66 N. Y. 77.

76. Taylor v. Page, 6 Allen, 86 (1863). On the other hand, it has been held in North Carolina, that a mortgage, if duly executed to secure a loan made by the mortgagee, can be foreclosed, although the note mentioned in the mortgage, be forged. Medlin v. Buford, 117 N. C. 278, 23 S. E. 217; Kenney v. The Jefferson County Bank, 12 Colo. App. 24, 54 Pac. 404. See also Coler v. Barth, 24 Colo. 31, 48 Pac. 656.

gage, it was held that the *bona fide* holder of the note, without notice, could enforce it, and Swayne, J., said: "The contract as regards the note was that the maker should pay it at maturity to any *bona fide* indorsee without reference to any defense to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract."[77] A deed of trust stands on the same footing as a mortgage; and as an incident and accessory to the paper, the transfer of the latter carries with it to the transferees the benefit of the security.[78] The holder of a bill or note secured by mortgage or deed of trust may proceed at law and in equity at the same time.[79] Where a mortgage was made to secure the indorser of a note, it was held, in Maryland, that it inured to the benefit of every *bona fide* holder; and that the mortgagee could not release the mortgagor so as to deprive the holder of its benefit.[80]

§ 834b. But the doctrine of the text is subject to this limitation: that if the land conveyed by the mortgage was subject to a prior lien of a third party, the indorsee of the note would only acquire the right to enforce his claim against the land subject to such lien whether he had notice of it or not. This doctrine arises from the very nature of such a case, as the indorser himself could not by a negotiable, or other contract, supersede the pre-existing rights of a third person not a party to his act.[81] And wherever the assignee is chargeable with

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77. Carpenter v. Longan, 16 Wall. 273 (1872); Sawyer v. Prickett, 19 Wall. 166 (1873). See to same effect Logan v. Smith (Sup. Ct. Mo.), 3 Cent. L. J. 384 (1876), 62 Mo. 455. See Laplace v. Laplace et al., 43 La. Ann. 284, 8 So. 914; Savings Bank v. Schott, 135 Ill. 655, 25 Am. St. Rep. 401, 26 N. E. 640.

78. New Orleans, etc., v. Montgomery, 95 U. S. (5 Otto) 16 (1877); Potts v. Blackwell, 4 Jones Eq. 58, Crawford v. Aultman & Co., 139 Mo. 262, 40 S. W. 952; Adler v. Sargent, 109 Cal. 42, 41 Pac. 799.

79. Olcott v. Gallagher, 93 U. S. (3 Otto) 199.

80. Boyd v. Parker, 43 Md. 782. See McCracken v. German Fire Ins. Co., 43 Md. 471; Demuth v. Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322; Anderson v. Kreidler, 56 Nebr. 171, 76 N. W. 581. See also Babcock v. Young, 117 Mich. 155, 75 N. W. 302; Peck v. Dyer, 147 Ill. 592, 35 N. E. 479.

81. Linville v. Savage, 58 Mo. 248; Logan v. Smith, 62 Mo. 455 (1876); Orrick v. Durham, 79 Mo. 174. See Laplace v. Laplace et al., 43 La. Ann. 284, 8 So. 914; Owen v. Evans, 134 N. Y. 514, 31 N. E. 999. But where A. purchases property subject to a mortgage executed by his grantor, and thereafter conveys it to B. with the recital in the deed that B. assumes and agrees to pay the mortgage debt as part of the consideration of the sale, he may be held liable on the mortgage note. Crone v. Stinde, 156 Mo. App. 262; Rouse v. Johnson, 66 Mo. App. 57; Johns v. Wilson, 180 U. S. 440, 21 Sup. Ct. Rep. 445.

constructive notice of an equity prior to the mortgage under which he claims, he must yield to it.[82] If the transfer of a note payable to order, and of the mortgage to secure it, be by delivery merely, both note and mortgage are open to equities.[83] A mortgagee in a mortgage to secure a note which he holds cannot transfer the mortgage so as to exclude the rights of another party without notice to whom he transferred the note, and the *bona fide* holder of the note may in equity require assignment of the mortgage to himself.[84]

§ 835. It has been held that where a promissory note and a mortgage securing its payment have been executed to a corporation by A., and such corporation executed to C. its negotiable bond for a sum equal to the note, attaching thereto the note and mortgage, and reciting in the bond that the corporation transferred the note and mortgage to C. as security, and that both should be transferable in connection with the bond, and not otherwise; that this was a sufficient indorsement within the law merchant to pass to C. the legal title to the note, and that he became thereby a *bona fide* holder, and was entitled to protection against equitable defenses existing against it in the hands of the corporation.[85] Where a note is secured by mortgage, and there is a provision in the mortgage not contained in the note, the mortgage will control.[86] In Massachusetts it has been

82. Sims v. Hammond, 33 Iowa, 368; English v. Wafles, 13 Iowa, 57; Savings Bank v. Schott, 135 Ill. 655, 26 N. E. 640; 25 Am. St. Rep. 401.

83. Crum v. Corby, 11 Kan. 464.

84. Morris v. Bacon, 123 Mass. 58. See also Strong v. Jackson, 123 Mass. 60; Burhans v. Hutcheson, 25 Kan. 625; Adler v. Sargent, 109 Cal. 42, 41 Pac. 799.

85. Crosby v. Roub, 16 Wis. 625 (1863), Paine, J.: "The intent to pass the title and make the note transferable by delivery afterward as a note payable to order, and duly indorsed by the payee, is beyond question. And this contract, like all others, must take effect according to the intent of the parties, if it is sufficient in law to express that intent. And the fact that the parties contracted for an absolute liability by the vendor, evidenced by a distinct negotiable instrument on the back of the one transferred, cannot, upon any rational principle, be held to distinguish the case, so far as the mere question of a transfer is concerned, from a case where they contract for no liability, or for the conditional liability of an indorser, or the absolute liability of a guarantor. I conclude, then, that if the bond had been written on the back of the note, it would have been fully sufficient to pass the legal title within the law merchant." Bange v. Flint, 25 Wis. 456. See *ante*, § 689, and *post*, § 855; Pullen v. Ward, 60 Ark. 90, 28 S. W. 1084; American Nat. Bank v. Klock, 58 Mo. App. 335.

86. Dobbins v. Parker, 46 Iowa, 358. See *ante*, § 156. When a note expressly provides that the principal bears interest at the rate of 7 per cent. from date

held that if one who holds by assignment duly recorded a mortgage and a note indorsed in blank purporting on its face to be secured by it, "the same being collateral to" a certain note, assigns the mortgage, and afterward indorses the note for which it was collateral (retaining the mortgage note) to another by an assignment in like words duly recorded, he conveys a title to the mortgage debt, except as against an innocent purchaser for value without notice; and one to whom he subsequently passes the mortgage note and fraudulently assigns the mortgage upon a separate paper as collateral security for a loan, is not such a purchaser.[87] Where a deed of trust given to secure sundry notes maturing at different times, provides that none of them shall become due, and that the deed shall not be foreclosed till the maturity of the note made last payable, the holder purchasing one of the notes, with knowledge of such provisions, cannot recover judgment until the last note matures.[88]

§ 835a. The parties to a mortgage may substitute a new note for the original by way of renewal without affecting the validity of the security. No change in the form of the indebtedness or in the mode or time of payment will discharge the mortgage.[89]

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until paid, and the mortgage securing the same provides that, in default of payment of any part of the sum secured when due, interest shall be paid at the rate of 12 per cent. per annum from the date of the note, the rate of interest recoverable in an action brought on the note and mortgage is controlled by the terms of the note and is limited to 7 per cent. per annum. See New England Mortgage Security Co. v. Casebier, 3 Kan. App. 741, 45 Pac. 152. Compare Hawes v. Mulholland, 78 Mo. App. 493; Lawson v. Spencer, 81 Mo. App. 169; Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272.

87. Strong v. Jackson, 123 Mass. 60. See Tilden v. Stilson, 49 Nebr. 382, 68 N. W. 478.

88. Brownlee v. Arnold, 60 Mo. 79. Where a mortgage is given to secure a series of notes of even date, maturing at different times, and the mortgage contains a provision that upon the failure to pay any one of said notes at maturity, then all of said notes shall become due and payable, and the mortgage may be foreclosed; and all of the notes so secured are assigned to different parties before maturity of any of them, the assignees of the notes take a *pro tanto* interest in the mortgage security, with priority according to the dates at which their notes mature, as stated in the notes, and this rule of priority is not changed by the default of the mortgagor and maker on failure to pay either the principal or interest of any note at maturity, by which default all the notes mature. See Horn v. Bennett, 135 Ind. 158. *Contra*, Green County Bank v. Chapman, 134 Mo. 427, 35 S. W. 1150. See Maddox v. Wyman, 92 Cal. 674, 28 Pac. 838.

89. Stein v. Kaun, 244 Ill. 32, 91 N. E. 77; Buck v. Wood, 85 Me. 204, 27 Atl. 103; Watkins v. Hill, 8 Pick. 522; Pomeroy v. Rice, 16 Pick. 22; Jones on Mortgages, 924. See *ante*, § 205, and § 748.

CHAPTER XXVI

RIGHTS OF A BONA FIDE HOLDER OR PURCHASER OF NEGOTIABLE INSTRUMENTS ORIGINATING IN FRAUD, DURESS, OR VIOLATION OF AUTHORITY.

§ 836. There are numerous cases in which the line of demarcation between the fraud which does not affect the *bona fide* holder for value, and without notice, and that which utterly vitiates the instrument in all hands whatsoever, is narrow and difficult to distinguish. The distinctions taken are frequently very refined and metaphysical; but the test questions to be applied, we think, are these: (1) Has the party sought to be charged created an agency or trust, by means of which the fraud has been committed? (2) Has he deliberately given the appearance of validity to the instrument? (3) Has he committed negligence respecting it, by means of which an opportunity for the fraud has been created? And whenever either of these questions can be answered affirmatively upon a fair consideration of all the circumstances of the case, the balance of equity is in favor of the *bona fide* holder for value and without notice, the axiomatic principle of law then applying, that where one of two innocent persons must suffer, the one who creates the trust, or does the act from which the loss results, must bear it.

SECTION I

HOLDER OF NEGOTIABLE INSTRUMENTS COMPLETED, BUT NOT DELIVERED

§ 837. (1) The *first* class of cases of the description above mentioned are those in which a completed bill or note is obtained from the maker or drawer, without any delivery on his part, actual or constructive. We have seen that delivery is necessary in the case of a bill or note, as it is in the case of every other contract, in order to consummate its validity between the parties to it. Suppose, however, that a bill, or promissory note, or bank note, has been fully

completed in form and signed by the drawer or maker, and, before delivery, is stolen from the possession of the party who has signed it, and passed by the thief to a *bona fide* holder for value in the usual course of business, would the fact that the party signing had never delivered it afford him a defense against such *bona fide* holder? Whether the instrument be payable to bearer, or to the order of the thief, if it be indorsed by him, we can see no reason why the *bona fide* holder should not be entitled to recover. The want of delivery is a defect not apparent on the face of the bill or note. The party has given the appearance of validity to his paper. His signature is itself an assurance that his obligation has been perfected by delivery; and it being necessary that the loss should fall upon one of two innocent parties, it should fall upon the one whose act had opened the door for it to enter.[1] In Massachusetts this doctrine has been applied in favor of the holder of bank notes which were signed and ready for use, and which were stolen before they had been issued from the vault of the bank in which they were deposited;[2] and in Illinois, against the maker of a note who signed it as a mere matter of amusement, and from whom it was stolen by one who saw him sign it, and who passed it to an innocent indorsee, the court saying, per Walker, J.:[3] "The maker evidently intended to sign such a note as this, and she knew its contents when she signed the instrument. This case does not materially differ from any other note or bank bill which may be stolen and negotiated after it has been made." And in a latter case, where the maker drew his note for $108, intending to insert a condition that it should not be valid unless the plows for which it was executed were delivered, and the payee snatched it from his hand, ran off, and transferred it to a *bona fide* holder for value, without notice, this case was reaffirmed, and its principle applied.[4]

§ 838. There are cases which take a different view. Thus in Michigan, where the maker of a note payable to the order of B., signed it and left it on a table in a room where his sister and B. re-

1. Kinyon v. Wohlford, 17 Minn. 239; Faulkner v. White & Son, 33 Nebr. 199, 49 N. W. 1122; Wortham v. State, 56 Tex. Cr. 253, 120 S. W. 439, quoting text.

2. Worcester County Bank v. Dorchester, etc., Bank, 10 Cush. 488. See Thompson on Bills (Wilson's ed.), 92; 1 Parsons on Notes and Bills, 114, and *post*, § 839.

3. Shipley v. Carroll, 45 Ill. 285; Martin v. Muhlke, 186 Ill. 327, 37 N. E. 954.

4. Clarke v. Johnson, 54 Ill. 296; First Nat. Bank v. Farmers' & Merchants' Bank, 56 Nebr. 149, 76 N. W. 430.

mained together, enjoining B. not to take it, as the negotiation pending was not concluded; but B., nevertheless, took it and transferred it to an innocent purchaser, it was held that the maker was not liable, not having been guilty of "culpable negligence." [5]

In this particular case it would seem that the maker, by trusting the paper in the custody of B., rendered himself liable for the consequences; and that the facts hardly justified the conclusion that the maker was guilty of no culpable negligence. But if the paper had been snatched from the maker's hand, as in one of the Illinois cases above cited, then having trusted no one, having been guilty of no negligence, and not having deliberately concluded the act which imparted the appearance of validity to it, it would seem too extreme an extension of the doctrine in favor of a *bona fide* holder of a negotiable instrument to subject the maker to its payment. All purchasers must incur some risk; and to protect them, after the maker has done some act which, in equity and good conscience, should seal his mouth, is all that seems to us necessary to guard their rights, without inflicting great injustice on the innocent party. It is the case of one innocent party against another equally so; and when the latter has done nothing to lower the grade of his claim to protection, we do not see that the former stands upon any superior footing.

Under Negotiable Instrument statute.—While the statute provides that every contract on a negotiable instrument is incomplete and revocable until delivery, it further declares that where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed.[6] So that, in those states which have enacted the statute, the conflict of authority discussed in the foregoing sections is settled against the rule that a maker is not liable unless he has been guilty of negligence, and in favor of the protection of an innocent purchaser, as to whom a valid delivery is conclusively presumed.[7] It has been held thereunder that the conclusive presumption declared by the statute applies when the instrument is complete, and that when a check is in the hands of a holder in due course, the maker cannot defend on the ground that, because his agent had no express

5. Burson v. Huntington, 21 Mich. 415. Very similar were the circumstances in Salander v. Lockwood, 66 Ind. 285, except that maker did not know he had signed a note. He was held bound. See Branch v. Commissioners, 80 Va. 434; Dodd v. Dunne, 71 Wis. 582.

6. Appendix, sec. 16.

7. Hodge v. Smith, 130 Wis. 326, 110 N. W. 192.

authority to deliver the check to the payee, it was unlawfully put in circulation,[8] and that such presumption exists as well when the note was taken from a thief as in any other case.[9]

§ 839. Where the maker has perfected the instrument, and left it undelivered in a safe, desk, or other receptacle, it should then be at his hazard. Such papers are made for use, and not for preservation. The maker creates the risk of their being eloigned, by keeping them on hand, and places them on the same basis as negotiable papers which have been put upon the market. When once issued the purchaser is protected and the owner loses, even though he had guarded his property with bolt and bar; and if bankers and others who must necessarily be in possession of negotiable securities in the course of trade are not protected, we can discover no principle which can be invoked to protect one who holds his own paper contrary to the ordinary wants and usages of trade.[10]

§ 840. In New York the cases on this point do not seem to us reconcilable. In one case, where a note for $120, made payable to A. or bearer, for the purpose of being given in renewal of another, was stolen out of the maker's desk, and sold to the holder for $115 it was held that the maker was not liable; W. F. Allen, J., saying: "The note never had any inception so as to enable any person to become a *bona fide* holder of it. It was an imperfect instrument, wanting delivery to give it validity as the promissory note of the defendant. The holder has taken a blank piece of paper, not a promissory note." [11] But in a later case, where the note was indorsed by the payee, for whose accommodation it was made, and left in his desk, and it was eloigned therefrom and passed to a *bona fide* holder, for value, and

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8. Buzzell v. Tobin, 201 Mass. 1, 86 N. E. 923.

9. Massachusetts Nat. Bank v. Snow, 187 Mass. 159, 72 N. E. 959.

10. Thompson on Bills (Wilson's ed.), 92; 1 Parsons on Notes and Bills, 114, in which it is said: "If a person sign notes in blank, and lock them up in his safe, whence they are stolen, filled up and negotiated, without fault or negligence on his part, he is not liable. Possibly it might be held otherwise, if he make and sign a perfect note, payable to bearer, and it be stolen under similar circumstances; on the ground that, when the instrument is once perfected (although it has never passed out of the maker's hand, and consequently has had no inception as a contract), it is like money; and any one who receives it in good faith, and for a valuable consideration, acquires a perfect title."

11. Hall v. Wilson, 16 Barb. 556 (1853).

without notice, it was held that the fact it had never been delivered as a valid security was no defense.[12]

SECTION II

HOLDER OF NEGOTIABLE INSTRUMENTS INCOMPLETE AND UNDELIVERED

§ 841. (2) The *second* class of cases arises when an incomplete instrument has been signed and stolen, without any delivery to an agent in trust, or otherwise, intervening. In such cases no trust for any purpose has been created. No instrument has been perfected. No appearance of validity has been given it. No negligence can be imputed. Therefore, if the blank be filled, it is sheer forgery, in which the maker is in nowise involved, and he is not, therefore, bound, even to a *bona fide* holder without notice.[13]

§ 842. In New York it has been held that where coupon bonds of a railroad corporation, negotiable in form, and containing a provision on their face that "the president of the company is authorized to fix by his indorsement the place of payment of the principal and interest, in conformity with the tenor of this obligation," and also bearing the following indorsement: "I hereby agree that the within bonds and the interest coupons thereto attached shall be payable in ———, G. C. Young, president," were not valid in the hands of *bona fide* holders for value, and without notice, they having been stolen from the safe of the company by the soldiers of the United States, and issued into the world in this imperfect form. The ground of the decision is that the blank as to place of payment not having been filled, was notice to the world that the instrument had not been completed, and that no one was clothed with authority by the president of the company to complete it.[14]

§ 842a. In England, where the defendant gave his blank acceptance to H., who returned it, and it was then stolen from the chamber of the

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12. Gould v. Segee, 5 Duer, 270 (1856).

13. 1 Parsons on Notes and Bills, 114. See *ante*, § 839, note 6.

14. Ledwick v. McKim, 53 N. Y. 315 (1873). See Redlick v. Doll, 54 N. Y. 236; Davis Machine Co. v. Best, 105 N. Y. 67. But where the instrument is complete in form no subsequent reformation of it can affect the rights of a *bona fide* holder. Dunham v. Packing Co., 100 Mich. 75, 58 N. W. 627.

defendant, and C. filled in his own name and negotiated it, it was held that a *bona fide* holder could not recover, Brett, L. J., saying there was no estoppel, no ratification, and no negligence on the part of the defendant.[15]

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15. Baxendale v. Bennett, L. R., 3 Q. B. D. 525 (1878), 47 L. J. Q. B. 624, 26 W. R. 899, 33 Am. Rep. 137, 40 L. T. R. (Court of Appeals) 23 (1878), Bramwell, L. J., saying: "The defendant is sued on a bill alleged to have been drawn by W. Cartwright on and accepted by him. In very truth he never accepted such a bill; and if he is to be liable, it can only be on the ground that he is estopped to deny that he did so accept such a bill. Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would unless estopped be saying something contrary to his former conduct in what he had said or done or failed to say or do. Is that the case here? Let us examine the facts. The defendant drew a bill (or what would be a bill had it had a drawer's name) without a drawer's name, addressed to himself, and then wrote what was in terms an acceptance across it. In this condition it, not being a bill, was stolen from him, filled up with a drawer's name, and transferred to the plaintiff, a *bona fide* holder for value. It may be that no crime was committed in the filling in of the drawer's name, for the thief may have taken it to a person telling him it was given by the defendant to the thief with authority to get it filled in with a drawer's name by any person he, the thief, pleased. This may have been believed, and the drawer's name *bona fide* put by such person. I do not say such person could have recovered on the bill. I am of opinion he could not; but what I wish to point out is, that the bill might be made a complete instrument without the commission of any crime in the completion. But a crime was committed in this case by the stealing of the document, and without that crime the bill could not have been complete, and no one could have been defrauded. Why is not the defendant at liberty to show this? Why is he estopped? What has he said or done contrary to the truth, or which should cause any one to believe the truth to be other than it is? Is it not a rule that every one has a right to suppose that a crime will not be committed, and to act on that belief? Where is the limit if the defendant is estopped here? Suppose he had signed a blank check with no payee or date or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to a holder? If so, suppose there was no Stamp Law, and a man simply wrote his name, and the paper was stolen from him, and somebody put a form of a check or bill to the signature, would the signer be liable? I cannot think so. But what about the authorities? It must be admitted the cases of Young v. Grote (4 Bing. 253) and Ingham v. Primrose (7 C. B. [N. S.] 82, L. J. C. P. 294), go a long way to justify this judgment; but in all those cases, and in all the others where the alleged maker or acceptor has been held liable, he has voluntarily parted with the instrument, it has not been got from him by the commission of a crime. This undoubtedly is a distinction, and a real distinction. The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime. But it is said that he had done so through negligence. I confess I think he has been negligent, that is to say, I think if he had had this paper from a third person as a bailee bound to keep it with ordinary care, he would not have done so.

SECTION III

HOLDER OF NEGOTIABLE INSTRUMENTS INTRUSTED TO ANOTHER WITH BLANKS

§ 843. (3) The *third* class of cases comprises those in which the party sought to be charged upon the negotiable instrument has been betrayed by his agent, or some other party to whom he has intrusted his signature on a blank paper, and who has fraudulently written over it a bill or note. There is no doubt that if the bill or note were complete with the exception that there was a blank left for the sum, the parties who had signed, accepted, or indorsed it would be bound to pay any sum with which it might be filled up to a *bona fide* holder without notice of the limitation of authority to the agent or other person having it in hand,[16] and it is immaterial that such holder knew that it had been signed, accepted, or indorsed in blank, unless he was

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But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion. Then the Bank of Ireland v. Evans' Trustees (5 H. of L. Cas. 389) shows, under such circumstances, there is no estoppel. It is true that was not the case of the negotiable instrument, but those who complained of the negligence were the parties immediately affected by the forged instrument." See District of Columbia v. Cornell, 130 U. S. 659; Garrard v. Lewis, 10 Q. B. Div. 30.

16. Michigan Bank v. Eldred, 9 Wall. 544; Russell v. Langstaffe, 2 Doug. 514; Violett v. Patton, 5 Cranch, 142; Orrick v. Colston, 7 Gratt. 189; Frank v. Lilienfeld, 33 Gratt. 385; Diercks v. Roberts, 13 S. C. 338; Hopps v. Savage, 69 Md. 516; Eichelberger v. Bank, 103 Ind. 402; National Exch. Bank v. White, 30 Fed. 414. In Fullerton v. Sturgis, 4 Ohio St. 530, A. and B., as sureties of C., signed an instrument payable to D. or order, in blank as to date, amount, and time of payment, and delivered it to C., the principal, with the agreement that it should not be filled up for more than \$1,000 or \$1,500. C. filled it up for \$10,000, and discounted it, and it was held that the parties were bound. In Johnston Harvester Co. v. McLean, 57 Wis. 258, A., as accommodation maker with B., signed a note upon the upper left-hand corner of which were the figures "\$45," but the amount of which was left blank with the understanding that B. should fill the blank so as to make it a note for \$45. B., however, before delivery to payee, and without his knowledge, added a cipher to the figures and filled the blank with the words "four hundred and fifty dollars." Held, (1) that the figures in the corner were no part of the note, and an unauthorized change in them did not vitiate the note; (2) that A. having intrusted the blank to B., was, as against persons having no knowledge of his want of authority, bound by the act of B. in filling up the note for the unauthorized amount. See Redlick v. Doll, 54 N. Y. 236. And see *ante*, §§ 142 *et seq*, 147, 842.

also cognizant of its being fraudulently filled up.[17] If he knew when he took the paper that authority as to filling it up was exceeded, he could not recover.[18]

It seems, also, to be well settled that if the party sought to be charged has intrusted his blank signature to an agent or other person, and has authorized such agent or other person to fill the blank in some form, for some purpose, that he would be bound to a *bona fide* holder if the agent or person wrote over such signature a bill or note. Thus, where papers indorsed in blank were left with a clerk, with authority to use them for certain purposes, and they were fraudulently obtained from him and used differently, the indorser was held liable.[19]

§ 844. In all these cases the first test stated by the text obviously applies. The party sought to be charged has created the agency or trust by means of which the fraud has been committed. Holding the agent out to the world, by confiding his signature into his hands, and accrediting him with that "letter of credit for an indefinite sum," [20] he who has thus told others to trust him, cannot throw the burden of loss on them when they have complied with that request. To hold otherwise would be to punish confiding innocence, and to protect the authors of the fraud. In Maine, where suit was brought by a *bona fide* holder against the maker of a note who alleged that it was a forgery, and his evidence tended to show that the instrument when delivered contained blanks unfilled, which were afterward fraudulently filled, it was held that it was for the jury to determine whether the instrument was delivered as an incomplete paper with blanks to be filled, and that if it was so delivered for any purpose, the person receiving it had implied authority to fill the blanks, and the maker would be liable thereon to a holder in good faith.[21] So, where a blank was signed to be filled as an order on a savings bank and a negotiable note was written over it.[22] So, where the maker of a note for $300 left a blank between "hundred" and "dollars," and "twenty" was

17. Huntington v. Branch Bank, 3 Ala. 186; Breckenridge v. Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353.

18. Clewer v. Wynn, 59 Ga. 246.

19. Putnam v. Sullivan, 4 Mass. 45. See 1 Parsons on Notes and Bills, 114; Faulkner v. White & Son, 33 Nebr. 199, 49 N. W. 1122; Brittan v. Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

20. See *ante*, § 142.

21. Abbott v. Rose, 62 Me. 194.

22. Breckenridge v. Lewis, 84 Me. 349, 24 Atl. 864, 30 Am. St. Rep. 353.

inserted so as to make the note for \$320, a *bona fide* holder was held entitled to recover, the maker having afforded the opportunity of alteration.[23] In an English case it appeared that the defendant signed an acceptance blank as to the amount in the body, but in the margin of which were the figures £14 0s. 6*d*., that being the sum for which he desired to accept. He then handed the acceptance to the drawer, who inserted in the blank "one hundred and forty-four pounds, no shillings, and sixpence," and fraudulently altered the marginal figures to correspond. The plaintiff having received the bill thus altered, *bona fide*, and without notice of the fraud, was held entitled to recover.[24] Cases of this kind are elsewhere more fully cited and discussed.[25]

Under Negotiable Instrument statute.—Under the statute it has been held that where there was no apparent authority on the part of the holder to fill in blanks, and there was no reliance on possession as evidencing authority to complete the instrument, a bank which discounted notes was not a *bona fide* holder when the notes were not complete and could only be made so by filling the amount and date and time of payment, as it was said that one can be a holder in due course only where the instrument is "complete and regular upon its face." [26]

SECTION IV

HOLDER OF NEGOTIABLE INSTRUMENTS WRITTEN OVER BLANK SIGNATURES

§ 845. (4) The *fourth* class of cases comprises those in which the signature of the party has been written on a blank paper, and no authority has been given to the persons in whose hands it is intrusted, or to whose it may come, to write any contract over it; as, for instance, if such signature were written on the fly-leaf of a book loaned to such person, or in an album, or were left with him for any legitimate pur-

23. Yocum v. Smith, 63 Ill. 321.

24. Garrard v. Lewis, 10 Q. B. Div. 30; Johnston Harvester Co. v. McLean, 57 Wis. 258, in which case the same fraud was practiced, and the same rule applied.

25. See vol. II, chapter XLIII, on Alteration, section VI, §§ 1405 to 1409 inclusive.

26. Appendix, sec. 52. Hunter v. Bacon, 111 N. Y. S. 820, 127 App. Div. 572, in which case the note had been made by a partner after dissolution and sent to a bank, whose cashier, knowing of the dissolution, filled in the blanks, and it was held that the retired partner was not liable thereon.

pose, such as to be used as a means of identifying the writer's handwriting; and in such cases, if a bill or note be written over the blank signature, the party would not be bound.[27] Thus, where the party wrote his name on a blank paper, and it was taken from his table by another, who caused a note to be written over it, and put in circulation, these views were taken, Collier, C. J., saying: "If a recovery were allowed upon such a state of facts, then every one who ever indulges in the idle habit of writing his name for mere pastime, or leaves sufficient space between a title and his subscription, might be made a bankrupt by having promises to pay money written over his signature." [28]

§ 846. In these cases, no trust or agency was reposed in the holder of the blank. No appearance of validity was given to the paper as a note. And it could hardly be said that the party was guilty of any negligence in exercising his right to do so simple a thing as the mere writing of his name, when he attached no words to it to give it any significance. In Iowa, the doctrines above stated have been adopted, and there, in a case where A. wrote his name on a piece of blank paper, and sent it to B., who was his agent respecting certain matters, in order that he might use it in identifying his signature, and B. had a note printed over it and passed it to C., before maturity, in the usual course of business, it was held that the latter could not recover.[29]

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27. Caulkins v. Whisler, 29 Iowa, 495; Nance v. Lary, 5 Ala. 370; First Nat. Bank v. Zeims, 93 Iowa, 140, 61 N. W. 483, citing the text.

28. Nance v. Lary, 5 Ala. 370; Chamberlain Banking House v. Noble, 85 Mo. App. 428, citing text.

29. Caulkins v. Whisler, 29 Iowa, 495, in which case Beck, J., said: "The case differs materially in its facts from the case cited in support of plaintiff's right to recover. In these cases blanks were filled up contrary to the direction of the maker, or without his authority. But in all of such cases the makers intended to execute an instrument which should be binding upon them. Blanks were filled up contrary to the authority given by the makers, or in some other way the instruments were made so that they did not correspond with the intention of the makers; but in all such cases there were makers and instruments, and through the frauds of those to whom the instruments were intrusted, they were thus made to be of different effect than was designed by the makers. In these cases it is correctly held, that while the parties perpetrating the fraud in some cases may have been guilty of forgery, yet the makers were bound upon the instruments as against holders in good faith and for value. The reason is obvious. The maker ought rather to suffer on account of the fraudulent act of one to whom he intrusts his paper, or who is made agent in respect to it, than an innocent party. The law esteems him in fault in thus putting it in the power of another to perpetrate the

SECTION V

HOLDER OF NEGOTIABLE INSTRUMENTS PROCURED BY IMPOSITION ON INFIRM OR ILLITERATE PERSONS

§ 847. (5) The *fifth* class of cases are those in which some natural infirmity or defect of education has been imposed upon, and the party deceived into signing a note under the impression that it was for a different amount, or was a contract of a different character. Thus, if a note were fraudulently or falsely read to a blind man, and he were to sign it believing it to have been correctly read;[30] or if the party were unable to read, and signed a note, after due inquiry and precaution, under the assurance that it was an agreement of a different kind, we should have a new element entering into the consideration of his liability. In such cases the want of faculties to detect the fraud shields the party from its consequences, and the authorities justly exonerate him.

He has created no agency or trust. He has not intentionally or knowingly given the appearance of validity to the paper. It cannot be said that he has acted negligently, because his infirmities prevented that diligence which men of ordinary faculties and of education possess.[31]

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fraud, and requires him to bear the loss consequent upon this negligence. In the case under consideration no fault can be imputed to defendant. He did not intrust his signature to the possession of the forger for the purpose of binding himself by a contract. He conferred no power upon the party who committed the crime to use it for any such purpose. He was not guilty of negligence in thus giving it, for it is not unusual, in order to identify signatures, and for other purposes, for men thus to make their autographs. The defendant cannot be regarded as being so far in fault in the transaction that he ought to bear the loss resulting from the crime." See Kline v. Guthrie, 42 Ind. 227; Deturler v. Besh, 44 Ind. 70; First Nat. Bank v. Zeims, 93 Iowa, 140, 61 N. W. 483, citing the text.

30. Putnam v. Sullivan, 4 Mass. 45, Parsons, C. J., saying: "That, perhaps, if a blind man had a note falsely and fraudulently read to him, and he indorsed it supposing it to be the note read to him, he would not be liable as indorsee, because he is not guilty of any *laches*." See Schuylkill County v. Copley, 67 Pa. St. 386 (a bond).

31. The doctrine of negligence has been held not to apply to nonnegotiable instruments. Kastner v. Pribilinski, 96 Ind. 232; Means v. Anderson, 19 R. I. 118, 32 Atl. 82; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046; Willard v. Nelson, 35 Nebr. 651, 53 N. W. 572, 37 Am. St. Rep. 455, note; The Kalamazoo Nat. Bank v. Clark, 52 Mo. App. 593, quoting text.

§ **848.** In New York,[32] where a *bona fide* holder for value, and without notice of any defect, brought suit on a promissory note, the defendant offered to prove in evidence that he was unable to read, and that, when he signed the note, it was represented to him, and he believed, that it was a certain other contract, offered to be also produced in evidence, and which purported to be of an entirely different character. The Supreme Court of New York (overruling the decision of the lower court) held that the evidence was admissible, and presented a sufficient defense, Talcott, J., saying: "A *bona fide* holder of commercial paper, for value and before maturity, is protected, in many cases, against defenses which are perfectly available against the original parties, such as that the signature was obtained by false and fraudulent representations; that the paper has been diverted; that a blank bill or acceptance has been filled up for a greater amount than the party to whom it was delivered was authorized to insert, etc. But, in all these cases, the party intended to sign and put in circulation the instrument as a negotiable security; where this is the case, he is bound to know that he is furnishing the means whereby third parties may be deceived and innocently led to part with their property on the faith of his signature, and in ignorance of the true state of facts. But while this is a rule of great convenience and propriety, there are and must be some limits to its application, some defenses as to which even a *bona fide* purchaser purchases at his peril. * * * The true distinction was tersely stated by Bovill, C. J., in Foster v. McKinnon (38 Law Journal Rep. [N. S.] 310), interrupting counsel, *arguendo*, who was stating the proposition that where the plaintiff proves he is a *bona fide* holder for value, it is immaterial that the signature of the defendant was obtained by fraud. 'That,' said the Chief Justice, 'is where the defendant intended to put his name to an instrument which was a bill.'" In another New York case evidence was given tending to show that the note was signed by the maker at his own house; that he and two of his sons were present who could read; that defendant attempted to read the paper, but did not understand it well, and that it was then read over by the person presenting the paper, an entire stranger to the defendand and his family, and was signed by defendant. The note was held by a *bona fide* holder, and the defendant claimed to have signed it under the belief that it was a contract to act as agent for a patent

32. Whitney v. Snyder, 2 Lans. 477. See Chapman v. Rose, 56 N. Y. 137, and *post*, § 850; Willard v. Nelson, 35 Nebr. 651, 53 N. W. 572, 37 Am. St. Rep. 455, note.

cultivator. It was held that the case turned on the question of the defendant's negligence; that it was improper in the inferior court to direct a verdict for the plaintiff; and that whether the maker was negligent or not was a question of fact for the jury.[33]

§ 849. In Wisconsin, where a German, unable to read or write the English language, was induced to sign a note on the fraudulent representation that it was a contract of agency respecting a patent machine, he was likewise protected against a *bona fide* holder, on the ground that he had no intention of signing a note, and was guilty of no negligence in affixing his signature.[34] So it was held, in the same State, that where the maker of a note was induced by fraud to sign a negotiable note, supposing it to be nonnegotiable, notwithstanding laches on his part, he was not bound to a *bona fide* holder.[35] But this case seems to go too far. In Iowa the payee read the note falsely to a German unable to read English, who signed it, supposing it to be, as read, for a smaller amount. It was held that he was bound unless he could show that he was not negligent.[36]

§ 849a. It has been said by Chief Justice Gibson, that "if a party who can read, will not read a deed put before him for execution; or, if being unable to read will not demand to have it read and explained to him, he is guilty of supine negligence, which, I take it, is not the

33. Fenton v. Robinson, 4 Hun, 252; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046.

34. Walker v. Ebert, 29 Wis. 96. To same effect see Puffer v. Smith, 57 Ill. 527; Van Brunt v. Singley, 85 Ill. 281; Baldwin v. Bricker, 86 Ind. 222; Green v. Wilkie, 98 Iowa, 74, 66 N. W. 1046, 60 Am. St. Rep. 184; First Nat. Bank v. Lierman, 5 Nebr. 247; Shenandoah Nat. Bank v. Gravatte, 4 Nebr. (Unof.) 591, 95 N. W. 694, citing text; Bowers v. Thomas, 62 Wis. 480; Griffiths v. Kellogg, 39 Wis. 290. In California the contrary has been held, Bedell v. Hering, 77 Cal. 572.

35. Kellogg v. Steiner, 29 Wis. 627 (1871). See also Butler v. Carns, 37 Wis. 61 (1875), and Mitchell v. Tomlinson, 91 Ind. 168.

36. Fayette County Sav. Bank v. Steffer, 54 Iowa, 214; Allen v. Haley, 77 Cal. 572. An answer to a complaint in an action on a promissory note, alleging that defendant could not read, and that the payee undertook to read the instrument for him, and read same as if it contained a clause making the payment thereof conditional, but failed to read that it was payable in bank, and provided for the payment of interest from date, is not sufficient as an answer of *non est factum* where it was not averred that a disinterested person could not be found to read the instrument for him. See Lindley v. Hoffman, 22 Ind. App. 237, 53 N. E. 471; First Nat. Bank of Cameron v. Stanley, 46 Mo. App. 440, citing text.

subject of protection, either in equity or law." [37] And, ordinarily, in the absence of any device to put the party off his guard, an omission to read the instrument by one having the capacity to do so, will render him liable, and put him beyond the protection of the law, although he is assured that he is signing a paper of a different kind from what it really is.[38] But in all such cases the question of negligence is difficult of legal solution, and no absolute invariable rule can well be laid down. If the paper be ostensibly read to one who cannot himself read, it is still to him a matter that must rest on faith; and if he takes due precaution to ascertain its true character, it would be a great hardship to inflict responsibility upon him which he did not intend to assume. And what is due precaution must be determined by the peculiar circumstances of each case.[39]

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37. Greenfield's Estate, 2 Harr. 496; Radcliffe v. Biles, 94 Ga. 480, 20 S. E. 359. See Crim v. Crim, 162 Mo. 544, 63 S. W. 489.

38. Ruddell v. Phalor, 72 Ind. 533; Ruddell v. Dillman, 73 Ind. 521; Fisher v. Von Behren, 70 Ind. 19; Pennsylvania R. Co. v. Shay, 82 Pa. St. 198; Roach v. Karr, 18 Kan. 529; Seebright v. Fletcher, 6 Blackf. (Ind.) 380; McCormack v. Molburg, 43 Iowa, 561; Hopkins v. Hawkeye Ins. Co., 57 Iowa, 203; Merritt v. Bagwell, 70 Ga. 579; Cannon v. Lindsay, 85 Ala. 198; Baldwin v. Barrows, 86 Ind. 351; Yeagley v. Webb, 86 Ind. 427; Carey v. Miller, 25 Hun, 28; Radcliffe v. Biles, 94 Ga. 480, 20 S. E. 354; Martin v. Smith, 116 Ala. 639, 22 S. E. 917. It is no defense to an action on a promissory note that the maker relied on certain representations made by an agent of the payee at the time of its execution, and that it did not contain the contract as actually made; the note not having been signed under any emergency, and there being nothing to prevent the maker from reading it, and it not being shown that the failure to read it was brought about by an actual fraud perpetrated by the agent of the payee at the time of its execution. Walton Guano Co. v. Copelan, 112 Ga. 319, 37 S. E. 411, 52 L. R. A. 268. An excuse for failing to pay the full amount of a note that the maker was worried in mind and did not read the mortgage security, is not a valid excuse by a man of large practical business experience who could, by ordinary attention to the terms of the mortgage, have detected any error in it. Condon v. Rice, 88 Md. 720, 44 Atl. 169. But it has been held that where a drawer signed a draft for goods shipped without reading it, not having his spectacles, he was held not to have been negligent therein, when he applied to the defendant bank, and, having given the data required, signed a draft prepared by the cashier, as he had a right to rely on the accuracy and skill of the cashier in a matter so peculiarly within the line of his business. Stoner v. Zachary, 122 Ia. 287, 97 N. W. 1098.

39. Baldwin v. Bricker, 86 Ind. 222; Williams v. Stoll, 79 Ind. 80. Though the maker of a note could not read and write, yet where his fourteen year old son signed the note for him, at his request, and in his presence, without reading the paper to the maker, the defense of mistake cannot be maintained against an innocent holder for value. New Madrid Banking Co. v. Poplin, 129 Mo. App. 121, 108 S. W. 115. On a defense of fraud against the maker, in an action by an

SECTION VI

HOLDER OF NEGOTIABLE INSTRUMENTS EXECUTED UNDER MISTAKE AND MISREPRESENTATION

§ 850. (6) The *sixth* class of cases are those in which the party possesses the ordinary faculties and knowledge, and is betrayed into signing a bill or note by the assurance that it is an instrument of a different kind. It is generally agreed that if the party is guilty of any negligence in signing the paper, he is bound; [40] and the act itself, it seems to us, can hardly be committed without negligence.[41] A man

innocent holder, it was held that the maker could not maintain such defense on the ground that he could not read and supposed that he was signing another contract, when several members of his family were standing by who could read; and especially when he contented himself with a partial reading by a total stranger. First Nat. Bank v. Hall, 129 Mo. App. 286, 108 S. W. 633.

40. In Chapman v. Rose, 44 How. Pr. 364, 56 N. Y. 137, Johnson, J., said: "In such case the rule is, that he is bound by the act of him whom he has trusted, in favor of a holder in good faith." Fenton v. Robinson, 4 Hun, 252; Putnam v. Sullivan; Ross v. Doland, 29 Ohio St. 473; Nebeker v. Cutsinger, 48 Ind. 436; Fayette County Sav. Bank v. Steffes, 54 Iowa, 214; Salander v. Lockwood, 66 Ind. 285; First Nat. Bank v. Latton, 67 Ind. 256; Fisher v. Von Behren, 71 Ind. 19; Ruddell v. Phalor, 72 Ind. 533; Indiana Nat. Bank v. Weckerly, 67 Ind. 345; Gettler v. Pickett, 61 Ala. 387 (*semble*); Dinsmore v. Stimbert, 12 Nebr. 439; National Exch. Bank v. Veneman, 43 Hun, 244, citing the text; Hollingshead v. American Nat. Bank of Macon, 104 Ga. 250, 30 S. E. 728; First Nat. Bank of Cameron v. Stanley, 46 Mo. App. 440, citing text; Yeomans v. Lane, 101 Ill. App. 228; Grant v. Isett, 81 Kan. 439, 105 Pac. 1021; Cedar Rapids Nat. Bank v. Rhodes, 96 Miss. 700, 51 So. 717. See *ante*, § 847, and *post*, § 851. The fact that the maker of a note given for a premium on a life insurance policy did not read it and supposed that it was to be due immediately and to be paid out of the money he was to borrow from the insurance company, whereas the notes were due in one year from that date, does not show such mistake of which the law can take notice. Poindexter v. McDowell, 110 Mo. App. 233, 84 S. W. 1133. Where a person, unable to read or distinguish papers without his glasses, signed without using his glasses a note which had been surreptitiously placed among other papers which it was his duty to sign and in such a manner that he could not distinguish it from the other papers, he is estopped by his carelessness from setting up the fraud practised in defense to the note as against a payee who was not a party thereto and had no knowledge of it. McCoy v. Gouvion, 102 Ky. 386, 43 S. W. 699.

41. Leonard v. Dougherty, 22 W. Va. 536; First Nat. Bank v. Johns, 22 W. Va. 520, Johnson, J., saying: "If the party signed the note, if it was his genuine signature, and he intended to sign a paper, and by artifice and fraud was induced to sign, and did *in fact* sign a negotiable promissory note, which was afterward purchased for value before maturity without notice of any such fraud in its procure-

has no right to have eyes and see not; or ears and hear not; and while the law should protect those who suffer from the want of the senses in their proper development, or ordinary education to throw the burden of the failure to use them upon innocent third parties. In such cases we should say the act of signing the paper without intending to do so, as a general rule, imported negligence *per se*, and rendered the party liable.[42] A misrepresentation by a total stranger is not sufficient to defeat an action on a promissory note, plainly legible, and assigned before maturity to a holder for value, when the only excuse of the maker is that he was too busy to read the note.[43] If he has full and unrestricted means of ascertaining the true character of the instrument before signing it, but neglecting to avail himself of such means of information, and relying on others' representations, he signs and delivers a negotiable paper, instead of a different paper, which he intended to sign, he cannot be heard to impeach it when it has been passed to a *bona fide* holder. In accordance with this doctrine it was held in Iowa that where one Matting was induced to sign a promissory note under the false representation that it was a contract of agency, respecting a certain patent seeder and cultivator, he was bound to a *bona fide* holder.[44]

ment, he is bound to such innocent holder, and the well-established rule applies with striking force in such a case (even if it could be said that the maker was entirely without fault in signing the note) 'when one of two innocent parties must suffer by the act of a third, he, who by his act has enabled such third person to cause the loss, must sustain it.'" In Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, L. R. A. (N. S.) 1075, 107 Am. St. Rep. 823, it was held that where an indorsement of a note, payable to the order of the maker, was the effect of a fraudulent trick or device, which the indorser was in no way responsible for, an innocent purchaser for value cannot recover thereon.

42. Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 505, Brewer, J., citing the text; First Nat. Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506; Harrison v. Walden, 89 Mo. App. 164; Hollingshead v. American Nat. Bank of Macon, 104 Ga. 250, 30 S. E. 728; Pavey v. Stauffer, 45 La. Ann. 353, 12 So. 512; Crim v. Crim, 162 Mo. 544. Unless the plea aver notice to the holder of such fraud and deception before he acquired the note. Tower v. Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937.

43. Wilcox v. Tetherington, 103 Ill. App. 404.

44. In Douglass v. Matting, 29 Iowa, 498, Beck, J., said: "The defendant trusted the one with whom he was dealing with the preparation of the instrument. The instrument as prepared was not what defendant had agreed to sign, but was voluntarily executed by him. The act of the agent was a fraud whereby the defendant was induced to make a note, and not the false making of it, which is necessary to constitute a forgery. * * * Now it would be manifestly unjust to permit the maker, while admitting the genuineness of his signature, to defeat the note, on the ground that, through his own culpable carelessness while dealing

Again, in Iowa, where a party's signature was fraudulently obtained to a printed form or blank, under pretense of getting an order for a machine, and the payee filled it up as a negotiable note for $75, payable to T. H., or bearer, the like decision was rendered.[45] In New York similar views now prevail; [46] and in Illinois, where the maker of a note for $180 signed it without reading it, under representations that it contained a condition that it should not be paid until a certain number of hay-loading devices were sold, he was held bound to the *bona fide* holder, upon the same principles.[47] In Kansas, the maker

with a stranger, he signed the instrument without reading it or attempting to ascertain its true contents. The law will favor, as between the holder and maker in such a case, the more innocent and diligent. The maker had it in his power to protect himself from the fraud, but failed to do so. When the consequences of this act are about to be visited upon him, he seeks to make another bear it, on the ground that he was defrauded through his own gross negligence. He can certainly claim protection either on the ground of his innocence or diligence. The rule contended for by the appellee would tend to destroy all confidence in commercial paper. It is better that defendant, and others who so carelessly affix their names to paper, the contents of which are unknown to them, should suffer from the fraud which their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country interfered with and unsettled." See this case distinguished in Knoxville Nat. Bank v. Clarke, 51 Iowa, 264; Millard v. Barton, 13 R. I. 603; Brown v. Hoffelmeyer, 74 Mo. App. 385.

45. In McDonald v. Muscatine Nat. Bank, 27 Iowa, 319 (1869), Cole, J., said: "This conclusion is based upon the fact, as shown by plaintiff's own evidence, that the signature of the plaintiff was placed to the blank instrument, and it was delivered and intrusted by him to the payee for some purpose. In such case the rule may well be applied." Cowgill v. Petifish, 51 Mo. App. 264.

46. Chapman v. Rose, 56 N. Y. 137 (1874), overruling same case in 44 How. Pr. 364 (1873), and explaining Whitney v. Snyder, 2 Lans. 477; Fenton v. Robinson, 4 Hun, 354. See *ante*, § 848. See, to same effect, Shirts v. Overjohn, 60 Mo. 315; Fredericks v. Clemens, 60 Mo. 313; Citizens' Nat. Bank v. Smith, 55 N. H. 393; Cannon v. Moore, 17 Mo. App. 101.

47. Leach v. Nichols, 55 Ill. 273, McAllister, J.: "The case of Foster v. McKinnon, decided in the English Common Pleas, in July, 1869, and reported in 38 L. J. Rep. (N. S.), p. 310, is one where the plaintiff was an indorsee of a bill of exchange for £3,000, and sued the defendant as indorser. The plaintiff was a holder for value before maturity, and without notice of the fraud. Callow, the acceptor of the bill, testified that he produced the bill to the defendant (a gentleman far advanced in life), for him to put his signature on the back, after that of one Cooper, who was payee and first indorser of the bill, Callow not saying it was a bill, but told the defendant the instrument was a guaranty. The defendant did not see the face of the bill at all, but the bill was of the usual shape, and bore a bill stamp, the impress of which stamp was visible at the back of the bill. The defendant signed his name after Cooper, he, the defendant, as the witness stated, believing the document to be a guaranty only. The Lord Chief Justice told the

signed under the impression that the paper was a contract of agency, and without reading it, and it being a negotiable note for $90, he was held bound to a *bona fide* holder.[48]

jury that if the indorsement was not the defendant's signature, or if, being his signature, it was obtained upon a fraudulent representation that it was a guaranty, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guaranty, and if the defendant was not guilty of any negligence in so signing the paper, the defendant was entitled to a verdict. The jury found for the defendant. A rule *nisi* was obtained for a new trial, and the cause was fully argued, and carefully considered by the court, upon examination of all the authorities which could be found bearing upon the question. The instruction was sustained by the whole court in a very elaborate opinion delivered by Byles, J., who says: 'It seems plain, on principle and on authority, that if a blind man, or a man who cannot read, or a man who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterward signs, then, at least if there be no negligence, the signature so obtained is of no force, and it is invalid, not merely on the ground of fraud, where fraud existed, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and, therefore, in contemplation of law, never did sign the contract to which his name is appended. The authorities appear to support this view of the law. In Thoroughgood's Case, 2 Rep. 96, it was held that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is, nevertheless, not his deed. In a note to Thoroughgood's Case, 2 Rep. 96, in Frazers' edition of Coke's Reports, it is suggested that the doctrine is not confined to the condition of an illiterate grantor, and a case in Kelway's Reports, p. 70, is cited in support of this observation. On reference to that case, it appears that one of the judges did there observe that it made no difference whether the grantor were lettered or unlettered. That, however, was a case where the grantee himself was the defending party; but the position, that if a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him, is supported by many authorities (see Com. Dig., tit. "Fait," 62), and is recognized by Bayley, J., and the Court of Exchequer, in the case of Edwards v. Brown, 1 Cromp. & J. 312. Accordingly, it has recently been decided in the Exchequer Chamber, that if a deed be delivered, and a blank left therein be thereafter improperly filled up (at least if this be done without the grantor's negligence), it is not the deed of the grantor. Swan v. The North British Australasian Co., 2 Hurls. & C. 175, 32 L. J. R. (N. S.) Exch. 273. These cases apply to deeds, but the principle is equally applicable to other contracts. * * * It was not his design, and if he was guilty of no negligence, it was not even his fault that the instrument he signed turned out to be a bill of exchange.'" See Sims v. Bice, 67 Ill. 88, where party was imposed upon, and fraudulently induced to sign a note, supposing it to be an agreement of agency, and was interrupted in the course of the transaction. He was unable to read readily, and a verdict in his favor was sustained.

48. Ort v. Fowler, 31 Kan. 478.

So in Missouri the *bona fide* holder was sustained in his right to recover where the maker signed a negotiable note, though supposing it was a receipt for plows. In this case he was also deemed bound by a subsequent ratification.[49]

In Illinois, under statutory enactments, whether signature of a note is obtained by fraud of the payee, or by inducing him to believe it is not a note, but a different instrument, it is void even in the hands of a *bona fide* holder.[50] But if he was acquainted with its language, or might have been by the exercise of ordinary prudence and caution at the time he signed it, false and fraudulent representations of the payee as to its legal effect will not render it void in such a holder's hands.[51]

In Ohio, negligence is the test. If the maker is charged with negligence, as when he signs a paper containing blanks capable of being filled up as a note, or signs it without reading it, relying on what is told him, he is bound, notwithstanding he was deceived and did not intend to make a note;[52] but if not chargeable with negligence he is not.[53]

In Nebraska it is considered that the party to an instrument is not guilty of negligence where he relies on the reading of it by another party thereto.[54] If such party were a stranger, we should say it was negligence;[55] and, indeed, it seems that it is negligence when one can read, not to read for himself.[56]

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49. Shirts v. Overjohn, 60 Mo. 315; Fredericks v. Clemens, 60 Mo. 313. See Kemble v. Christie, 55 Ind. 140.

50. Hubbard v. Rankin, 71 Ill. 129; Richardson v. Schirtz, 59 Ill. 313. In Auten v. Gruner, 90 Ill. 300, the maker read the note twice and thought it was for $10. By some fraud or device unknown to him it was for $300. Held, not valid in hands of *bona fide* holder. The statute, making fraud or circumvention used in obtaining the making or execution of a note a defense to an action thereon, relates, in the matter of the fraud, to the execution of the instrument itself, and not to the consideration. Connolly v. Dammann, 232 Ill. 175, 83 N. E. 531; Freehold Bank v. Kennedy & Wright Co., 148 Ill. App. 310; Sinnickson v. Richter, 140 Ill. App. 212; Mann v. Merchants' Loan & Trust Co., 100 Ill. App. 224.

51. Hornes v. Hale, 71 Ill. 552. See also Swannell v. Watson, 71 Ill. 456; Mead v. Munson, 60 Ill. 49; Commercial State Bank v. Judy, 133 Ill. App. 35; Cowgill v. Petifish, 51 Mo. App. 264, citing text.

52. Ross v. Doland, 29 Ohio St. 473.

53. De Camp v. Hanna, 29 Ohio St. 467.

54. Palmer v. Largent, 5 Nebr. 223.

55. See Swannell v. Watson, 71 Ill. 456.

56. See *ante*, § 850.

§ 851. Conflicting decisions.—In other States the courts go far to protect the defrauded parties to the paper rather than the innocent holders.[57] In Michigan, where the maker of a note, of defective eyesight in the dusk of evening, was induced by an impostor to sign several papers adroitly arranged to overlie each other, under the assurance that they were contracts respecting the agency for a patent hayfork, and amongst them was a negotiable note for $120, which was passed to a *bona fide* holder, the holder was not permitted to recover. The defective eyesight was not referred to as exempting the maker from the charge of negligence, but the broad doctrine was asserted, that, as he did not intend to make a negotiable paper, he was not bound.[58] And the like view was at one time taken in Missouri, in a case differing only in the circumstance that there was no physical infirmity in the maker, and that the patent machine about which the negotiation took place was a pump instead of a hayfork;[59] but this case was subsequently overruled, and the doctrine of the text adopted, that in order to be protected against an innocent holder for value, on executing negotiable paper when he believed it to be a different contract, the maker must have been guilty of no negligence about the matter.[60] In another Michigan case it was held, that while

57. Where the fraud and deception were such that inducing a person to sign an instrument not intended amounted to a forgery, such instrument is not valid although in the hands of an innocent holder for value, in the absence of negligence. Biddeford Nat. Bank v. Hill, 102 Me. 346, 66 Atl. 721, 120 Am. St. Rep. 499; Yakima Valley Bank v. McAllister, 37 Wash. 566, 107 Am. St. Rep. 823, 79 Pac. 1119, 1 L. R. A. (N. S.) 1075; Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974, 92 N. W. 364.

58. In Gibbs v. Linabury, 22 Mich. 492 (1871), Graves, J., said: "Now, when a party never designed to put, or cause to be put, any sort of negotiable paper in circulation, when the thought of doing so never entered his mind, when he had never bargained to do so, when he has never consciously been privy to any attempt to set such paper afloat, how can it be said that his will in any way assented to the concoction of such a contract so as to make him an object of the rule? So far as this principle is concerned, it is not perceived how the instance here supposed would differ from that when the act leading to the mischief is done by an insane man, or is compelled by duress. The point is, that the will does not go with the act." First Nat. Bank v. Deal, 55 Mich. 592; Soper v. Peck, 51 Mich. 563; Kagel v. Totten, 59 Md. 447; Baldwin v. Fagan, 83 Ind. 447. See Deturler v. Bish, 44 Ind. 70.

59. Briggs v. Ewart, 51 Mo. 251 (1873), followed in Martin v. Smylee, 55 Mo. 577, and Corby v. Weddle, 57 Mo. 452. See Beland v. Brewing Assn., 157 Mo. 593.

60. Shirts v. Overjohn, 60 Mo. 305. See also New Madrid Banking Co. v. Poplin, 129 Mo. App. 121, 108 S. W. 115; Mackey v. Peterson, 29 Minn. 298.

there may be cases where one signing and putting in circulation an instrument, should be bound by the terms thereof, even though different from what he supposed them to be, that rule would not apply where a party signed in good faith what he had heard read and what purported to be a power of attorney, contract, deed, or other similar instrument, in case a negotiable note of that date, of which he had no notice or intimation, should have been mysteriously lurking in the depths of the instrument so signed, and should afterward turn up with his signature attached thereto.[61]

§ **851a.** In England, it would seem, from the case of Foster v. McKinnon,[62] that the holder, under such circumstances, is not protected. In that case the party was induced to indorse a bill upon the assurance that it was a guaranty, and it was held that he was not bound. It appears from the evidence, however, that he was a gentleman far advanced in life, and that circumstance may have been of some weight in relieving him from the imputation of negligence. We certainly cannot concur in the doctrine that the intention of the party signing the paper should determine the question of his responsibility. Third parties can have no opportunity to scrutinize his intention, which is a sealed book to all but himself; and he should not be permitted to escape the responsibility of what he did by pleading what he designed to do.

But the language of Lord Chief Justice Bovill is consonant with the principle of the text. He said: "If the defendant's signature to the document was obtained upon a fraudulent representation that it was a guaranty, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict."

§ **852.** In Indiana, a very strong decision has been rendered protecting the maker against a *bona fide* holder.[63] There, where the maker of a negotiable promissory note, payable at a bank in that State, was induced, by the fraud and circumvention of the payee, to sign his name to such note, when he honestly supposed and believed that he was writing his name on a blank piece of paper, to enable the payee to see how his name was spelled or written, and the

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61. Anderson v. Walter, 34 Mich. 113.

62. 4 C. B. 704, 38 L. J. (N. S.) 310. See *ante*, § 850, and Chapman v. Rose, 56 N. Y. 137.

63. Cline v. Guthrie, 42 Ind. 227. See also Deturler v. Bish, 44 Ind. 70; Webb v. Corbin, 78 Ind. 406.

maker did not, after he discovered that he had so signed his name to the note, voluntarily deliver it to the payee, but it was taken possession of wrongfully and forcibly by the payee, and by him carried away against the consent of the maker and negotiated, it was held (1) That the maker was no more bound by his signature than if it were a total forgery, although the person to whom it was negotiated was a purchaser and holder in good faith, and for a valuable consideration before maturity; and also (2) That admitting that the maker signed his name to the note, with full knowledge of its character, it was nevertheless invalid, and void, even in the hands of an innocent purchaser for value, for the want of delivery; nor was the maker liable on the ground that when one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it. But in another case in that State the maker was held liable to a *bona fide* holder for value, notwithstanding he was led to execute the note by fraudulent and false representations of the payee that it was a different sort of instrument, and signed it, not supposing it was a negotiable note, nor intending to make one.[64] And in that State, whenever the maker is negligent in putting forth his signature to a note, whether he knows it to be a note or otherwise, he is now considered liable to a *bona fide* holder.[65]

§ **853.** It is quite remarkable that throughout the northwestern States so many cases have occurred almost identical in circumstances, and in which, in fact, the names of the parties are frequently the only distinguishing elements. The peddlers of patent machines and patent rights seem to have practiced a particular trick upon their vic-

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64. Kimble v. Christie, 55 Ind. 140. To same effect, see Nebeker v. Cutsinger, 48 Ind. 436; Woollen v. Wise, 73 Ind. 201; Woollen v. Whitacre, 73 Ind. 201; Ruddell v. Dillman, 73 Ind. 521; First Nat. Bank v. Latton, 67 Ind. 256; Fisher v. Von Behren, 71 Ind. 19; Ruddell v. Phalor, 72 Ind. 733; Indiana Nat. Bank v. Weckerly, 67 Ind. 345; Woollen v. Ulrich, 64 Ind. 120; Maxwell v. Morehead, 66 Ind. 301; Thomas v. Ruddell, 66 Ind. 326. See Wisconsin cases, *ante*, § 849, note.

65. See Cases *supra*, and Peoples' State Bank v. Ruxer, 31 Ind. App. 245, 67 N. E. 542. In Home Nat. Bank v. Hill, 165 Ind. 226, 74 N. E. 1086, the court said that where one has negligently signed a promissory note negotiable by the law merchant he cannot successfully defend against such a note in the hands of a *bona fide* holder, although it was procured from him by the means of fraud, and without any consideration whatever, but in a case where a party not guilty of negligence signs a negotiable note in the belief induced by fraudulent practices that it is a paper of a character altogether different from the one which he intended to sign, then, under the circumstances, such note cannot be enforced against him, although it has passed into the hands of a *bona fide* purchaser for value.

tims, and have flooded the courts with litigation arising out of it. These cases are notable instances of the contagion and imitativeness of fraud. In some of the States, legislation has been deemed necessary to protect society against frauds committed through such instrumentalities as those herein discussed.[66]

SECTION VII

HOLDER OF NEGOTIABLE INSTRUMENT DELIVERED BY THIRD PARTY IN VIOLATION OF INSTRUCTIONS

§ **854.** Still another class of cases, presenting a question somewhat different from any yet discussed, has arisen where parties have signed their names to bills and notes, either perfect in form, or in blank, with authority only to deliver them as complete and valid instruments upon condition that some other person shall become a party, or some contingency be fulfilled. In these cases it will be observed the person with whom such instrument is left is its mere custodian, and not an agent having any absolute power to dispose of it. He is not, as to the instrument, an agent with limited powers, but the agency itself is conditioned upon the happening of the event upon which he is to become the agent to deliver. In such cases there is the high authority of the English Court of Exchequer of Pleas, that the party whose name is upon the instrument will not be bound if the custodian of it issue it to a *bona fide* holder before the condition is fulfilled; but the weight of authority in the United States, with reason, as we think, supports the opposite view. In the Court of Exchequer of Pleas, where it appeared that A. agreed to join his brother B. in making a promissory note for his accommodation, provided C. would also join; and with a view to carrying out the arrangement, a note, blank as to date and as to the payee, and running, "We jointly and severally promise to pay Mr. ———, or order, £1,000," was

66. In New York, by statute, where a note is given in whole or in part for the right to make, use, or vend a patent right, the words "given for a patent right" are required to be prominently written or printed on the face before execution, and it is subject to all defenses as if in the hands of the original taker. The sale of a note so given without a compliance with the statute is a misdemeanor. 1 Laws 1877, chap. 65, p. 68. In some other States there are also provisions as to notes given for patent rights. See Pendar v. Kelley, 48 Vt. 27; Moses v. Comstock, 4 Nebr. 516.

signed by A., leaving room before his name for C.'s—another handed it to B.; and B., without procuring C. to sign, also passed the note to D., filling up the blanks, and inserting D.'s name as payee, it was held that D. could not recover against A., upon the ground that the refusal of C. to join was a countermand of authority to B. to issue; and that B. then had no authority to deal with it.[67] This is the *ratio decidendi* of the case, as will be seen by reference to the opinion of Parke, B. In Vermont, however, where A. signed a joint and several note with B., as his surety, payable at a bank, with the agreement that he should not use it unless he obtained another surety upon it, the court held that the bank to which B. passed the note, without procuring another surety, could recover against A., A. being without knowledge of the agreement; but distinguished the case from that just quoted.[68] But there is no distinction that we can discover in the

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67. Awde v. Dixon, 6 Exch. 869 (1851), Parke, B., said: "It is unnecessary to say whether this instrument is a forgery or not, but there is certainly ground for contending that the making of it complete, contrary to the directions of the defendant, renders it a false instrument as against him. I do not gainsay the position, that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover. But this is a different case. Here, the instrument, to which the defendant's name is attached, is delivered to his brother, with power to make it a complete instrument, on one condition only, that is, provided Robinson would be a joint surety with him. This, therefore, is an instance of a limited authority, where, in case of a refusal by Robinson to join, there is a countermand. Robinson refused to join, and consequently the defendant's brother had no authority to make use of the instrument. A party who takes such an incomplete instrument cannot recover upon it, unless the person from whom he receives it had a real authority to deal with it. There was no such authority in this case, and unless the circumstances show that the defendant conducted himself in such a way as to lead the plaintiff to believe that the defendant's brother had authority, he can take no better title than the defendant's brother could give. The maxim of law is, *nemo plus juris in alium transferre potest quam ipse habet*. It is a fallacy to say that the plaintiff is a *bona fide* holder for value; he has taken a piece of blank paper, not a promissory note. He could only take it as a note under the authority of the defendant's brother, and he had no authority, consequently the instrument is void as against the defendant." Alderson, B., and Platt, B., concurred. Rule absolute. Twenty-sixth Ward Bank v. Stearns, 148 N. Y. 515, 42 N. E. 1050. In this case it was held that if a director of a bank while acting as the agent of the bank, procures an indorsement upon a promissory note upon the understanding that an additional indorsement shall be obtained, which is not done, the bank, on taking the note, is chargeable with notice of the condition and its nonperformance, available to the indorser as a defense to an action on the note by the bank.

68. Passumpsic Bank v. Goss, 31 Vt. 315 (1858), Barrett, J.: "The case of Awde v. Dixon, 5 L. & E. Rep. 512, upon a first impression seems to come nearer

principles of the two, though the facts, as to the particular instruments, vary. In Kentucky, where a party signed as surety, and left the note with the principal, with the agreement that it should not be obligatory until a certain other surety had signed, the surety was held; and the grounds of the decision seem to us at once comprehensive and conclusive.[69] In such cases notice to the holder of the condi-

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to the present case, and to countenance the defense here made. But on examination it clearly stands on a different ground. In that case, the payee's name was left blank when the defendant signed the note as surety. It was inserted at the time the note was delivered, and the money was advanced upon it, the principal 'stating falsely that he had authority to deal with it.' Moreover, the defendant signed, leaving a space for the name of the person who was to sign as cosurety. With the note in this condition when presented to the plaintiff, he becomes the payee by having his name inserted, and receives it. It is obvious, from the report of the case, that the court deemed the insertion of the payee's name, and the passing off of the note, to be a forgery upon the defendant, the same as if the sum had been left blank when signed by the surety, and afterward had been filled with a larger sum than had been agreed between the principal and surety." * * * Same judge, p. 321: "The propriety of this view is strongly illustrated by the well-known course of this kind of business. The instance has hardly occurred of a bank making inquiry when paper, genuine and apparently designed for discount, is presented at the counter, whether, as against the makers, it is entitled to be used. If the court should sustain this defense in this case, it would become necessary for banks, and equally for all persons, upon the offer of a note with sureties, in the usual course of business, to call before them all the makers, and ascertain, by personal inquiry, whether it was 'all right,' and not subject to some side agreement or reservation in favor of some of the sureties, that might render it invalid as against them. We think such a rule of law would not only contravene the well-established usages of business, but would surprise, if not shock, the judgment of the community upon this subject." See also Farmers', etc., Bank v. Humphrey, 36 Vt. 554. So held in Nebraska. Brumback v. German Nat. Bank, 46 Nebr. 540, 65 N. W. 198; Joyce v. Cockrill, 35 C. C. A. 38, 92 Fed. 838.

69. Smith v. Moberly, 10 B. Mon. 269 (1850), Simpson, J., saying: "But a delivery of a writing of this character, under such circumstances, to the principal, does not have the effect of characterizing it as a mere escrow; but, on the contrary, the principal should be considered as the agent of the surety, and empowered by him to pass the writing to the person to whom it may be made payable, and his delivery as being sufficient to make it effectual, unless the payee had notice of the special terms upon which it was signed. The implied discretionary authority to use the note, arising out of its possession by the principal, uncontradicted by its terms or anything apparent on its face, cannot be restricted by any agreement between the payors themselves, of which the payee had no notice. The same principle is substantially decided in the case of Bank of the Commonwealth v. Curry, 2 Dana, 142. The law in relation to the execution of deeds and specialties is not applicable to promissory notes. In the language of this court in the case of Taylor, etc., v. Craig, 2 J. J. Marsh. 246, 'promissory notes are *quasi* mercantile, but are not in this country, as they are in England, since the

tion, and its violation, is necessary to a defense.[70] So in Missouri where one indorsed a note upon agreement that another should indorse also.[71] And the same views have prevailed, justly as we think, in Indiana,[72] New Hampshire.[73] and Iowa,[74] and have been recognized in other States.[75]

§ 855. **Escrows.**—In none of the cases is it maintained that a bill or note, either in full or in blank, intrusted to the payee, to be valid upon a condition, will not be binding if the condition is violated. Such delivery to the payee is in law absolute and complete; and whether the instrument be negotiable or under seal, the doctrines which apply when third parties are the custodians do not extend to them.[76] An instrument under seal deposited with a third party, to be delivered upon condition, is called an escrow; and according to the English precedent referred to, and to some of the American decisions which have either followed it as an adjudication or recognized the doctrine which it asserts, a negotiable instrument may also be deposited with a third party as an escrow, and the parties to it will not be bound if the depositary issue it in breach of the trust reposed in him.[77] In a Wisconsin case, where a promissory note and a mort-

statute of Anne, negotiable precisely as bills of exchange. But, for many purposes, the doctrine of bills of exchange applies to promissory notes, because the reason of it applies equally to both kinds of paper. The law in relation to the execution of both is the same; and justice and the exigencies of commerce require that the drawer of a bill, or payor of a note, should be bound sometimes, when, if the instrument were a deed, he would not be liable.' " See also Taylor v. Craig, 2 J. J. Marsh. 449; Pittsburg, etc., Ry. Co. v. Lynde, 55 Ohio St. 23, 44 N. E. 596.

70. Bonner v. Nelson, 57 Ga. 433.

71. Bank of Missouri v. Phillips, 17 Mo. 30 (1852). See Ayres v. Milroy, 53 Mo. 516. Held, that in the case of a nonnegotiable note it is different.

72. Deardorff v. Foresman, 28 Ind. 481 (1865); Whitcomb v. Mills, 90 Ind. 384; Riggs v. Trees, 120 Ind. 402.

73. Merriam v. Rockwood, 47 N. H. 81.

74. Gage v. Sharp, 24 Iowa, 15, the condition being the execution of a mortgage to protect the surety. See also McCramer v. Thompson, 21 Iowa, 244; Micklewaitt v. Noell, 69 Iowa, 345; Graff v. Logue, 61 Iowa, 707, citing the text.

75. Tabor v. Merchants' Nat. Bank, 48 Ark. 454; Ward v. Hackett, 30 Minn. 150, 44 Am. Rep. 187; Jordan v. Jordan, 10 Lea, 124, 43 Am. Rep. 294; Davis v. Gray, 61 Tex. 506; McCormick v. Holmes, 41 Kan. 267, citing the text; Brumback v. German Nat. Bank, 46 Nebr. 540, 65 N. W. 198.

76. Massman v. Holscher, 49 Mo. 87 (1871); *post*, § 856; Hurt v. Ford, 142 Mo. 283, 44 S. W. 228.

77. Babcock v. Beman, 1 Root, 87; Couch v. Meeker, 2 Conn. 302; Chipman

gage to secure it were placed in the hands of a stranger to be delivered to the payee upon the happening of a certain event, and he delivered them to the payee without authority, and without waiting for such event, it was held that neither the mortgage nor the note were valid, although the latter was in the hands of a *bona fide* holder for value without notice.[78] A material alteration of a note made by one of the promisors before delivery avoids it as against the other, although done without fraudulent intent.[79]

In Arkansas, it was said by Oldham, J., respecting a note: "If delivered to a third person, it is not binding until the condition upon which it was delivered be performed; but, if directly to the promisee, it is binding from delivery, whether the condition be performed or not." [80]

§ **855a.** If the bill or note be delivered to an agent to be used for a certain purpose, as, for instance, to apply its proceeds to a particular debt, it will be void if diverted from that purpose in the hands of any holder having notice of such diversion, or affected with such notice.[81]

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v. Tucker, 38 Wis. 50. *Contra*, Hutchinson v. Brown, 19 D. C. 136; Hansford v. Freeman, 99 Ga. 376, 27 S. E. 706.

78. Chipman v. Tucker, 38 Wis. 43 (1875), Cole, J.: "Delivery of a promissory note by the maker is necessary to a valid inception of the contract, and until there is a delivery, the note has no vitality, and the rules of commercial paper have no application to it." See also Roberts v. McGrath, 38 Wis. 52; Roberts v. Wood, 38 Wis. 60; Peigh v. Huffman, 6 Ind. App. 658, 34 N. E. 32. *Contra*, National Bank of St. Joseph v. Dakin, 54 Kan. 656, 39 Pac. 180, 45 Am. St. Rep. 299; Sharp v. Allgood, 100 Ala. 183, 14 So. 16; Norfolk Nat. Bank v. Nenow, 50 Nebr. 429, 69 N. W. 836; Smith v. Goodrich, 167 Ill. 46, 47 N. E. 316.

79. Draper v. Wood, 112 Mass. 315.

80. Scott v. State Bank, 9 Ark. 36; Tabor v. Merchants' Nat. Bank, 48 Ark. 454, 3 S. W. 805.

81. *Ante*, § 282 *et seq.*; Smith v. Knox, 3 Esp. 46; Quebec Bank v. Hellman, 110 U. S. 182, Woods, J., saying: "It is clear that the deposit of a promissory note with an agent of a third party, on the condition that it should be used by the agent's principal for a specified purpose, will not confer title so as to authorize the principal to hold the note for a different purpose. * * * Under such circumstances, without the performance of the condition, there is no delivery in the commercial sense, and no title passes." See also Delauney v. Mitchell, 1 Stark. 439; Evans v. Kymer, 1 B. & Ad. 528; Puget de Bras v. Forbes, 1 Esp. 117; O'Connor v. Jones, 65 Hun, 48, 19 N. Y. Supp. 725. But the *bona fide* holder (so it has been decided by the Supreme Court of New York) could only recover what he had actually paid for the notes. See First Nat. Bank of Springfield v. Haulenbeek, 65 Hun, 54, 19 N. Y. Supp. 567; Norfolk Nat. Bank v. Nenow, 50

§ 856. Difference between sealed and unsealed instruments.—It should be borne in mind that there is a cardinal distinction between the perversion of instruments in form negotiable, or capable and intended to be made so in a certain contingency, and that of instruments under seal. The latter, when completed, may be delivered to third persons—that is, to other than the parties—with authority only to deliver them upon condition; and in such case, if the condition be violated, the party intending to be only conditionally bound will not be bound absolutely.[82] A sealed instrument so delivered to a third person is called an escrow.

But negotiable instruments, as it seems to us, stand on a different footing entirely. They are letters of credit, and proclamations that all is right to every purchaser or transferee; and one who chooses to put his name on an instrument possessing these characteristics, instead of confining his liability by shaping it in a form expressive of his meaning, should not be permitted to ensnare others and escape himself unscathed. To hold otherwise would be a wide departure from the principles which ramify the law merchant, and would be as repugnant to reason as a decision that an instrument absolute on its face might be varied by a parol condition. And even as to sealed instruments the doctrine now finds favor that, if complete, and signed by sureties with condition that other sureties shall join, the signing sureties will be bound if they leave them with the principal obligors and then deliver them without procuring the additional sureties,[83] though it is otherwise in cases where such instruments, when left with the obligors, indicate on their face that they are incomplete, and that additional parties are contemplated,[84] and also where the party tak-

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Nebr. 429, 69 N. W. 936. Where a note executed by a corporation was assigned by the payee to the president with the knowledge of the corporation, and with the intention on its part that he should negotiate the note for its benefit, it should not be heard to complain that he used the note for his own advantage. Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058.

82. Nash v. Fugate, 24 Gratt. 202. See §§ 68, 148. Parol evidence that the delivery was conditional and evidence of the terms of the condition is not open to the objection of varying or contradicting the written contract. Higgins v. Ridgway, 153 N. Y. 130, 47 N. E. 32; Galvin v. Syfers, 22 Ind. App. 43, 52 N. E. 96.

83. Dair v. United States, 16 Wall. 1; Nash v. Fugate, 24 Gratt. 202, 32 Gratt. 595; Cutter v. Roberts, 7 Nebr. 637; State v. Potter, 63 Mo. 212; State v. Peck, 53 Me. 284. *Contra*, People v. Bostwick, 32 N. Y. 445; State Bank v. Evans, 3 Green, 155; Joyce v. Cockrill, 35 C. C. A. 38, 92 Fed. 838. See *ante*, § 68.

84. Ward v. Churn, 18 Gratt. 801. See editor's notes, 20 Moak's Reports,

ing them has notice that the condition is violated.[85] If the sealed instrument, perfect on its face, be left with the obligee, upon condition that it should be valid only upon its execution by a third person, the delivery is complete, and it is valid and operative though not so executed.[86]

SECTION VIII

HOLDER OF NEGOTIABLE INSTRUMENTS EXECUTED UNDER DURESS

§ 857. Any contract entered into under duress lacks the first essential of validity—the consent of the contractor—and bills and notes form no exception to the rule. As between immediate parties, proof of duress at once annuls the instrument, or rather enables the party who was under duress to avoid it, at his option;[87] but whether or not in the hands of a *bona fide* holder for value without notice, the duress in its inception renders it voidable, is a question upon which the authorities do not altogether agree. It has been held in England that where it appeared that the defendant gave the bill while under duress abroad, and under a threat of personal violence and confiscation of property, and without consideration, that it was incumbent on the plaintiff to give some evidence of consideration,[88] and all the author-

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593; National Bank of St. Joseph v. Dakin, 54 Kan. 656, 39 Pac. 180, 45 Am. St. Rep. 299; Florence R. R. & Improvement Co. v. Chase Nat. Bank, 106 Ala. 364, 17 So. 720, citing text.

85. Nash v. Fugate, 32 Gratt. 595.

86. Miller v. Fletcher, 27 Gratt. 403; Simonton's Estate, 4 Watts, 180; Duncan v. Pope, 47 Ga. 445; Ward v. Lewis, 4 Pick. 518; Currie v. Donald, 2 Wash. 59; The Deering Harvester Co. v. Peugh *et al.*, 17 Ind. App. 400, 45 N. E. 808.

87. Bush v. Brown, 49 Ind. 573 (1875), and authorities cited; Fairbanks v. Snow, 145 Mass. 153. And to constitute duress, it is immaterial that the threats were not made directly to the party signing the note, if they were intended to, and were so, communicated to the maker. Schultz v. Catlin, 78 Wis. 611, 47 N. W. 946; City Nat. Bank v. Kusworm, 91 Wis. 166, 64 N. W. 843; Knott v. Tidyman, 86 Wis. 164, 56 N. W. 632; Hensinger v. Dyer, 147 Mo. 219, 48 S. W. 912.

88. Duncan v. Scott, 1 Campb. 100. In England the old authorities held that the duress sufficient to avoid a contract must be such as to create reasonable fear of death or mayhem; and that fear of battery or trespass upon property is insufficient. See 4 Cruise Dig. 260. And this old rule has been adhered to in modern English cases. But in the United States it is relaxed, according to many decisions. See Sasportas v. Jennings, 1 Bay, 470; Collins v. Westbury, 2 Bay,

ities go so far as to require evidence of consideration. But the party who signs a bill or note under such threats and dangers of personal violence as would naturally impel a man of reasonable firmness and courage, is certainly not a free agent, and in nowise in default; and we can but think that the better doctrine is that held in Scotland, where force used to obtain the subscription of a bill or note nullifies the subscription, since the subscriber's consent is wanting. The party is not bound by such a subscription, more than if it had been forged, in which case the obligation being originally null, even an indorsee can acquire no right to enforce it.[89] The principle there is not extended to all cases where the party consented under such circumstances as to raise a good objection against the original payee—for instance, where the bill or note was obtained by fraud, or by a mixture of deception and terror, though without such a degree of violence as would influence a man of ordinary constancy. Thus, where a party whose cattle had broken into another's field was intimidated by the threat of a lawsuit to give him a bill for an unreasonable amount of damages, it was held that the bill must be reduced in so far as the damages were exorbitant.[90] But it does not appear that the grounds of reduction in this case could have been pleaded against an indorsee suing on the bill or note, for there was a real consent, and consequently an obligation which, till reduced, was transmissible to a third party.

§ **858.** The English doctrine is cited by many text-writers on bills and notes without criticism or dissent, and as a correct statement of

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211; Forshay v. Ferguson, 5 Hill, 158; United States v. Huckabee, 16 Wall. 431. As to what constitutes duress, see Jones Co. v. Board of Education, 30 App. Div. 429, 51 N. Y. Supp. 950, citing the cases of Secor v. Clark, 117 N. Y. 350, 22 N. E. 754; and Barrett v. Weber, 125 N. Y. 25, 25 N. E. 1068. In Pate v. Allison, 114 Ga. 651, 40 S. E. 715, it was held that, to an action on a promissory note brought on by one other than the payee, a plea that the defendant was coerced and induced to execute the note, by reason of threats made to him by the payee thereof, is demurrable, in the absence of an allegation therein that the plaintiff took the note after its maturity, or had notice of such threats when he took it. See also Callendar Sav. Bank v. Loos, 142 Iowa, 1, 120 N. W. 317.

89. Thompson on Bills (Wilson's ed.), 62; Butterfield v. Davenport, 84 Ind. 592; Berry v. Berry, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351.

90. Thompson on Bills (Wilson's ed.), 62. And it has been held in New York that a threat to immediately attach one's property, if established, makes a case of duress. See Newman v. Curiel, 75 Hun, 31, 26 N. Y. Supp. 977; James & Haverstock v. Dalbey, 107 Iowa, 463, 78 N. W. 51.

the law;[91] but at least one English author seems to agree with us,[92] as does also an American writer on bills and notes.[93]

Indeed, we can discern no principle which could compel any person, whether a party to a negotiable or other kind of instrument, to pay it, when under violent duress—that is, under the compulsion of force with the only alternative of submitting to great bodily injury or indignity. Consent is of the essence of every contract, and if it is not given, the party should not be bound if he had no alternative but to seem to give it, or suffer grievous wrong. He creates no trust, he commits no negligence, whereby the confidence of another can be betrayed. He is in no default, having a right of self-defense in preferring his own life and safety to the chances of pecuniary injury to others; and his extorted act is nothing more nor less than the act of the wrongdoer who uses his person as the instrument of forging his name. Threats to inflict slighter wrongs would, as we have seen, stand on a different footing.[94]

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91. Byles on Bills (Sharswood's ed.), 220; Bayley on Bills, chap. IX, p. 318; Chitty on Bills (13th Am. ed.), 85; Edwards on Bills, 325; Story on Notes, § 188; Story on Bills, § 185; Farmers' Bank v. Butler, 48 Mich. 192.

92. In Roscoe's Digest of Bills and Notes, note 20, p. 117, it is said, in commenting on Duncan v. Scott, 1 Campb. 100: "It may be doubted whether the defendant in this case was liable even to a *bona fide* indorsee for value. The bill being drawn under duress, no contract arose, and it resembles the case of a bill drawn by a *feme covert*, who is under a disability to contract."

93. Professor Parsons says, in vol. I, Notes and Bills, p. 276: "A note or bill obtained by duress might not be available in any hands against the party so compelled; and if the note were a good note, and a subsequent party indorsed it by duress, he would not be bound to any one; but a subsequent indorsee who indorsed it over for value would be bound to his own indorsee, or those deriving title from him." But in a previous portion of his work he follows in the rut of the authorities already quoted in a previous note. 1 Parsons on Notes and Bills, 188; Palmer v. Poor, 121 Ind. 135, 22 N. E. 984.

94. In Massachusetts it was held that there is a distinction between force and threats, and Holmes, J., said: "No doubt if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; and if the signature and delivery had not been her acts, for whatever reason, no contract would have been made, whether the plaintiff knew the facts or not. There sometimes still is shown an inclination to put all cases of duress upon this ground. Barry v. Equitable Life Assn., 59 N. Y. 587, 591. But duress, like fraud, rarely, if ever, becomes material as such, except on the footing that a contract or conveyance has been made, which the party wishes to avoid. It is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable. Foss v. Hildreth, 10 Allen, 76, 80; Vinton v. King, 4 Allen, 562, 565; Lewis v. Banister, 16 Gray, 500; Fisher v. Shattuck, 17 Pick.

In a New York case, where a married woman was coerced by her husband with threats of violence to sign a promissory note, in such form as to charge her separate estate, the Court of Appeals held it absolutely void.[95]

Although a note be voidable, for duress, as to the maker, an indorser cannot avail himself of that defense, there being no coercion or restraint as to him.[96]

SECTION IX

WHEN HOLDER OF NEGOTIABLE INSTRUMENTS IS PROTECTED BY ESTOPPEL IN PAIS

§ 859. There are some cases in which defenses which would avoid the instrument in any one's hands are rendered unavailable to the defendant by his own conduct—cases in which, to use the legal phrase, he is "estopped" from pleading the particular defense which he endeavors to set up. "An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Thus, if a person who is negotiating with the payee or indorsee of a note for the purchase of it, inquires concerning its validity of the maker, and the latter assures him that the note is good, that he has no defense against it, that it is good business paper, or that it is all right and will be paid, the maker could not afterward plead that it was usurious or otherwise illegal, or failure or want of consideration, or any equity existing between himself and the transferrer.[97] His

252; Worcester v. Eaton, 13 Mass. 371, 375, 7 Am. Dec. 155; Whelpdale's Case, 5 Coke, 119*a*, 1 Bl. Comm. 130; Hatch v. Barrett, 34 Kan. 232, citing the text.

95. Loomis v. Ruck, 56 N. Y. 465 (1874); Berry v. Berry, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351.

96. Bowman v. Hiller, 130 Mass. 153; West v. Miller, 125 Ind. 70, 25 N. E. 143; Graham v. Marks & Co., 98 Ga. 67, 25 S. E. 931.

97. Davis v. Thomas, 5 Leigh, 1; Tobey v. Chipman, 13 Allen, 133; Vaughn v. Terrall, 57 Ind. 182; Rose v. Hurley, 39 Ind. 82; McCabe v. Raney, 32 Ind. 312; Reedy v. Brunner, 60 Ga. 107; Vanderpool v. Brake, 28 Ind. 130; Plant v. Voegelin, 30 Ala. 160; Cloud v. Whiting, 38 Ala. 57; Wilkinson v. Searcy, 74 Ala. 243; Muse v. Dantzler, 85 Ala. 359; Plummer v. Farmers' Bank, 90 Ind. 386; Hammett v. Barnum, 30 Mo. App. 291; Sutton v. Beckwith, 68 Mich. 303. In Grauel v. Soeller, 52 Hun, 375, the language employed in reply to an inquiry from the purchaser was, "So far as giving the note to S. was concerned, I supposed it was all right, but that it was distinctly understood that the note was not to be negotiated." The purchaser was protected notwithstanding this agreement,

mouth is closed by his previous representation, as to all who act upon it, and the law will not assist him to lead another into a pitfall, and then to make him a scapegoat for himself. And so, if the holder purchased the note with the defendant's knowledge and consent, it has been held that the latter cannot set up prior payment, or other defense against it.[98] It is to be observed that estoppel does not arise unless the act or course of conduct alleged to constitute it is acted upon by the party seeking to benefit by it,[99] and, therefore, a statement made by the maker to the indorser of a note after he acquires it, that it is all right, does not amount to estoppel.[1] Nor does it arise where there is a mistake or misunderstanding as to the identity of the note concerning which the representation is made.[2]

§ 860. Representations, referring only to the then existing status of the instrument, will not exclude defenses subsequently arising.[3]

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which, it was said by the court, made no defense to the note if violated. Scott v. Hart (Pa.), 3 Cent. 574; Lynch v. Kennedy, 34 N. Y. 151; Crout v. De Wolf, 1 R. I. 393; Brooks v. Martin, 43 Ala. 360, Peters, J.: "It is difficult to conceive what would make a note 'all right' that could not be collected by suit, or that would not be paid at maturity, if the maker was able. * * * Had there been a suit pending on the note between Brooks and Martin, and the latter had come into court and pleaded that the note was 'all right,' the court could not have refrained from giving judgment against him. Now, by his words, he puts in this plea before suit is brought, and the law will not permit him to withdraw it after suit is brought." See *post*, § 1351; Krathwohl v. Dawson, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496. Stephenson v. Clayton, 14 Ind. App. 76, 42 N. E. 491, holds that the maker of a note is estopped to deny her liability thereon as to a purchaser for value before maturity by stating to him before the purchase that she had no defenses thereto, and would pay the note, although she did not at the time know that she had any defenses. Crabtree v. Atchison, 93 Ky. 338, 20 S. W. 260; Scott v. Taul, 115 Ala. 529, 22 So. 449. See Barrette v. Baker, 136 Mo. 512, 37 S. W. 130.

98. Downer v. Reed, 17 Minn. 493. But it has been held in Mackay v. Holland, 4 Metc. (Mass.) 69, that where the maker of a note for the accommodation of the payee said that it was good, in answer to a question put by an indorser who acquired it after maturity, was not precluded from showing that he made the admission in ignorance of the fact that his liability had been ended by the payment of the debt for which it had been indorsed in the first instance. *Contra*, Reedy v. Brunner, 60 Ga. 107 (*semble*); Brown v. First Nat. Bank, 103 Ala. 123, 15 So. 435, citing text.

99. Moore v. Robinson, 62 Ala. 537.

1. Crossan v. May, 68 Ind. 242; Hoover v. Kilander, 83 Ind. 420.

2. Erickson v. Roehm, 33 Minn. 53.

3. Maury v. Coleman, 24 Ala. 381; Cloud v. Whiting, 38 Ala. 57; Allen v. Frazee, 85 Ind. 283; Koons v. Davis, 84 Ind. 389; Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373, citing text.

And where they are made by an indorser, and not by the maker, they bind the former, but not the latter.[4] This plea, on the part of the plaintiff, which excludes the right of the defendant to set up the true condition of affairs as a defense, is called "estoppel *in pais*," it being an extraneous matter *dehors* the record. And whenever it is relied upon where the system of common-law pleading prevails, it has been held that it must be specially pleaded.[5]

§ 861. **Good faith essential to estoppel.**—It is to be observed respecting estoppel that while it exacts good faith from the party bound, it likewise exacts good faith in the party dealing with him. Therefore, if the latter is himself cognizant of a fraud upon the maker at the time of the purchase, and knows, also, that the maker is ignorant respecting it, good faith would require that he should inform the maker of it, and if he does not so inform him, the maker will not be estopped by having told the purchaser that the note was all right, and would be paid at maturity, from setting up the fraud of which the purchaser had notice.[6] And so the holder will not be protected if he knew of any illegality in the instrument.[7] In other words, estoppel is a plea that is born of, and must be nourished by, equity, and he that asks equity must do equity. If he conceals facts from the maker, he acts inequitably and cannot recover.[8] And so, if the plaintiff rely upon an estoppel *in pais*, in order to recover against the defendant who has really a defense, equity only requires that he should be indemnified to the full extent of the amount he has invested on the faith of the defendant's representation, and in the absence of fraud on the part of the defendant, the plaintiff can only recover that amount with legal interest.[9] An indorser who signs the name of a

4. Dowe v. Schutt, 2 Den. 621.
5. Davis v. Thomas, 5 Leigh, 1.
6. Sackett v. Kellar, 22 Ohio St. 554.
7. Watson v. Hoag, 40 Iowa, 143 (1874), Beck, J.
8. Platt v. Jerome, 2 Blatchf. C. C. 186.
9. Campbell v. Nichols, 33 N. J. L. (4 Vroom) 88, Beasley, Ch. J., saying: "If the drawer of a note should, through mistake, admit its validity to a person who, to the knowledge of such drawer, was about to purchase it, after such purchase for full value, it is clear he could not aver his mistake and set up the invalidity of the note as a defense. In such a case it is right that he should bear the loss whose carelessness occasioned it. But suppose the purchaser gave only part value for the note, upon what principle should he be allowed to recover more than the money thus paid of the drawer, who, although he inadvertently admitted his liability, in point of fact owes nothing on the paper? The true measure is, that the party acting on the faith of a representation should be indemnified from loss,

firm is estopped to deny its existence, in order to protect himself.[10] The maker of a note to a company to pay assessments on his real estate is not estopped to deny that the assessments were void, and that he was not informed as to the facts affecting them when he made the note.[11]

§ 862. Certificates of validity.—Sometimes the practice is resorted to of annexing the maker's certificate to the note that the same is given for value and will be paid when due, or that it is business paper; and it has been held in New York that if it be afterward sold to a third person for an amount less than should have been paid for it if discounted at legal interest (which in New York would be usurious), the maker is estopped by his certificate from setting up the defense of usury.[12] This doctrine is questionable at best, and, as we think, erroneous. If one about to pay a note inquires touching its character, it is right that the maker's representations should bind him. They are given in the usual course of business in answer to a pertinent inquiry, and there is nothing to excite the buyer's suspicions, but everything to allay them. But when a note has annexed to it a certificate proclaiming that it is valid and will be paid, this is no more than its face purports without any additional certificate. It is too much like a man having "I am honest" chalked on his back; and as the words "value received,"[13] or others equally importing value

by the application of the doctrine of estoppel *in pais*, and these limits, as I think, take the whole field of the doctrine. The rule is designed to protect against fraud, either in fact or in law; but the remedy does not extend beyond the injury. Neither good policy nor honest dealing requires that one who has made an admission which has influenced the conduct of another, should be estopped by such admission from showing the truth of the case, except to the extent of permitting the person misled from recovering indemnification. For it is to be remembered that the principle of estoppel applies as well to cases of unintentional deceptions as to designed and actual frauds, and it would certainly seem plain, that, in the former class of cases, the limitation of the doctrine above indicated is absolutely necessary for the accomplishment of the ends of justice."

10. Hubbard v. Mathews, 54 N. Y. 43.

11. Madry v. Sulphur Springs, etc., Turnpike Co., 57 Ind. 149.

12. Chamberlain v. Townsend, 26 Barb. 611; Mechanics' Bank v. Townsend, 29 Barb. 569; Truscott v. Davis, 4 Barb. 495; Clark v. Sisson, 4 Duer, 408. But if the certificate alleged to have been given stating among other things that "there is no offset, discount or counterclaim or defense against the same," is successfully impeached upon the ground of fraud, the defendant will not be estopped by the statements contained in such certificate. See Hill v. Thixton, 94 Ky. 96, 23 S. W. 947; Crabtree v. Atchison, 93 Ky. 338, 20 S. W. 260.

13. Gaul v. Willis, 26 Pa. St. 259.

received, and obligation to pay, do not estop the maker from showing that the consideration was usurious, or otherwise illegal and void, so should not the mere repetition of words to the like effect, in another form. On the contrary, the overzeal to create an appearance of legality would be in itself a circumstance of suspicion which should put the purchaser on his guard.[14]

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14. Jaqua v. Montgomery, 33 Ind. 46 (1870). In this case the maker of a nonnegotiable note wrote a certificate contemporaneous with its execution, that it was "all right and will be paid by me when due." But this was held not to estop the maker from showing, against a *bona fide* holder who acquired it for value before maturity, that the note was fraudulently obtained. Gregory, Ch. J., said: "The instrument signed at the time the note was executed has not the first element of an estoppel. It is no more than what the note itself imported on its face. It was obtained by the same fraudulent act that proved the execution of the note. It was a part of the same contract, and was as much a part of the note as if it had been incorporated in it. It was a statement upon which the appellant had no right to rely. Indeed, I think that such a paper accompanying an ordinary promissory note should have the effect of exciting suspicion that all was not right. It looks too much like the act of the thief in attempting to cover up his crime.

CHAPTER XXVII

THE CONFLICT OF LAWS—THE LAW OF PLACE APPLICABLE TO NEGOTIABLE INSTRUMENTS

SECTION I

GENERAL PRINCIPLES OF THE LAW OF PLACE

§ 863. Each one of the United States is, in contemplation of its own and of the Federal Constitution, a distinct and independent sovereignty, with its own peculiar code of laws and system of judicature. And while, in the aggregate, they compose one integral confederacy, which is itself an independent nation, paramount in certain respects to the States, in all other respects the States retain their separate autonomies, and are deemed as much foreign to each other as if not in anywise associated together. The regulation of contracts comes peculiarly within the province of the States, and, therefore, contracts between citizens of the different States, while they may be enforced by process in the Federal courts, nevertheless are to be construed and effectuated not by a general system of law which overspread the whole country, but, in accordance with the principles of international law, which govern transactions between parties of different nations.

§ 864. As long as all the parties to a bill or note are confined within the limits of a single State, the local law alone determines their rights and liabilities. No suit can be brought in a Federal court so long as the parties thereto continue to reside therein, and any question which may be litigated begins and ends with the local tribunals.[1] But the vast and constant traffic between the States, and the general use of bills and notes as a medium of exchange, give circulation to those instruments from hand to hand, and from State to State; and questions of nicety are often presented in the inquiry by what law the

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1. See *ante*, § 10*a*.

rights and liabilities of the parties are to be ascertained. In some of the States the English statute of 3 & 4 Anne is in force.[2] In others, where none but notes payable at bank are negotiable, there are peculiar statutory provisions respecting commercial paper. While in the greater number of jurisdictions the Uniform Negotiable Instruments Law has been adopted.[3]

In all of the States, each recognizes the precedents of its own courts, as independently of the rulings of the Supreme Court of the United States as of those of Great Britain, which may, indeed, shed great light on all commercial questions, but are of no binding authority. When suit is brought in one of the Federal courts, it, on the other hand, will be guided by the general law merchant in questions referable to it, and will follow its own views about it, unless the nature of the liability contracted has already been declared by statute in the particular State of the contract, before the contract was entered into.[4]

It is, therefore, important, in any treatise upon negotiable instruments, to discuss the principles by which the liabilities of parties are to be determined, when they have been contracted in different States. A party whose domicile is in Maine, may make a contract in Maryland for the purchase of real estate in Virginia, and may in Maryland execute his negotiable note therefor, payable in Texas; and suit might be brought against him in California. And the question might arise whether or not the law of the maker's domicile, the *lex domicilii*, as it is termed; or the law of the place where the contract was made, *lex loci contractus;* or the law of the situs of the property purchased, *lex loci rei sitæ;* or the law of the place where the note was made payable, *lex loci solutionis;* or the law of the place where suit was brought, *lex fori*, were applicable to the transaction.

§ 865. General principles.—The following general principles on this subject may be stated:

First. Every contract is, in respect to its formalities, an authentication to be regulated by the laws of the State or country in which it is entered into; and it is also regulated by the laws of the State or country in which it is made, in respect to its nature, validity, interpretation, and effect, except when it is to be performed in another State or country.

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2. See *ante*, § 5.
3. See the Appendix.
4. See, *ante*, § 10.

Second. When a contract is made in one State or country to be performed in another State or country, it is to be regulated by the laws of the place of performance, without regard to the place at which it was written, signed, or dated, in respect to its nature, validity, interpretation, and effect.[5]

Third. In determining the place where a contract is made, the place where it was delivered, as consummating the bargain, controls;[6] and not the place where it was written, signed, or dated.

Fourth. If a party contracts while *in transitu*, and without identity with any other place, the place of his domicile is deemed the place of the contract.

Fifth. If a contract be illegal and void at the place where it is made, it is void everywhere.

Sixth. The laws of a State or country have no extraterritorial force, *proprio vigore;* and are only executed by other States and countries from considerations of courtesy or policy, termed the comity of nations.

Seventh. The laws of a State or country being only executed in another by comity, they will be executed only so far as they may be consistent with religion, good morals, and with the public rights and interests of the State or country in which the remedy is sought.

Eighth. The courts of a State or country cannot take judicial notice of the laws of a foreign State or country; and when such laws are sought to be applied, they must be alleged and proved.

Ninth. The law of the place where suit is brought, the *lex fori*, as it is termed, regulates the form of the action and the nature and extent of the remedy. And we may add,

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5. Brown v. Gates, 120 Wis. 349, 98 N. W. 205, 97 N. W. 221, quoting text.

6. Connor v. Donnell, 55 Tex. 173, citing the text. The law applicable to promissory notes executed in one state and payable in another, having conflicting laws, has been summed up judicially as follows: (1) All matters hearing upon the execution, the interpretation, and validity of the note, including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made. (2) All matters connected with the payment, including presentation, notice, demand, protest, and damages for nonpayment, are to be regulated by the law of the place where by its terms the note is to be paid. (3) All matters respecting the remedy to be pursued, including the bringing of suits, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought. Garrigue v. Keller, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324; Union Nat. Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614.

Tenth. That if the contract express the place with reference to which it is made, that settles it.[7]

§ 866. The comity of nations.—It results from the principle that the laws of a country have no binding force beyond its own boundaries, that the appeal for their enforcement addresses itself entirely to the comity and discretion of the forum in which suit is brought. That comity is freely exercised by civilized countries, which look for and receive reciprocal courtesies from other nations; and the close relations of the several States of the Union with each other, the family likeness of their institutions, and the homogeneity of their people, are powerful incentives to the exercise between them of a comity peculiarly liberal and expansive.[8] But, nevertheless, a State must be just before it is generous; and, therefore, no State should exercise comity in favor of contracts which violate its own laws, or the law of nature, or the law of God.[9] It must consult sound morals and the interests and public policy of its own people, and if to enforce the laws of another State or country would lead to their infringement, it would be treacherous to its own duties to lend aid to their execution.[10] As

7. Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. Rep. 102; Garrigue v. Keller, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324; Union Life Ins. Co. v. Pollard, 94 Va. 152, 26 S. E. 421, 64 Am. St. Rep. 715; Brown v. Gates, 120 Wis. 349, 98 N. W. 205, 97 N. W. 221. Though drafts drawn in Germany upon a firm in New York were made payable by their terms in New York, they are controlled as to their validity by the law of Germany when it was understood by the parties that the drafts should be negotiated in Germany and were drawn for that purpose, and the money was actually advanced upon them there. Whitehead v. Heidenheimer, 68 N. Y. S. 704, 57 App. Div. 590. The fact that the note states that the residence of the payee is in another state does not designate that state as the place of payment. Strawberry Point Bank v. Lee, 117 Mich. 122, 75 N. W. 444. But the rule of intention will not be applied where the parties agreed to be bound by a foreign law to escape the provisions of a local statute. Mayer v. Roche, 77 N. J. L. 681, 75 Atl. 235, 26 L. R. A. (N. S.) 763.

8. Lathrop v. Commercial Bank, 8 Dana, 118.

9. Forbes v. Cochrane, 2 B. & C. 448; Gooch v. Faucett, 122 N. C. 271, 29 S. E. 362; Alexander v. Bank, 19 Tex. Civ. App. 620, 47 S. W. 840, citing text.

10. Ohio Ins. Co. v. Edmundson, 5 La. 295; Armstrong v. Toler, 11 Wheat. 258; Pearsall v. Dwight, 2 Mass. 84; Mahorner v. Hooe, 9 Smedes & M. 247; Donovan v. Pitcher, 53 Ala. 411; Flagg v. Baldwin, 38 N. J. Eq. 219; Pope v. Hanke, 155 Ill. 617, 40 N. E. 339. In an Arkansas case, Arden Lumber Co. v. Henderson Iron Works & Supply Co., 83 Ark. 240, 103 S. W. 185, it was held that stipulations for attorneys' fees are agreements for a penalty, and that though such a stipulation was good and enforceable in Louisiana where the notes were executed, yet in a suit brought thereon in Arkansas such stipulations would not be

an illustration: "In many countries a contract may be maintained by a courtesan for the price of the prostitution; and one may suppose an action to be brought here upon such a contract which arose in such a country. But that would never be allowed in this country," [11] as was well said in England, and might be said here.

SECTION II

LEX LOCI CONTRACTUS

§ **867.** We shall now endeavor to illustrate these general principles by applying them to the various liabilities which arise upon negotiable instruments. The rule is of general acceptation that the law of the place where the contract is made regulates the formalities of its execution and authentication and the consideration necessary to its validity; and also regulates its interpretation, nature, obligation, and effect.[12] If formally executed upon a legal consideration

enforced. See also Security Co. of Hartford v. Eyer, 36 Nebr. 507, 54 N. W. 538, 38 Am. St. Rep. 735, that the validity of a provision for an attorney's fee is governed by the law of the forum, and Clark v. Tanner, 100 Ky. 275; Exchange Bank v. Appalachian Land & Lumber Co., 128 N. C. 193, 38 S. E. 813.

11. Robinson v. Bland, 2 Burr. 1077, Wilmot, J.

12. McDougal v. Rutherford, 30 Ala. 253; Tenney v. Porter, 61 Ark. 329, 33 S. W. 211; Lockwood v. Lindsey, 6 App. D. C. 396; Dolman v. Cook, 1 McCart. 56; Evans v. Anderson, 78 Ill. 558; Mott v. Rowland, 85 Mich. 561, 48 N. W. 638; Houston v. Keith (Miss.), 56 So. 336; Benton v. German-Am. Nat. Bank, 45 Nebr. 850, 64 N. W. 227; Costa v. Davis, 4 Zabr. 319; Armour v. McMichael, 7 Vroom, 92; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.), 875, 121 Am. St. Rep. 858; King v. Sarria, 69 N. Y. 24; Hyde v. Goodnow, 3 N. Y. 266; Merchants' Bank of Canada v. Brown, 83 N. Y. S. 1037, 86 App. Div. 599; Steward v. Commonwealth Nat. Bank (Okl.), 119 Pac. 216. Jamieson v. Potts, 55 Oreg. 292, 105 Pac. 93, 25 L. R. A. (N. S.), 24; Warner v. Citizens' Nat. Bank, 6 S. Dak. 152, 60 N. W. 746; Armendiaz v. Sana, 40 Tex. 291; Crofoot v. Thatcher & Josselyn, 19 Utah, 212, 57 Pac. 171, 75 Am. St. Rep. 725; Beach v. Brown, 17 Utah, 435, 53 Pac. 991; Smith v. Anderson, 70 Vt. 424, 41 Atl. 441. "Unless it clearly appears that the contracting parties had some other law in view." See Brockway v. American Express Co., 171 Mass. 158, 50 N. E. 626. The negotiability of a certificate of deposit must be determined by the law of the state in which it was executed, and not by the law of the state in which it may have been indorsed. Krieg v. Palmer Nat. Bank (Ind. App.), 95 N. E. 613. Where a promise to accept a foreign bill of exchange was to be performed in another state, whether the agreement should be in writing must be determined by the law of that state. Bank of Laddonia v. Bright-Coy Commission Co. (Mo. App.), 120 S. W. 648.

there, it is valid everywhere,[13] and if defective there in either respect, it is invalid everywhere.[14] These doctrines are absolutely necessary to healthful commercial intercourse between States and nations, and they find various illustrations in numerous cases. Thus, where a bill was made and indorsed in blank in France, and sued in England, and it appeared that by French law the blank indorsement, without additional formalities, did not pass the property to the holder, it was held that there could be no recovery in England, although by the English law the indorsee in blank could sue.[15] But in a subsequent case it has been shown that, while the legal principle of this decision is correct, the view taken of the French law was erroneous, an indorsement by procuration meaning only that just such title as the indorser had should pass.[16] So, where a note was made in Mississippi, for a slave, and lacked a certain certificate, which was necessary by the laws of that State to its validity, it was held void in Arkansas, where suit was brought.[17] So, where a bill was drawn in Michigan upon a drawee in Chicago, Illinois, it was held that a parol acceptance valid in Chicago was binding, although by the laws of Michigan an acceptance must be in writing.[18] So, where a bill was drawn in Chicago upon a firm of St. Louis, Mo., and was verbally accepted by a member of the firm at the time in Chicago, it was held to be governed by the laws of Illinois, and binding.[19] And, it has been held, the note of a married woman, valid in the State

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13. Ford v. Buckeye Ins. Co., 6 Bush, 133; Fant v. Miller, 17 Gratt. 47; Andrews v. Pond, 13 Pet. 65; Palmer v. Yarrington, 1 Ohio St. 253; Andrews v. Herriott, 4 Cow. 510; Smith v. Mead, 3 Conn. 253; Wood v. Wheeler, 111 N. C. 231, 16 S. E. 418.

14. Thayer v. Elliott, 16 N. H. 102; Ansted v. Sutter, 30 Ill. 164; Pearsall v. Dwight, 2 Mass. 84; Van Schaick v. Edwards, 2 Johns. Cas. 355; Kanaga v. Taylor, 7 Ohio St. 134; Robinson v. Bland, 2 Burr. 1077; Briggs v. Latham, 36 Kan. 255, citing the text; Hager v. National German-American Bank, 105 Ga. 116, 31 S. E. 141.

15. Trimbey v. Vignier, 1 Bing. N. C. 151; Dunnegan v. Stevens, 122 Ill. 396. As to the obligation of an indorsement being governed by the law of the place of its execution, see *ante*, under § 678.

16. Bradlaugh v. De Rin, L. R., 5 C. P. [*476], 475. See *post*, § 906.

17. Moore v. Clopton, 22 Ark. 125.

18. Mason v. Dousay, 35 Ill. 424. See also Bissell v. Lewis, 4 Mich. 450; Exchange Bank v. Hubbard, 10 C. C. A. 295, 62 Fed. 112; Hubbard v. Exchange Bank, 18 C. C. A. 525, 72 Fed. 234; Garreston v. Bank, 47 Fed. 867, citing text.

19. Scudder v. Union Nat. Bank, 91 U. S. (1 Otto) 406. In such case, held a foreign bill. Grimshaw v. Bender, 6 Mass. 157; Warner v. Citizens' Nat. Bank, 6 So. Dak. 152, 60 N. W. 746.

where it is executed, will be enforced in a State where she is incompetent to enter into such a contract.[20]

§ 868. Place of delivery and consummation of contract.—The place where a contract is made depends not upon the place where it is written, signed, or dated, but upon the place where it is delivered as consummating the bargain.[21] Thus, the law of the place where a bill or note is written, signed, or dated does not necessarily control it but the law of the place where it is delivered from drawer or maker to payee, or from indorser to indorsee. A note drawn and dated in Maryland, but delivered in New York, in payment of goods there purchased, or money loaned, is payable in and governed by the laws of New York.[22] And if a note be dated and signed in blank in Virginia, and sent to Maryland, and there filled up and negotiated, it is a Maryland, and not a Virginia, note.[23] Where a note was dated in Missouri, and signed by one maker there, and was then signed by other makers in Iowa and there delivered, it was held to be governed

20. Robinson v. Queen, 87 Tenn. 446. See also Baer v. Terry, 105 La. 479, 29 So. 886; Garrigue v. Keller, 164 Ind. 676, 74 N. E. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324 (as to a married woman signing as surety). Where an accommodation note, signed by a husband with his wife as surety, was executed and delivered to the payee in Alabama, and made payable in Illinois without any understanding as to where it should be negotiated but in fact negotiated in Illinois, it is an Alabama contract, and as to its validity is governed by the law of Alabama. Union Nat. Bank v. Chapman, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614.

21. Phipps v. Harding, 17 C. C. A. 203, 70 Fed. 468, citing text; McGarry *et al.* v. Nicklin, 110 Ala. 559, 17 So. 726, 55 Am. St. Rep. 40, note, citing text; Kelley v. Telle, 66 Ark. 464, 51 S. W. 633; Gay v. Rainey, 89 Ill. 221; Hart v. Wills, 52 Iowa, 56; Briggs v. Latham, 36 Kan. 255, citing the text; Cherry v. Sprague, 187 Mass. 113, 72 N. E. 456, 67 L. R. A. 33, 105 Am. St. Rep. 381; Lawrence v. Bassett, 5 Allen, 140; Freese v. Brownell, 35 N. J. L. (6 Vroom) 286; Campbell v. Nichols, 33 N. J. L. (4 Vroom) 81; Overton v. Bolton, 9 Heisk. 762; E. L. Welsh Co. v. Gillette, 146 Wis. 61, 130 N. W. 879.

22. Cook v. Moffat, 5 How. 295; *Re* Conrad, 1 Pa. Leg. Gaz. 284; Hyde v. Goodnow, 3 N. Y. 266; Davis v. Coleman, 7 Ired. 424. On the same principle, if a merchant orders goods from England, and the English merchant executes the contract, it is governed by English law. Whiston v. Stodder, 8 Mart. (La.) 95; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 55 Fed. 223. Where a note was given on an order given in Rhode Island and received and accepted in Massachusetts and to be performed there, the contract is a Massachusetts contract, and if the dealings were not valid in Massachusetts, the note was without consideration. Winward v. Lincoln, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160.

23. Fant v. Miller, 17 Gratt. 47.

by the laws of the latter State.[24] And where a note was held by a bank in New Hampshire, and a renewal for part thereof and balance in cash was sent to and received and accepted by the New Hampshire bank in place of the old note, the new note was a New Hampshire contract.[25] And a bill accepted in New York for accommodation of a drawer in Massachusetts, and there put in circulation, would be governed by Massachusetts law.[26] So, where a note is indorsed for accommodation in one State, and delivered in another, the indorsement is governed by the laws of the latter, for the accommodation indorser makes that party to whom he lends his signature his agent for putting the instrument into circulation, and his own contract with those to whom it is negotiated must, consequently, be judged on the principles of agency, which refer it to the place where the circulation commences.[27] In a Maine case it appeared that a husband and wife executed a note in Massachusetts, the wife being surety for her husband, and the husband delivered it by mail to the payee in Maine. By the law of Massachusetts the wife could not so bind herself, but in Maine a married woman could contract for any lawful purpose. The law of Maine was held to apply, and the wife held liable.[28]

§ 869. When apparent is presumed to be actual place of delivery.—But however the doctrine above illustrated may be as a general

24. Hart v. Wills, 52 Iowa, 56. Where a note was executed in Michigan and sent by the maker to an indorser in Wisconsin for signature, who signed it and by direction of the maker sent the paper to the payee in Michigan, the contract is governed by the law of the state of Michigan. Hackley Nat. Bank v. Barry, 139 Wis. 96, 120 N. W. 275 (1909).

25. Nashua Sav. Bank v. Sayles, 184 Mass. 520, 69 N. E. 309, 100 Am. St. Rep. 573.

26. First Nat. Bank v. Morris, 1 Hun, 680, overruling Jewell v. Wright, 30 N. Y. 259, and approving Bank of Georgia v. Lewin, 45 Barb. 340, and Bowen v. Bradley, 9 Abb. (N. S.) 395; Farmers' Nat. Bank v. Sutton Mfg. Co., 3 C. C. A. 1, 52 Fed. 191.

27. Cook v. Litchfield, 5 Sandf. 330; Stanford v. Pruet, 27 Ga. 243; Davis v. Clemson, 6 McLean, 622; Gay v. Rainey, 89 Ill. 221; Bell v. Packard, 69 Me. 105; Wharton on Conflict of Laws, § 459; 2 Parsons on Notes and Bills, 380; Stubbs v. Colt, 30 Fed. 419, citing the text; Staples v. Nott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480. A suit in Missouri on a note made in Pennsylvania, dated and payable in Missouri and delivered in Missouri, is not barred by the Pennsylvania Statutes of Limitation, but is governed by the Missouri Statutes. American School of Osteopathy v. Turner, 143 Mo. App. 416, 128 S. W. 229.

28. Bell v. Packard, 69 Me. 105. See also Mayer v. Roche, 77 N. J. L. 681, 75 Atl. 235, 26 L. R. A. (N. S.) 763.

rule (and we by no means intend to discredit it as such), it should not be regarded as without exceptions. And where the parties acquiring a bill for value, and in the usual course of business, have no knowledge that it was not issued and delivered as a subsisting instrument at the place where it bears date, it is but just that they should be entitled to regard its ostensible as its real character, and should at least not be permitted to suffer by reason of the after-discovered fact that it was not there delivered.[29] In the absence of evidence to the contrary, it will be presumed that a note was executed and delivered at the place where it bears date.[30] And where one of two makers of a note lived in the state, and it does not appear definitely where the other maker lived, it may be presumed to have been executed within the State.[31]

In consonance with this view, it has been held in Pennsylvania, that where a drawer in Philadelphia there dated and wrote a bill, blank as to the payee, and sent it to London, where a payee's name was inserted, his indorsement procured, and the bill negotiated to a bank which had no "notice of the manner in which it originated, or of the fact that it was issued in London, and not in Philadelphia"—such drawer was bound in damages to the holder, as upon a bill actually drawn and delivered in Philadelphia. For, as said by Lewis, J.: "It bore the dress of a bill of exchange drawn in Pennsylvania; and upon the principle that every one is presumed to produce all the consequences to which his acts naturally and necessarily tend, the presumption is that the defendants intended that the purchasers of it should receive it under the belief that it was a bill drawn in Philadelphia, in the usual course of business." [32]

And where it appeared, in England, that parties resident in Ireland signed and indorsed a copper-plate impression of a bill, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B. in England for his use; and B. dated it "Waterford," a place in Ireland, filled up the blanks, and negotiated it to the plaintiff, who had no knowledge that the history of the bill

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29. 1 Parsons on Notes and Bills, 57. See National Bank v. Smoot, 1 McArthur, 371; Quaker City Bank v. Showacre, 26 W. Va. 52, citing the text; Watson v. Boston Woven Cordage Co., 75 Hun, 115, 26 N. Y. Supp. 1101, quoting with approval the text.

30. Parks v. Evans, 5 Del. 576; Dundee Mortgage & Trust Investment Co. v. Nixon, 95 Ala. 318, 10 So. 311.

31. Hefflebower v. Detrick, 27 W. Va. 16.

32. Lennig v. Ralston, 23 Pa. St. 139.

was not exactly what its face purported—it was held that it was to be considered an Irish bill, by relation from the time it was signed in Ireland, and consequently that an English stamp was not necessary.[33]

§ **870.** A bill sketched out and accepted in England, but afterward signed by the drawer abroad, would be considered as made abroad; or *vice versa*, if signed by the drawer abroad and filled up in England.[34] Where a bill was drawn in Jamaica, on a stamp of that island only, and a blank was left for the payee's name, it was held that an English stamp was not necessary to the validity of the insertion of the bearer's name in England.[35] And where a British subject, residing in Florence, signed a joint and several note as one of its makers, and sent it by post to his brother in England, the other maker, who also signed it, and paid it into bank—it was held that a cause of action arose in England, upon its delivery there to the payee.[36] It is to be observed that courts do not take judicial notice of the divisions of foreign States and countries into counties, towns, and cities.[37]

§ **871. Interpretation of the contract.**—The ascertainment of the true meaning and intention of the parties is the prime object of the interpretation of contracts, and as the same words are used with different significations in different communities, and import different obligations—it follows that the interpretation placed upon them must be according to the signification and effect attached to them in the State or country in which the contract is made—otherwise the intention of the parties will be defeated, instead of effectuated. Thus by the word "month" is sometimes meant a lunar, and sometimes a calendar month, and if it were used in a contract entered into in a foreign State or country, evidence would be admissible to show in

33. Saaith v. Mingay, 1 Maule & S. 87, Grose, J., said: "The question is, whether this is to be considered as an Irish or an English bill of exchange. The case seems to me to be this: a piece of paper signed by a person in Ireland, is given for the purpose of being filled up, and operating as a bill of exchange; and al hough it was imperfect at the time when it was signed, yet when it became perfect by being filled up, it operated as a bill of exchange, from the time when it was signed and intended to have such operation." See National Bank v. Smoot, 1 McArthur 371.

34. Parker v. Sterne, 9 Exch. 684.

35. Crutchley v. Mann, 5 Taunt. 529.

36. Chapman v. Cotterell, 34 L. J. Exch. 186.

37. *Ante*, chapter I, § 11.

what sense the term was there understood. So the word "pounds" when employed in England would mean pounds sterling; while in the United States it would mean pounds in American currency, which is a fourth less in value. So the term "usance" in different countries signifies different periods of time, varying from half a month to several months in duration. It is obvious that in such cases the contract must be enforced according to the meaning of the several terms in the countries wherein they are respectively used. The law in force at the time the contract is made must apply to it in respect to its interpretation and effect, otherwise the Legislature would itself make a contract for the parties. Therefore, a State enactment, making notes payable at a designated place negotiable, would only relate to notes executed after its passage.[38]

§ **872. By the nature of the contract** is meant those qualities which pertain to it. Thus, whether it be joint or several, or joint and several; whether absolute or conditional; whether of principal or surety; whether personal or real, are points which concern the nature of the contract, and are to be governed by the law of the place at which it is entered into. This is well illustrated in an English case, where suit was brought in England upon a bill accepted at Leghorn, where the law is, that if the acceptor have not in his hands sufficient funds of the drawer, and the drawer then fail, the acceptance is thereupon vacated. It was held that the law of Leghorn should prevail.[39]

§ **873. Obligation of the contract.**—In speaking of the obligation of contracts, Story says: "It would be easy to multiply illustrations under this head. Suppose a contract, by the law of one country, to involve no personal obligation (as was supposed to be the law of France in a particular case which came in judgment), but merely to confer a right to proceed *in rem*, such a contract would be held everywhere to involve no personal obligation. Suppose, by the law of a particular country, a mortgage for money borrowed should, in the absence of any express contract to pay, be limited to a mere repayment thereof out of the land, a foreign court would refuse to entertain a suit giving it a personal obligation. Suppose a contract for the payment of the debt of a third person in a country where

38. Cook v. Citizens' Mut. Ins. Co., 53 Ala. 37. See § 970*a*.
39. Burrows v. Jemimo, 2 Str. 733.

the law subjected such a contract to the tacit condition that payment must first be sought against the debtor and his estate; that would limit the obligation to a mere accessorial and secondary character, and it would not be enforced in any foreign country, except after a compliance with the requisitions of the local law. Sureties, indorsers, and guarantors are, therefore, everywhere liable only according to the law of the place of their contract. Their obligations, if created by such local law as an accessorial obligation, will not anywhere else be deemed a principal obligation. So, if by the law of the place of a contract, its obligation is positively and *ex directo* extinguished after a certain period by the mere lapse of time, it cannot be revived by a suit in a foreign country, whose laws provide no such rule, or apply it only to the remedy. To use the expressive language of a learned judge, it must be shown, in all such cases, what the laws of the foreign country are, and that they create an obligation which our laws will enforce." [40] Upon these principles the law regulating the liability of partners would be that of the place where the contract was made.[41]

§ **874. As to defenses and discharges.**—Any plea which impeaches the original validity, or declares the subsequent extinguishment of the contract, must be governed by the law of the place where the contract was made. Thus, infancy,[42] coverture,[43] tender, or payment,[44] or discharge by insolvent laws,[45] if a valid defense by the *lex loci contractus*, will be a valid defense everywhere. And if the *lex loci* payment by bill or note is conditional payment only, it will be so regarded even in States which hold such payment absolute,[46] and *vice versa*.[47]

§ **875.** But the discharge of a contract by the law of a place where it was not made, or to be performed, will not operate as a discharge of it in any other country.[48]

40. Story on Bills, § 143; Dunnegan v. Stevens, 122 Ill. 396; Shoe & Leather Bank v. Wood, 142 Mass. 567.

41. King v. Sarria, 69 N. Y. 24.

42. Male v. Roberts, 3 Esp. 163; 2 Parsons on Notes and Bills, 350.

43. Ibid.

44. Searight v. Callright, 4 Dall. 325; Warder v. Arell, 2 Wash. (Va.) 282

45. Sturgis v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213.

46. Bartsch v. Atwater, 1 Conn. 409; Vancleef v. Therasson, 3 Pick. 12.

47. Ward v. Howe, 38 N. H. 42.

48. Smith v. Buchanan, 1 East, 6; M'Millan v. M'Neil, 4 Wheat. 209; Sherrill

Thus a discharge under the insolvent laws of Pennsylvania would be no bar to a suit brought by an indorsee against the indorser of a note, the indorsement having been made in another State where action is brought, and where the indorsee resides, although the indorser resides in Pennsylvania.[49]

They who are infants in one country, may lawfully and validly contract in another, where by law they are of full age.[50]

SECTION III

LEX DOMICILII

§ **876.** There are some peculiar circumstances under which the domicile of the contracting parties becomes an important element of consideration, both for the purpose of ascertaining their intention, and of determining whether or not such intention may be legally effectuated. Thus, where a Virginian, transiently in California, contracts a debt there with a Californian, or with a Kentuckian, there transiently also, the question would at once arise, by what law shall the contract be governed? If the contract were in express terms to be performed in California, it would seem clear that the law of California would govern it, it being the *lex loci solutionis*, and California being thus indicated as the place with reference to which the contract was made.[51] And if the circumstances of the contract were such that it would be inferentially to be performed in California, the like rule would apply. Thus, if it were a debt for board at a hotel, or articles of personal subsistence or necessity, it would be payable by usage before the sojourner left the place, and, therefore, payable there, and controlled by its laws.[52]

But suppose there was a business transaction between the Virginian and Kentuckian, and the former were to accept the bill of the latter,

v. Hopkins, 1 Cow. 103, overruling Penniman v. Meigs, 9 Johns. 325; Green v. Sarmiento, Pet. C. C. 74; Frey v. Kirk, 4 Gill & J. 509; Smith v. Smith, 2 Johns. 235; Urton v. Hunter, 2 Hag. (W. Va.) 83; Pratt v. Chase, 44 N. Y. 597; Baldwin v. Hale, 1 Wall. 223; Story on Bills, §§ 165–169; 2 Parsons on Notes and Bills, 325. But see Braynard v. Marshall, 8 Pick. 194, where it was held otherwise.

49. Van Raugh v. Van Arsdale, 3 Cai. 154.

50. Saul v. Creditors, 17 Mart. 569.

51. See *post*, § 879. The case supposed in the text is cited and approved in Briggs v. Latham, 36 Kan. 255.

52. Wharton on Conflict of Laws, §§ 414, 415, 416, also § 426, rule D.

payable in future, but not expressly at any particular place, would it be deemed a Virginia or a California acceptance? The criterion to apply would be, whether or not the acceptance was to be paid in California or in Virginia.[53] If the Virginian were *in transitu*—that is, merely there for a particular negotiation, or for convenience, or merely casually passing through the State, without any local business established there—the single transaction would be governed by the law of his domicile, where it would be presumed he would be, and where it is presumable he would discharge his obligation at maturity; but otherwise the law of California would govern.

§ 877. In a case in Georgia, it appeared that the plaintiffs were residents of New York, and that the makers and indorsers of the note resided in Georgia, and that the indorsements were made and delivered in Tennessee to the agents of the plaintiffs. It was contended that it was accordingly a Tennessee contract; but the court held that, as it was known and understood that the indorsers resided in Georgia, and were in Tennessee only for the purpose of effecting negotiations, and as a matter of convenience, and the plaintiff's agent only happened to be there at the time, the parties must be deemed to have contemplated Georgia as the place of performance, and to be governed by its laws.[54]

§ 878. If the transaction, however, were between a Virginian and a Californian, resident, of course, in California, there would be strong reason to hold it a California contract, upon the principle stated by Grotius, and quoted approvingly by Story, that "if a foreigner makes a bargain with a native, he shall be obliged by the laws of his (the native's) State; because he who enters into a contract in any place is a subject for the time being, and must be obedient to the laws of that place;" [55] which would, in such case, seem justly applicable.

But it has been held in Massachusetts, that where the member of a Boston firm, at the time in Manchester, England, there accepted a bill drawn on his firm, by a drawer in Manchester, it was

53. Wharton on Conflict of Laws, § 402; 2 Parsons on Notes and Bills, 351.

54. Vanzant v. Arnold, 31 Ga. 210. See Bullard v. Thompson, 35 Tex. 318; Bigelow v. Burnham, 83 Iowa, 120, 49 N. W. 104, 32 Am. St. Rep. 294.

55. Story on Conflict of Laws, § 274. And in Jamieson v. Potts, 55 Oreg. 292, 105 Pac. 93, 25 L. R. A. (N. S.) 24, it was held that where a nonresident maker of a note was in the State when he executed and delivered the note to a resident thereof, it was a domestic, and not a foreign contract.

to be deemed a bill accepted in Boston, because the domicile of the firm was there, and that damages were recoverable at ten per cent., as they would be upon a like bill accepted in Boston.[56] But this case, although quoted, without apparent disapproval, by several high authorities,[57] is not in consonance with principles generally recognized. It has been sharply criticised by Story;[58] and in New York, upon the like state of facts, an opposite decision was rendered.[59] This latter decision the same learned author regarded as in entire harmony with the general principles on the subject, and prophesied that it would obtain general credit in the commercial world.[60]

In Scotland, it seems that an acceptance is deemed payable at the place of the acceptor's domicile at the time when it becomes due.[61]

SECTION IV

LEX LOCI SOLUTIONIS

§ 879. If, by the law of the State or country where the contract is made, it is formal and legal, it is valid everywhere, and will be given force and effect according to such law, as we have already seen, and especially is this so when the note is executed in one State and by its terms payable there.[62] But when the contract is made in one place

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56. Grimshaw v. Bender, 6 Mass. 157, Parsons, Ch. J., saying: "It is manifest that the remedy contemplated by the parties, in the event of the bill being dishonored, must be sought in this State, where the acceptors lived. The instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to Boston, and it had been accepted here payable in London."

57. Wharton on Conflict of Laws, § 451; 2 Parsons on Notes and Bills, 351. But see 2 Parsons on Notes and Bills, 339, note *j*.

58. Story on Conflict of Laws, § 319, where it is said: "There was nothing on the face of the bill that alluded to an acceptance in Boston, and nothing in the circumstances that pointed in that direction. It was certainly competent for the firm to contract in England, and to accept in England; and beyond all question, if the bill had been drawn solely on the person who accepted it, the acceptance must have been deemed to be made in England, notwithstanding his domicile in Boston."

59. Foden v. Sharp, 4 Johns. 183.

60. Story on Conflict of Laws, § 320.

61. Don v. Lippman, 5 Clarke & F. 12, where a bill payable generally was accepted in Paris by a Scotchman domiciled in Scotland.

62. Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; Martin

to be performed in another the law of the place where it is made yields, in certain respects, to that of the place of performance; for it is in view of, and in reference to, the laws of the place of performance, that it is to be presumed the terms of the contract were selected, and its stipulations entered into.[63] "The general principle as to contracts made in one place to be performed in another," says Chief Justice Taney, "is well settled. They are to be governed by the law of the place of performance."[64] Such, also, is the rule of the civil law: "*Contraxisse uniusquisque in eo loco intelligitur, in quo ut solveret se obligavit.*" Thus, in Massachusetts, a note payable to A. or order at any or either bank in a city, is negotiable; but if such a note were made in Massachusetts, and were payable in Virginia, it would not at one time have been negotiable, because not payable at a particular

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v. Berry, 1 Ind. Ter. 399, 37 S. W. 835, citing text, and as to validity of a stipulation allowing attorney's fees; Arnett v. Pinson (Ky.), 108 S. W. 852 (as to the validity of a note not having written across its face the words "peddler's note"); Colonial Nat. Bank of Cleveland v. Duerr, 95 N. Y. S. 810, 108 App. Div. 215; Merchants' Bank of Canada v. Brown, 83 N. Y. S. 1037, 86 App. Div. 599. An Iowa statute providing that if a negotiable note is procured of the maker by fraud, and is afterwards indorsed before maturity, for value, to an innocent purchaser, yet such purchaser can only recover the sum he paid for the note, applies to a note made and payable in Iowa. Creston Nat. Bank v. Salmon, 117 Mo. App. 506, 93 S. W. 288. A note executed and made payable in the State of Minnesota is governed by the law of that state as to its validity, and a nonresident of South Dakota cannot obtain the enforcement of a contract which perpetrates a fraud upon a citizen of Minnesota when a statute of that state provides him with ample protection and immunity. First Nat. Bank of Sibley, Iowa v. Doeden, 21 S. D. 400, 113 N. W. 81.

63. Robinson v. Bland, 2 Burr. 1077; Pierce v. Indeseth, 106 U. S. 546; Andrews v. Pond, 13 Pet. 65; Belle v. Bruen, 1 How. 182; Kessler v. Armstrong Cork Co., 158 Fed. 744; Smith v. Mead, 3 Conn. 253; Stricker v. Tinkham, 35 Ga. 176; Midland Steel Co. v. Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290; Hunt v. Standart, 15 Ind. 33; Thorp v. Craig, 10 Iowa, 461; Goddin v. Shipley, 7 B. Mon. 575; Shoe and Leather Nat. Bank v. Wood, 142 Mass. 567; Akers v. Demond, 103 Mass. 323; Woodruff v. Hill, 116 Mass. 310; Prentiss v. Savage, 13 Mass. 23; Houston v. Keith (Miss.), 56 So. 336; Johnson v. Noble Machine Co. (Mo. App.), 129 S. W. 271; Tyrell v. Cairo & St. L. R. Co., 7 Mo. App. 294; Smoot v. Judd, 161 Mo. 673, 61 S. W. 854; Freese v. Brownell, 35 N. J. L. 285; Hyde v. Goodnow, 3 N. Y. 266; Fanning v. Consequa, 17 Johns. 511; Chapman v. Robertson, 6 Paige, 627; Thompson v. Ketchum, 4 Johns. 285; Caras v. Thalmann, 123 N. Y. S. 97, 138 App. Div. 297; Sylvester v. Crohan, 63 Hun. 509, 18 N. Y. S. Supp. 546; Hubble v. Morristown Land Co., 95 Tenn. 585, 32 S. W. 965; Blodgett v. Durgin, 32 Vt. 361; Byles (Sharswood's ed.) [*384], 563.

64. Andrews v. Pond, *supra;* Central Nat. Bank v. Cooper, 85 Mo. App. 383; Dygert v. Vermont Loan & Trust Co., 37 C. C. A. 389, 94 Fed. 913.

bank, as a Virginia statute at that time required.[65] Where a part of the contract is to be performed in one country, and a part in another, each part is to be governed by the law of the place where it is performable.[66] The question whether or not a note is negotiable is determined by the law of the State where it was made and payable, not by that of the State where suit is brought,[67] and this rule, it has been said, is not to be changed because of the incident that the note reserves title to the property which forms the predicate of the debt.[68]

§ 880. Presumption as to place of payment.—Whenever it is alleged that a bill is payable by the acceptor, or a note by the maker, at a place different from that at which such acceptance or making took place, it is necessary to show it, either by the express language of the instrument itself, or by intendment and construction of law arising from the attendant circumstances. And if the note be dated at a particular place and payable generally—that is, without designation of a particular place—the law attaches to it the presumption

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65. Freeman's Bank v. Ruckman, 16 Gratt. 126. See also Thompson v. Ketchum, 4 Johns. 285, where a note made in Jamaica, payable in New York, was held to be governed by New York law. A promissory note for the payment to the payee of a certain sum of money "payable at Northern Bank, Covington, Ky.," signed by the principal debtor in Ohio, and before delivery, which was in Ohio, signed in blank on the back by another party in Kentucky and by one in Pennsylvania, is a contract by all the parties thereto that the contract shall be performed in Kentucky, and as to its nature, validity, interpretation, and obligation is governed by the laws of that State. Montana Coal & Coke Co. v. Cincinnati Coal & Coke Co., 69 Ohio St. 351, 69 N. E. 613. Where notes, executed in Kentucky, were payable at a bank in the statute of Iowa, the law of that state, above referred to, places them upon the footing of a bill of exchange, and one who was in good faith the purchaser of the notes sued on for value, and without notice, can recover the amount of them. Price v. Gatliff (Ky.), 110 S. W. 332. But see Staples v. Nott, 128 N. Y. 403, 28 N. E. 57, 265 Am. St. Rep. 480. In this case the court said: "But naming a New York bank as the place where the maker would provide for the payment of note, did not characterize the contract in one way or the other. That arrangement was one simply for the convenience of the maker. It could have no peculiar effect. The transactions, which resulted in an agreement to extend the time for the payment of the debt and to accept a new note, took place wholly in the District of Columbia, and what else was enacted in the matter elsewhere, neither added to, or altered the agreement of the parties."

66. Pomeroy v. Ainsworth, 22 Barb. 118; Young v. Harris, 14 B. Mon. 556.

67. Sykes v. Citizens' Nat. Bank of Des Moines, 78 Kan. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 665, citing text; Shoe and Leather Nat. Bank v. Wood, 142 Mass. 567; Barger v. Farnham, 130 Mich. 487, 90 N. W. 281; Stix v. Mathews, 63 Mo. 371; Barry v. Stover, 20 S. D. 459, 107 N. W. 672, 129 Am. St. Rep. 941.

68. Lienkauf Banking Co. v. Haney, 93 Miss. 613, 46 So. 625.

that it is to be paid where made.[69] So it is to be presumed that an acceptance of a bill, naming no place of payment, is to be paid where made; and the address of the drawee generally indicates where such place of acceptance is.[70]

Such are the general principles sustained by text-writers and adjudicated cases.

§ 881. It has been held in Massachusetts, that if a bill or note be payable generally, and be negotiated by one holder to another in a foreign country, it becomes a promise to pay such holder, and is consequently a contract of the place of such negotiation to the holder, and is governed by its laws.[71] But although a debt payable generally is payable anywhere, and, if negotiable, is payable to anybody to whom it may be transferred, nevertheless a contract to pay generally is governed by the law of the place where it is made, for the debt is payable there as well as in every other place.[72] Being payable everywhere cannot render it subject to the laws of every place. The parties must have had in view the law of some place, and that is presumed to be the place where their contract is made. The holder does not make a new contract with the maker or acceptor, but becomes beneficiary of the contract as originally made, with certain additional privileges which arise, not from his location, but from his character as holder. Where a note is payable generally, no evidence would be admissible to show that in fact it was agreed to be paid in some special place.[73]

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69. Wilson v. Lazier, 11 Gratt. 477, Daniel, J.: "It seems to be well settled that a negotiable note made in a particular country is to be deemed a note governed by the law of that country, whether it is expressly made payable there, or is payable generally, without naming any particular place; since, at most, under the latter circumstances it is as much payable in that country as anywhere." Blodgett v. Durgin, 32 Vt. 361; Thompson v. Ketchum, 8 Johns. 189, 4 Johns. 285; Short v. Trabue, 4 Metc. (Ky.) 299; Backhouse v. Selden, 29 Gratt. 586; Pugh v. Cameron, 11 W. Va. 532. Recently held in Tennessee that, "If instrument inadvertently dated and made payable in that State, is shown to have been actually made and intended to be performed in another State, the law of the latter will govern as to rate of interest." Bank v. Mann, 94 Tenn. 17, 27 S. W. 1015. But the intention of the parties will control in determining what law governs their rights. See Glenny Glass Co. v. Taylor, 99 Ky. 24, 34 S. W. 711.

70. Todd v. Bank of Kentucky, 3 Bush, 626.

71. Braynard v. Marshall, 8 Pick. 194.

72. Story on Bills, § 158.

73. Frazier v. Warfield, 9 Smedes & M. 220.

SECTION V

LEX FORI

§ 882. It is a settled principle of law, that the remedies for breach of any contract must be pursued according to the law of the place where suit is brought. Those remedies are devised by the State in consonance with its own views of justice, public policy, and convenience; and comity does not require that it should depart from the courses of procedure which it applies to its own inhabitants, and extend greater or different privileges to strangers.[74] The foreigner who sues must take the law as he finds it.[75]

This doctrine extends to the determination of (1) the parties who may sue and be sued; (2) the time within which suit may be brought; (3) the form of action; and (4) the nature, effect, and extent of the remedy applied.

§ 883. Who may sue.—Who may sue is generally a question of the remedy; and the mere designation of the plaintiff is always made by reference to the *lex fori*. And as a general rule, if allowed by the *lex fori*, an assignee may sue in his own name, although he cannot so sue at the place of the assignment.[76] And if not allowed by the *lex fori*, he cannot sue in his own name, although he might do so at the place of assignment.[77] But we think this doctrine should not be pushed farther than to indicate the mere nominal parties to the suit when it is purely a question of remedy. Thus, if a note were non-negotiable in Virginia, and could not be there indorsed or assigned.

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74. Scoville v. Canfield, 14 Johns. 338; Bank of the United States v. Donally, 8 Pet. 372; Hyder v. Goodnow, 3 N. Y. 266; Van Reimsdyk v. Kane, 1 Gall. 371; Smith v. Spinolla, 2 Johns. 198; Wharton on Conflict of Laws, § 747; Crofoot v. Thatcher & Josselyn, 19 Utah, 212, 57 Pac. 171; Jamieson v. Potts, 55 Oreg. 292, 105 Pac. 93, 25 L. R. A. (N. S.) 24.

75. De la Vega v. Vianna, 1 B. & Ad. 284.

76. Foss v. Nutting, 14 Gray, 484. See Pearsall v. Dwight, 2 Mass. 84; also, 2 Parsons on Notes and Bills, 368, 369, note *g*, and cases cited; Wharton on Conflict of Laws, § 457.

77. Fisk v. Brackett, 32 Vt. 798; Folcott v. Ogden, 1 H. Bl. 135; Wharton on Conflict of Laws, § 735; 2 Parsons on Notes and Bills, 368. In Roads v. Webb, 91 Me. 414, 40 Atl. 128, 64 Am. St. Rep. 246, the notes were made in Indiana and indorsed in Maine as negotiable there, but the court said: "We hold these notes not negotiable. Plaintiff, therefore, cannot maintain this action."

yet if negotiable and actually indorsed in Kentucky, so as to completely vest title in the indorsee, the holder would then have an absolute right to recover the amount, and the *lex loci contractus* should govern.[78] So if by the law of the place of transfer, an executor or administrator may indorse or assign a note, so as to vest title and right to sue completely in his transferee, the latter should be permitted to sue anywhere.[79] This is due to a liberal comity. But the authorities predominate in number the other way.[80]

§ 884. Time within which suit may be brought.—The time within which suit may be brought is purely a question of the forum. Thus suit may be brought immediately in one State by attachment, although at the time no action would lie in the State where the cause of action arose.[81] And in like manner the Statute of Limitations of the forum prevails;[82] and no suit can be maintained if it be barred there, although by the law of the contract there was no limitation,[83] or a less restricted limitation.[84] And suit may be maintained where the limitation of the *lex fori* has not attached, although by the *lex loci contractus* action has been formally barred.[85] This doctrine rests upon the ground that the time of suit is purely a matter for local municipal regulation. It may be different in cases where the right, in contradistinction to the remedy, is held by foreign law to be extinguished. Such extinction might operate by comity everywhere.[86]

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78. Story on Bills, § 173; Story on Conflict of Laws, § 354; Trimbey v. Vigner, 1 Bing. N. C. 159; O'Callaghan v. Thomond, 3 Taunt. 82; Lee v. Selleck, 33 N. Y. 615, 32 Barb. 522 (*semble*).

79. Owen v. Moody, 29 Miss. 79; Harper v. Butler, 2 Pet. 239; Barrett v. Barrett, 8 Greenl. 353; 2 Parsons on Notes and Bills, 373, note *r*; Story on Conflict of Laws, § 350; Wharton on Conflict of Laws, § 457; Snyder & Dull v. Critchfield, 44 Nebr. 67, 62 N. W. 306.

80. Goodwin v. Jones, 3 Mass. 514; Thompson v. Wilson, 2 N. H. 291; Stearns v. Burnham, 5 Greenl. 261.

81. Clark v. Conner, 2 Strobh. 346; 1 Rob. Pr. (new ed.) 317.

82. Mineral Point R. Co. v. Barron, 83 Ill. 367; Jamieson v. Potts, 55 Oreg 292, 105 Pac. 93, 25 L. R. A. (N. S.) 24.

83. Nicolls v. Rodgers, 2 Paine C. C. 437.

84. Jones v. Hook, 2 Rand. 303; British Linen Co. v. Drummond, 10 B. & C. 903; Byles on Bills [*389], 572.

85. Power v. Hathaway, 43 Barb. 214; Bulger v. Roche, 11 Pick. 36; Putnam v. Dike, 13 Gray, 535; Estes v. Kyle, Meigs, 34; Huber v. Steiner, 2 Crompt. & M. 629. *Contra*, Harrison v. Stacy, 6 Rob. (La.) 15; Goodman v. Munks, 8 Port. 89.

86. Williams v. Jones, 13 East, 439.

§ 885. Form of action.—The necessity of selecting the form of action according to the law of the forum has been well illustrated in the United States in a number of cases where the instrument sued upon was deemed a specialty where made, and a simple contract where the suit was brought; or *vice versa*. Thus in some of the States a scroll attached to the promisor's name is the same as a common-law seal; and covenant or debt would be the proper remedy in the State where the promise was made, assumpsit not lying on a sealed instrument. And, moreover, by the local law defendant could not plead want of consideration, because of the instrument being sealed. But if suit were brought in a State where a scroll is not recognized as a seal, it has been repeatedly held, that assumpsit would be the proper remedy, and that want of consideration might be pleaded.[87] And the converse has been also held, that although where made the instrument might be a simple promissory note, yet if where suit was brought it was regarded as a specialty, the appropriate action of debt or covenant should be brought, and the sanctity attached to seals would be imputed to it.[88]

§ 886. Extent of remedy.—At one time it was held that the extent of the remedy was to be determined by the law of the place of contract, and where suit was brought in England upon a French contract, upon which by the laws of France no arrest could be made, it was held that the defendant could not in England be held to bail;[89] but the contrary doctrine is now well settled.[90]

§ 887. Questions of evidence appertain to the remedy, and consequently are controlled by the law of the forum.[91] "Whether a

87. Bank of the United States v. Donally, 8 Pet. 361; Le Roy v. Beard, 8 How. 451; Williams v. Haynes, 27 Iowa, 251; Douglas v. Oldham, 6 N. H. 150; Andrews v. Herriott, 4 Cow. 508; Warren v. Lynch, 5 Johns. 239; Steele v. Curle, 4 Dana, 381; 1 Rob. Pr. (new ed.) 234. That the rules of pleading observed in a State apply in an action brought therein upon a contract executed and to be performed in another State, see Kaufman v. Barbour, 96 Minn. 158, 107 N. W. 1128.

88. Thrasher v. Everhart, 3 Gill & J. 319.

89. Melun v. Fitzjames, 1 Bos. & P. 138; Talleyrand v. Boulanger, 3 Ves. Jr. 447.

90. De la Vega v. Vianna, 1 B. & Ad. 284; Smith v. Spinolla, 2 Johns. 198; Sicard v. Whale, 11 Johns. 194; Peck v. Hozier, 14 Johns. 346; Hindley v. Marean, 3 Mason, 90; White v. Canfield, 7 Johns. 117.

91. Union Cent. L. Ins. Co. v. Pollard, 94 Va. 155, 26 S. E. 421, 64 Am. St. Rep. 715; Fant v. Miller, 17 Gratt. 47; Corbin v. Planters' Nat. Bank, 87 Va. 661, 13 S. E. 98, 24 Am. St. Rep. 673; Story on Conflict of Laws, § 634*a*. The

witness is competent or not; whether a certain matter requires to be proved by writing or not; whether certain evidence proves a certain fact or not—this is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the court sits to enforce it," is the language of Lord Brougham.[92] Accordingly, evidence was admitted in Connecticut to show that a blank indorsement was made for collection only, although by the laws of New York, where the indorsement was made, such evidence was inadmissible;[93] and the question of the admissibility of parol evidence to show that the makers were in fact principal and surety is to be determined by the law of the forum.[94] Upon an analogous principle, it has been held in England, that as the Statute of Frauds does not make agreements void, but only prevents their being enforced by action, a parol agreement not to be performed within a year, though made in France, and valid there, could not be enforced in England.[95]

The certificate of a foreign notary of demand and notice as to a note, though evidence by the law of the place of payment, would be excluded unless admissible by the law of the place where suit is brought.[96]

§ **888.** The *lex fori* undoubtedly applies to the admissibility and credibility of witnesses;[97] but as to the number of attesting witnesses necessary to the validity of a writing, the law of the place where the writing was made would control on the ground *locus regit actum*.[98] And where the objection is not to the competency of evidence, but to its effect, the law of the place of contract should prevail. Thus a parol acceptance could only be proved by parol evidence, and, there-

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whole matter of presumption and burden of proof belongs to the law of evidence and is the law of the forum, and must govern even where a federal court, by reason of diverse citizenship, is administering the law of a state. Young v. Lowry, 192 F. 825.

92. Bain v. Whitehaven, etc., R. Co., 3 H. L. Cas. 1; Wharton on Conflict of Laws, § 768; Story on Conflict of Laws, § 635; Phillimore, iv, 662.

93. Downer v. Chesebrough, 36 Conn. 39.

94. Kaufman v. Barbour, 96 Minn. 158, 107 N. W. 1128.

95. Leroux v. Brown, 12 C. B. 801, 14 Eng. L. & Ex. 247; Byles on Bills [*390], 573.

96. Kirtland v. Wanzer, 3 Duer, 277. See also Second National Bank v. Smith, 118 Wis. 18, 94 N. W. 664, holding that the law of the forum controls as to the kind and sufficiency of the evidence necessary to prove notice of dishonor.

97. Wharton, § 769.

98. Ibid.

fore, if valid where made, it would be unreasonable to reject it because by the *lex fori* an acceptance must be in writing.[99]

§ 889. **Whether party is bona fide purchaser for value.** So the effect of the transaction in fixing the relations of the parties is, as between them, determined by the *lex loci contractus*. Thus, if by the *lex loci contractus* the purchaser acquires the note as a *bona fide* holder, not subject to the defense of a prior payment, such payment cannot be pleaded, although the *lex fori* would permit it.[1] And so, it has been held that a statute of the forum authorizing the attachment of choses in action, whether due or not due, and declaring inoperative and void any transfer, sale, or assignment thereof after the levy of the attachment, can have no extra territorial effect, so as to defeat the rights of a *bona fide* purchaser of a note in another State.[2] And whether or not the proprietor of the bill or note is a *bona fide* holder, is to be determined by the *lexi loci contractus*—that is, the place of payment.[3]

§ 890. **In respect to set-off** it is laid down by text-writers, and by the courts of common law, that a set-off to any action allowed by the local law is to be treated as a part of the remedy; and that, therefore, it is admissible in claims between persons belonging to different States or countries, although it may not be admissible by the law of the country where the debt which is sued was contracted.[4] The same principle applies to the mode of attacking consideration. When the *lex fori* allows a plea of want of consideration in a suit on an obligation, which by the *lex loci contractus* was sealed, and to which by such latter law no such plea could be offered, the *lex fori* controls.[5] So as to other legal and equitable defenses, where the very contract itself

99. Mason v. Dousay, 35 Ill. 424.

1. Harrison v. Edwards, 12 Vt. 651.

2. Kimbrough v. Hornsby, 113 Tenn. 605, 84 S. W. 613.

3. Allen v. Bratton, 47 Miss. 129; Woodruff v. Hill, 116 Mass. 310; Tyrrell v. Cairo & St. L. R. Co., 7 Mo. App. 294. Limerick Nat. Bank v. Howard, 71 N. H. 13, 51 Atl. 641, 73 Am. St. Rep. 489, citing text, and holding that when, in Vermont, where the indorsement was made, the holder must take the note without knowledge of facts and circumstances which would put a careful and prudent man to suspect that the paper was invalid, whereas in New Hampshire, the place of suit, mere suspicion of facts is not notice of and does not put the indorsee upon inquiry as to such facts, the law of Vermont controls.

4. Gibbs v. Howard, 2 N. H. 296; Bank of Gallipolis v. Trimble, 6 B. Mon. 600; Story on Conflict of Laws, § 575; Wharton on Conflict of Laws, § 788; Mineral Point R. Co. v. Barron, 83 Ill. 366.

5. Wharton, § 788.

does not exclude them, they are to be controlled by the *lex fori*.[6] Statutes providing certain exemptions from levy and sale upon execution affect the remedy, and those of the forum prevail.[7]

§ 891. The courts can take no judicial notice of the laws of another country.—When relied upon, they must be proved as facts, and otherwise it will be presumed that they are the same as the laws of the forum in which suit is brought;[8] or what is the same in effect, when the laws of the foreign country are not put in proof as facts, the court will apply to the transaction in suit the laws of the forum. Thus the law as to the rate of damages will be presumed to be the same where the bill is drawn in one country, and is sued on in another;[9] so it will be presumed, where the law of the forum authorizes an indorsee to sue before exhausting recourse against the maker, that the law of the place of the contract is likewise;[10] and so, where by the law

6. Bliss v. Houghton, 13 N. H. 126.

7. Mineral Point R. Co. v. Barron, 83 Ill. 367. Compare Seay v. Palmer, 93 Ala. 381, 9 So. 601, 30 Am. St. Rep. 57.

8. Hunt v. Johnson, 44 N. Y. 27; Dunn v. Adams, 1 Ala. 529; Fouke v. Fleming, 13 Md. 392; Whidden v. Seelye, 40 Me. 247; Legg v. Legg, 8 Mass. 100; Bean v. Briggs, 4 Iowa, 467; Harper v. Hampton, 1 Harr. & J. 687; Bernard v. Barry, 1 Greene, 388; Martin v. Martin, 1 Smedes & M. 176; Kuenzi v. Elvers, 14 La. Ann. 391; Hill v. Wilker, 41 Ga. 449; Savage v. O'Neill, 44 N. Y. 298; Byles on Bills (Sharswood's ed.), 573, 574; 1 Rob. Pr. (new ed.) 230; The Union Cent. L. Ins. Co. v. Pollard, 94 Va. 152, 26 S. E. 421, 64 Am. St. Rep. 715; Steward v. Commonwealth Nat. Bank (Okl.), 119 Pac. 216; National Bank of Commerce v. Kenney, 98 Tex. 293, 83 S. W. 368. Where the defendant in an action on a note secured by mortgage sets up the defense that the contract was made in another state, and that by the law of that State the mortgage should be foreclosed before suit is begun on the note, the burden of maintaining the defense is upon the defendant. Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866.

9. Kuenzi v. Elvers, 14 La. Ann. 391, Merrick, Ch. J., saying: "On the trial of these cases no evidence was offered of the laws of Brazil, where the bills were drawn. The defendants have paid the amounts specified on the face of the bills, and the only question submitted to this court for its determination is, whether or not the plaintiffs can recover damages at the rate of 10 per cent., as allowed by our statute on bills of exchange drawn in Louisiana on foreign countries, and there protested for nonpayment or nonacceptance. The bills drawn in Brazil (although against a shipment of coffee to this city) were payable in London, and are governed by the laws of Brazil, the country where they were drawn. Story on Bills § 397. But the record does not furnish us any proof of those laws. In the absence of proof, the laws of that country, in reference to bills drawn there upon other foreign countries, must be presumed to be the same as our own, and the damages claimed must be allowed."

10. Bean v. Briggs, 4 Iowa, 467; Bernard v. Barry, 1 Greene, 389.

of the forum a party signing in a certain way is regarded as an indorser, the foreign law will be presumed to be likewise.[11]

§ 891a. Presumption as to the common law.—There is this exception to the rule above stated: that where countries have once belonged to the same government, the courts, after the separation, will adopt a presumption suitable to the case, and most frequently presume the continuance of pre-existing laws.[12] And, therefore, in one State of the United States it should be presumed as to other States that were once under the common law, that the common law still prevails.[13] Texas, Louisiana, and a number of other States, were never under the common law, and where a promise to accept a bill was made in Texas, and was sued in Missouri it was held that in the absence of proof as to the Texas law, the Missouri statute would apply.[14] Sunday contracts were not void by common law, and it has been held in Michigan that it will not be presumed that, in a State which adopted the common law, there is a statute prohibiting the making such contracts on Sunday.[15] A contrary view has been taken in Georgia.[16] It would not be presumed that the common law obtained in Russia, and in the absence of proof, the law of the forum would prevail.[17]

§ 891b. Presumption as to the law merchant.—Where the question is one relating to the law merchant, which is of general application, as, for instance, the number of days of grace, it would be presumed that they were fixed by the law merchant, that is, that three days of grace were allowed—the law merchant being regarded as part of the common law.[18] Bonds and coupons in form negotiable

11 See § 895.

12. Dickinson v. Hoomes, 8 Gratt. 408; Arayo v. Currill, 1 La. 541; 1 Rob. Pr. (new ed.) 230.

13. Wharton on Evidence, § 314, and cases cited; Holmes v. Bank of Ft. Gaines, 120 Ala. 493, 24 So. 959; Bailey v. Devine, 123 Ga. 653, 51 S. E. 603, 107 Am. St. Rep. 153; Bank of Laddonia v. Bright Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648.

14. Flats v. Mulhall, 72 Mo. 522.

15. O'Rourke v. O'Rourke, 43 Mich. 58.

16. Hill v. Wilker, 41 Ga. 449.

17. Savage v. O'Neill, 44 N. Y. 298.

18. Lucas v. Ladew, 28 Mo. 342. See also Demelman v. Brazier, 193 Mass. 588, 79 N. E. 812, as to grace being abolished by the Negotiable Instrument statute.

according to the law merchant as now recognized, would be presumed in one State to be negotiable in another.[19]

§ **892.** There are some cases which are consistent with the doctrines above stated, and which seem to qualify the rule given by the limitation that a contract entered into in another State will not be presumed illegal there, although illegal by the law of the forum. Thus, in New York, where a minor under twenty-one years of age could not enter into a contract, the maker of a note executed in Jamaica was sued, and proved that he was under twenty-one years of age. But the law of Jamaica as to infancy was not proved. Kent, Ch. J., said: "As the defendant did not prove what the law of Jamaica was on the subject, he did not make out his defense, and the plaintiff is entitled to judgment." [20] The like view obtained in a similar case in England.[21] So in Mississippi, where a note was executed in Vicksburg, payable in New Orleans, Louisiana, bearing interest at 10 per cent. Six per cent. was the lawful rate of interest in Mississippi, where suit was brought. The action was sustained, there being no proof as to the laws of Louisiana.[22]

SECTION VI

LEX LOCI REI SITÆ

§ **893. Real estate** is controlled in respect to the validity and form of conveyance by the *lex loci rei sitæ*—that is, by the law of the place where it is situated. And while the *lex loci contractus* determines the nature and effect of a negotiable instrument, when it is secured by a mortgage on real estate, it becomes important in some cases to ascertain the law of the place of the mortgage, as there may arise a

19. Tyrell v. Cairo & St. L. R. Co., 7 Mo. App. 294.

20. Thompson v. Ketchum, 8 Johns. 192 (1811).

21. Male v. Roberts, 3 Esp. N. P. 163 (1800). Suit to recover upon contract made in Scotland. Plea, infancy. Lord Eldon said: "I hold myself not warranted in saying that such a contract is void by the law of Scotland, because it is void by the law of England. The law of the country where the contract arose should govern the contract; and what that law is, should be given in evidence to me as a fact."

22. Martin v. Martin, 1 Smedes & M. 177, 178 (1843), Clayton, J.: "The presumption is, that the parties have not violated the law by their contract."

conflict between it and the law of the place where the negotiable paper was executed, or is made payable.

§ 894. When mortgage of realty is in one State and loan secured is payable in another.—The question has been much litigated in the United States, as to what law applies when a mortgage is given as security for a loan, and the mortgage is in one State, and the place of payment of the loan in another. "The true test is, was the mortgage merely a collateral security, the money being employed in another State, and under other laws, or was the money employed on the land for which the mortgage was given? If the former be the case, then the law of the place where the money was actually used, and not that of the mortgage, applies.[23] If the latter, then the law of the place where the mortgage is situate must prevail." [24] Where money was borrowed, and the note made payable in New York but dated in Nebraska, where a mortgage to secure it was executed on land, the mortgage was held to be a mere incident of the loan, and the transaction being usurious by New York law, it was held void.[25] In New Jersey the court refused to enforce a contract made in New York and secured by a New Jersey mortgage on real property in that State, the contract being opposed to the policy of the New Jersey statutes prohibiting stock gambling.[26]

§ 894a. Married women may, under certain circumstances, bind their separate estate; and where it consists of realty, and a note is given by the married woman, it is considered that the law applicable to the transaction is that of the State where the realty is situate, and not that of the State where the note is made.[27]

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23. De Wolf v. Johnson, 10 Wheat. 383; Newman v. Kerson, 10 Wis. 333; Kennedy v. Knight, 21 Wis. 340; Davis v. Clemson, 6 McLean, 622; Atwater v. Walker, 1 C. E. Green, 42; Bank v. Cooper, 85 Mo. App. 383.

24. Wharton on Conflict of Laws, § 510; Arnold v. Potter, 22 Iowa, 194; Chapman v. Robinson, 6 Paige, 627; Goddard v. Sawyer, 9 Allen, 78; Pine v. Smith, 11 Gray, 38; Fitch v. Remer, 8 Am. Law Reg. 654. In an old case a bond was executed in Ireland for a debt contracted in England. It bore Irish interest, which was held valid because it constituted a security on lands situated in Ireland. Connor v. Bellamont, 2 Atk. 381; Story on Conflict of Laws, § 305; American Freehold Land and Mortgage Co. v. Sewell, 92 Ala. 163, 9 So. 143.

25. Sands v. Smith, 1 Nebr. 108; Thompson v. Kyle, 39 Fla. 582, 23 So. 12.

26. Flagg v. Baldwin, 11 Stew. 219.

27. Frierson v. Williams, 57 Miss. 457; Hayden v. Stone, 13 R. I. 106.

SECTION VII

BY WHAT LAW THE LIABILITY OF THE MAKER, ACCEPTOR, DRAWER, AND INDORSER IS DETERMINED

§ 895. In the first place, as to the maker of a note.—The maker's liabilities are controlled by the law of the place where the note is executed and delivered, unless it be payable elsewhere, in which case he will be deemed to have had reference to the law of such place, and it will control his obligation.[28]

Where A. in Baltimore, Md., wrote out a promissory note payable to the order of himself, sent it to B. in New York to be signed, and B. signed it there and mailed it to A. in Baltimore, it was considered a New York contract, that being the place of delivery and the post-office being regarded as a common agent of both parties—of the maker for the purpose of transmitting the note and of the payee for the purpose of receiving it for the maker.[29]

If by the law of the place of making, equitable defenses are admissible in the maker's favor, no subsequent indorsement in another place where the rule is different can preclude him from making them.[30]

Accordingly, it has been held that the maker of a note made and indorsed in Mississippi, where the maker was entitled to the benefit of all defenses against an indorsee which he could have made against the payee before notice of the indorsement, could avail himself of such defense in a suit brought in another State where a different rule prevailed.[31] And the converse has also been held, that where a note was made between parties resident in New York, and there negotiated while current, but paid by the maker before maturity, was afterward

28. Central Trust Co. v. Burton, 74 Wis. 329; Stevens v. Gregg (Ky.), 12 S. W. 775; Phipps v. Harding, 17 C. C. A. 203, 70 Fed. 468, citing text.

29. Barrett v. Dodge, 16 R. I. 744, 19 Atl. 530, 27 Am. St. Rep. 777. See also *supra*, § 868.

30. Wilson v. Lazier, 11 Gratt. 482; Chartres v. Cairnes, 16 Mart. 1; Yeatman v. Cullen, 5 Blackf. 241; Stacy v. Baker, 1 Scam. 417; Brabston v. Gibson, 9 How. 263; Ory v. Wilson, 4 Mart. (N. S.) 277; Backhouse v. Selden, 29 Gratt. 581.

31. Brabston v. Gibson, 9 How. 263. The general rule that the law of the State in which an assignment is made controls (*post*, § 899), is only available as a defense by the assignor, and where the question of the validity of a note is governed by the law of another state, the assignment made by other persons than the makers of the note in the state in which suit is brought could not make the contract, so far as the makers are concerned, governed by the laws of such state. Arnett v. Pinson (Ky.), 108 S. W. 852.

sued upon in Vermont by a *bona fide* holder for value and without notice, the maker could not avail himself of the defense of payment which was not good according to the law of New York, although by the law of Vermont in force at the time of such payment it would have been a good defense to the action.[32] The law of the place where the instrument is delivered and the contract consummated will in like manner determine whether the party sued is to be regarded as a joint promisor, an indorser, or otherwise,[33] and will control as to a surety.[34]

§ 896. In the second place, as to the acceptor of a bill.—The acceptor of a bill occupies a position analogous to that of the maker of a note, and his acceptance is a contract to pay the amount at the place where the acceptance is made, if the bill be in terms there payable, or inferentially so from being silent as to the place of payment.[35] The address of the bill to the drawee at a particular place generally indicates the place of his acceptance, and of payment; but if the bill be expressly payable elsewhere, then the place of payment determines the acceptor's liabilities.[36] Thus if a bill be drawn in Massachusetts, by a drawer there resident, upon a drawee in New York, and no place of payment be mentioned, it would be presumably payable in New York and be governed by the laws of that State.[37] And, if a merchant promise to accept a bill drawn on him by a merchant of another country, it is to be deemed a contract of the place where the acceptance is to be made.[38]

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32. Harrison v. Edwards, 12 Vt. 648.

33. Lawrence v. Bassett, 5 Allen, 140; Staples v. Nott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480.

34. Backhouse v. Selden, 29 Gratt. 581; Pugh v. Cameron, 11 W. Va. 523.

35. Musson v. Lake, 4 How. 262; Duerson's Admr. v. Alsop, 27 Gratt. 241; Wilde v. Sheridan, 21 L. J. Q. B. 260; Frierson v. Galbraith, 12 Lea, 129; Johnson County Sav. Bank v. Kramer, 42 Ind. App. 548, 86 N. E. 84; Bank of Laddonia v. Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. 648. Ames on Bills and Notes, vol. I, p. 214.

36. Freese v. Brownell, 35 N. J. L. (6 Vroom) 286; Bright v. Judson, 47 Barb. 29; Everett v. Vendryes, 19 N. Y. 436; Frazier v. Warfield, 9 Smedes & M. 220; Bainbridge v. Wilcocks, 1 Baldw. 536; Don v. Lipman, 5 Clarke & F. 1; Cooper v. Earl of Waldergrave, 2 Beav. 282. See Barney v. Newcomb, 9 Cush. 46; Heller v. Goslin, 65 N. Y. S. 232, 32 Misc. 36. Byles on Bills (Sharswood's ed.) 568.

37. Ibid.; Worcester Bank v. Wells, 8 Metc. (Mass.) 107; Lewis v. Owen, 4 B. & Ald. 654; Lizardi v. Cohen, 3 Gill, 430; Todd v. Bank of Kentucky, 3 Bush, 626; Freese v. Brownell, 36 N. J. L. 285. See *post*, § 898.

38. Boyce v. Edwards, 4 Pet. 111; Garretson v. Bank, 47 Fed. 867, citing text.

§ **897.** Sometimes letters of credit are written in one country by which the letter-writer becomes liable to accept bills in another country; or to accept them in the same country payable in another country. In the first instance, the engagement to make the acceptance must be construed as an engagement to accept according to the laws of the country where the acceptance is to be made. And although the acceptance would not be valid unless made in accordance with the laws of the place where made, the promise to accept contained in the letter of credit (while it might not operate as an acceptance) would be held valid in the judicial tribunals of the civilized world and enforced equally in one country as in another as a subsisting contract, the breach of which would entitle the injured party to complete redress for all the damage sustained by him.[39] But in Ohio a different view has been taken, apparently under the peculiar circumstances of the case, the court saying: "The letter, indeed, is dated New Orleans (Louisiana), and the acceptances were to be there; but the contract was closed in Cincinnati (Ohio); the bills were to be drawn and indorsed there; the money upon them to be obtained, and the produce brought there. With such a state of facts we suppose that Ohio furnishes the law of the contract." [40]

§ **898. In the third place, as to the drawer of a bill.**—The contract of the drawer of a bill and of the indorser of a bill or note is very different in its nature from that of the maker or acceptor. Thus, if a merchant in New York draw a bill on another in Richmond, Virginia, requiring him to pay a certain amount without specifying any place of payment, the drawee will, if he accepts, be bound to pay the amount in Richmond, that being implied by the address of the bill to him at that place. But it does not follow that the drawer would be himself bound to pay the amount of the bill in Richmond in the event of dishonor for nonpayment by the acceptor. His undertaking is not to pay it in Richmond himself, but a guaranty that it (the bill) shall be paid there by the drawee, and a further undertaking that if not so paid by the drawee, he will pay the amount in New York, provided the bill be duly presented, and he has received due notice of its dishonor. In other words, the drawer of a bill does not bind himself to pay it specially where the acceptor is impliedly or expressly called on to pay it; but his contract is to pay generally, and is conse-

39. Russell v. Wiggin, 2 Story, 230; Carnegie v. Morrison, 2 Metc. (Mass.) 397; Bissell v. Lewis, 4 Mich. 459. See Barney v. Newcomb, 9 Cush. 46.

40. Lonsdale v. Lafayette Bank, 18 Ohio (O. S.), 142 (1849).

quently construed to be a contract to pay at the place where the bill is drawn.[41] Accordingly, where a resident in Demerara drew a bill in favor of another resident there, payable in London, upon C., a resident in Scotland, and C. accepted it payable "at Payne and Smith's, in London"; it was held that the contract of the drawer was to be governed by the law of Demerara, and that the Dutch-Roman law there in force applied to this obligation. And T. Pemberton Leigh, Chancellor, said: [42] "It is argued that this bill being drawn payable in London, not only the acceptor, but the drawer must be held to have contracted with reference to the English law. This argument, however, appears to us to be founded on a misapprehension of the obligation which the drawer and indorser of a bill incurs. The drawer, by his contract, undertakes that the drawee shall accept, and shall afterward pay the bill according to its tenor at the place and domicile of the drawee. If this contract of the drawer be broken by the drawee, either by nonacceptance or nonpayment, the drawer is liable for payment of the bill, not where the bill is to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he made the contract may allow."

So, where a bill was drawn in California, where the rate of interest was twenty-five per cent., on a drawee in Washington City, where the rate was six per cent., it was held that the drawer was bound for the rate of interest at the place where the bill was drawn.[43]

And so where, by the laws of Mississippi, a bill was drawn, the drawer may set up want or failure of consideration between himself and the payee, although sued by an innocent holder for value and without notice; such defense has been held admissible, although, by

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41. Freese v. Brownell, 35 N. J. L. 286; Everett v. Vendryes, 19 N. Y. 436; Hunt v. Standart, 15 Ind. 33; Raymond v. Holmes, 11 Tex. 55; Kuenzi v. Elvers, 14 La. Ann. 391; Lennig v. Ralston, 23 Pa. St. 137; Price v. Page, 24 Mo. 67; Bonedon v. Page, 24 Mo. 595; Page v. Page, 24 Mo. 596; Bank of the United States v. United States, 2 How. 711; *Ex parte* Herbelback, *In re* Glyn, 2 Low. 526; Story v. McKay, 15 Ont. 170; Hazelhurst v. Kean, 4 Yeates, 19. See London & S. F. Bank v. Moore, 128 Cal. 650; Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, affirming 93 N. Y. S. 87, 103 App. Div. 428.

42. Allen v. Kemble, 6 Moore P. C. 314 (1848).

43. Gibbs v. Fremont, 20 Eng. L. & Eq. 555, 9 Exch. 25. See § 918. To same effect, see Crawford v. Branch Bank, 6 Ala. (N. S.) 15; Bailey v. Heald, 17 Tex. 102; Hubble v. Morristown Land Co., 95 Tenn. 575, 32 S. W. 965. *Contra:* Indorser liable for interest according to law of place in which bill is drawn. Mullen v. Morris, 2 Barr. 87.

the laws of Louisiana, where the drawee resided, and on which the bill was drawn, such defense was not available.[44]

§ 899. In the fourth place, as to the indorser of a bill or note.—The indorser of a bill or note is regarded, in like manner, as undertaking to pay at the place where his indorsement is made, in the event of dishonor and due notice, for the reason that he is, in effect, the drawer of a new bill at the place where, and the time when, he makes the indorsement, and is not considered as merely adopting the date of place and time of the bill or note which he indorses. And he is bound by the law of the place of indorsement,[45] even though the bill

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44. Wood v. Gibbs' Admr., 35 Miss. 560. In Musson v. Lake, 4 How. 262, where a bill drawn and indorsed in Mississippi was accepted in Louisiana, where the acceptors resided, the United States Supreme Court said: "So far as their (the acceptors') liabilities are concerned, they were governed by the law of Louisiana. But the drawer and indorsers resided in Mississippi; the bill was drawn and indorsed there, and their liabilities, if any, occurred there." And due diligence to recover of the drawer and indorsers was to be controlled, it was held, by the laws of the latter State. See Roquette v. Overman, L. R. 10 Q. B. 525 (1875) (quoted *post*, § 970*a*), and Duerson's Admr. v. Alsop, 27 Gratt. 241 (1876), wherein it is said by Staples, J.: "The decision (in Roquette v. Overman) is based upon the idea, chiefly, that as the liability of the indorser is to be measured by that of the acceptor whose surety he is, it followeth that an indorser residing in England might be reached by a law of France, through the medium of the acceptor who resided in France." And he adds that the decision is in direct conflict with that in Musson v. Lake, above quoted.

45. Slocum v. Pomeroy, 6 Cranch, 221; Guernsey v. Imperial Bank of Canada, 188 Fed. 300, as to necessity of some presentment, demand, protest, and notice of dishonor; Phipps v. Harding, 17 C. C. A. 203, 70 Fed. 468, citing text; Dundas v. Bowler, 3 McLean, 400; Clanton v. Barnes, 50 Ala. 403; Greathead v. Walton, 40 Conn. 226; Yeatman v. Cullen, 5 Blackf. 240; National Bank of Michigan v. Green, 33 Iowa, 140; Short v. Trabue, 4 Metc. (Ky.) 299; Trabue v. Short, 18 La. Ann. 257; Glidden v. Chamberline, 167 Mass. 486, 46 N. E. 103; 57 Am. St. Rep. 479, citing and approving text; Baxter Nat. Bank v. Talbot, 154 Mass. 213, 28 N. E. 163; Williams v. Wade, 1 Metc. (Mass.) 82; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554, affirming judgment 79 N. J. L. 40, 74 Atl. 708; Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193, citing text; Lee v. Selleck, 33 N. Y. 615, 32 Barb. 522; Cook v. Litchfield, 9 N. Y. 280 (1853), 5 Sandf. 330; Hyde v. Goodnow, 3 N. Y. 270; Aymar v. Sheldon, 12 Wend. 443; Colonial Nat. Bank v. Duerr, 95 N. Y. S. 810, 108 App. Div. 215; Dow v. Rowell, 12 N. H. 49; National Exch. Bank of Baltimore v. Rock Granite Co., 155 N. C. 43, 70 S. E. 1002, as to validity of indorsement by married woman; Grimes v. Tait, 21 Okl. 361, 99 Pac. 810; Douglass v. Bank, 97 Tenn. 133, 36 S. W. 874, citing text; Trabue v. Short, 5 Coldw. 293; Edwards on Bills, 185. The law of the place of indorsement governs as to the necessity of showing that the plaintiff

or note be expressly payable elsewhere.[46] "For," says the court, in the case in Tennessee, cited below, where the note was indorsed in Kentucky, "the fact that the note is payable in Louisiana is not enough. That is the maker's undertaking; but the indorser's contract is separate and distinct; and being made without any view of performance under the laws of Louisiana, it must be governed both upon principle and authority by the laws of Kentucky, where it was made." [47] Therefore, each of several and successive indorsers of a

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exhausted the maker's resourses before proceeding against the indorsers. Columbia Finance & Trust Co. v. Purcell, 142 Fed. Rep. 984.

46. Lee v. Selleck, 33 N. Y. 615, 32 Barb. 522; Trabue v. Short, 18 La. Ann. 257 (1866). The note was made in Kentucky, payable to the order of the payees at their office in New Orleans, La., and was indorsed in Kentucky. The indorsers were sued in Louisiana, where they were domiciled. The court said: "The defense is, that the contract of indorsement having been made in Kentucky, the liability of defendants as indorsers is governed by the law of that State, according to which a remote assignor of a note is not primarily liable to the holder, and the immediate assignor is only liable for the consideration received, with 6 per cent., and the holder cannot make him liable without first prosecuting the payor with diligence, which is not shown to have been done. * * * The general rule is that the form and effect of public and private written instruments are governed by the laws of the place where they are passed or executed, unless it is expressed that they are to have effect in another country; and the question is presented: Does the fact that the note sued on is payable to the defendants at their office in the city make them liable, under the laws of Louisiana, upon their indorsement made in Kentucky? Every indorsement, accommodation or otherwise, is essentially an original contract, equivalent to a new note or bill in favor of the holder and the acceptor or obligor. 12 M. 185 [Hill v. Martin, 12 Martin (La.), 177-185]; 11 Whart. 213, 341; Story on Notes, § 155. The agreement or obligation of defendants as indorsers having been entered into in Kentucky, without expressing a different place of performance, must, under the above general rule, be regulated by the law of Kentucky. The fact that the payors reside where the note is payable does not amount to such a designation of the place of performance as to take it out of the general rule. The parties, at the time of making the indorsements, were all in Kentucky, and are presumed by law to have contracted with reference to the laws of that State. See Story on Conflict of Laws, § 316*b*; 6 Cranch, 221; 8 N. S. 21 [Depau v. Humphreys, 8 Martin N. S. (La.) 21]. Doubtless the defendants may be sued at their domicile, but the obligation of their indorsement and the duties of the holders are governed by the law of Kentucky, where the indorsement was made. Such was the ruling in the case of Duncan v. Sparrow, 3 Ky. 167, which was a suit upon a note made in Louisiana and payable in Mississippi." To same effect, see Artisans' Bank v. Park Bank, 41 Barb. 602 (1864); Short v. Trabue, 4 Metc. (Ky.) 299; Trabue v. Short, 5 Coldw. 293 (1868); Hunt v. Standart, 15 Ind. 35 (1860); Lowry's Admr. v. Western Bank, 7 Ala. (N. S.) 120; Holbrook v. Vibbard, 2 Scam. 465; Currier v. Lockwood, 40 Conn. 349; Brook v. Vannest, 58 N. J. L. 162, 33 Atl. 382.

47. Trabue v. Short, 5 Coldw. 293.

bill or note may contract several and different liabilities, each being bound according to the law of the place where his indorsement was made. Thus, if a bill be drawn or note made in one State and indorsed successively in several others, the indorser in one State may be merely liable as a surety; [48] in another, he may not be liable until the holder has exhausted his remedy against the acceptor or maker; [49] while, in a third, he may be liable according to the general principle of the law merchant, immediately upon due notice of dishonor.[50]

§ 900. In a leading case on this subject, it was said by Shaw, Ch. J.: [51] "The note declared on being made in Illinois, both parties residing there at the time, and it also being indorsed in Illinois, we think that the contract created by that indorsement must be governed by the law of that State. The law in question does not affect the remedy, but goes to create, limit, and modify the contract effected by the fact of indorsement. In that which gives force and effect to the contract, and imposes restrictions and modifications upon it, the law of the place of contract must prevail when another is not looked to as a place of performance. Suppose it were shown that, by the law of Illinois, the indorsement of a note by the payee merely transferred the legal interest in the note to the indorsee, so as to enable him to sue in his own name, but imposed no conditional obligation on the indorser to pay, it would hardly be contended that an action could be brought here, upon such an indorsement, if the indorser should happen to be found here, because, by our law, such an indorsement, if made here, would render the indorser conditionally liable to pay the note.

"By the law of Illinois, the indorser is liable only after a judgment obtained against the maker; and as no such judgment appears to have been obtained on this note, the condition upon which alone

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48. Ingersoll v. Long, 4 Dev. & Bat. 293. Where a transaction between the holder and maker has the effect, under the law of the state where the note was made, of releasing the maker from liability, the law of the state where an indorsement was made that the effect of such release of the maker will prevent the holder from proceeding against the indorser will apply. Spies v. National City Bank, 174 N. Y. 222, 66 N. E. 736, 61 L. R. A. 193.

49. Hunt v. Standart, 15 Ind. 33; Violett v. Patton, 5 Cranch, 142; Howell v. Wilson, 2 Blackf. 418; Williams v. Wade, 1 Metc. (Mass.) 82; Slocum v. Pomeroy, 6 Cranch, 221; Trabue v. Short, 18 La. Ann. 257.

50. McDonald v. Bailey, 14 Me. 101.

51. Williams v. Wade, 1 Metc. (Mass.) 82.

the plaintiff may sue is not complied with, and, therefore, the action cannot be maintained."

§ **901.** This doctrine, that the drawer and indorser are bound according to the law of the place of drawing or indorsing, although sustained by great weight of opinion, and an overwhelming current of authorities, has not escaped criticism and dissent, and rests, as it seems to us, rather upon the sanction of decisions than upon clear and well-defined principles. If A., in New York, draws a bill on B., in Richmond, directing him to pay $1,000 at the First National Bank, in Raleigh, North Carolina, he thereby guarantees to C., the payee, that the money shall be there paid by B. on the day of its maturity. He is as clearly bound as B. is, although secondarily, that the money shall be paid at the time and at the place named. If either tenders the amount at the time and place, it would be a good tender. And, although A.'s liability is contingent upon due notice of dishonor, the liability is, nevertheless, for breach of his contract that B. should pay at Raleigh. He has contracted that the amount shall be there paid by the hand of B., and yet his contract is regarded as being governed by the law of New York; while B.'s contract to pay by his own hand is governed by the laws of North Carolina. This seems to us an inconsistency of the law; and while the doctrine is now perhaps too well settled to be disturbed, it does not bear the test of searching analysis. In Indiana,[52] it was at one time boldly denied, though subsequently established,[53] and Chancellor Kent has ex-

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52. Shanklin v. Cooper, 8 Ind. 42 (1846). The note was executed, and made payable in New York, and indorsed to the plaintiff in Indiana. Blackford, J., said: "We consider the indorsement to be a contract which must be governed by the law of the place where the note is payable, without regard to the place where the indorsement was actually made. The maker of the note before us bound himself to pay it in New York to the payee or order, and the payee, by the indorsement, directed him to pay it, at the same place, to the indorsee. The indorser is, indeed, the drawer of a bill of exchange, in which the maker of the note is the acceptor, and the indorsee the payee; and it is payable where the note is payable. The indorsement in the present case, therefore, if made in this State, stands on the same ground with a bill of exchange drawn here and payable in New York, and there can be no doubt but that the contract of the drawer of such a bill would be governed by the law of New York." To same effect, see Peck v. Mayo, 14 Vt. 33.

53. Hunt v. Standart, 15 Ind. 33 (1860); Mox v. State Bank, 13 Ind. 521. In Raymond v. Holmes, 11 Tex. 60, it is said by Lipscomb, J.: "It would seem, that if it be true, that the drawer and every indorser undertakes that the bill shall be paid at the place of payment named in the bill, it would be difficult, on

pressed his dissatisfaction with it.[54] Professor Parsons thinks it would be a better rule if the place of payment should be generally adopted as governing the liability of all parties, except with regard to damages, etc., and whatever may be properly regarded as belonging to remedy, which depends upon the *lex fori*.[55]

§ 902. **Whether or not the transferrer is liable as indorser or assignor** must be determined by the law of the place where the transfer is made. The United States Supreme Court has said: "An instrument may be negotiable in one State which may yet be incapable of negotiability by the laws of another State, and the remedy must be in the courts of the latter on such instrument." [56] Therefore, if a note negotiable by the laws of Maryland be transferred in Virginia or West Virginia, where it is not negotiable (not being payable at a particular bank), the transferrer is not an indorser in the sense of the law merchant, but an assignor, and cannot be sued until recourse against the maker has been exhausted.[57] So if a note drawn in Ohio, where, being payable at bank, it is negotiable, be transferred in Kentucky, where such a note is not negotiable, the indorser in Kentucky is not technically such, but only an assignor.[58] If the note be made and be payable in Illinois, where recourse against maker must be exhausted before indorser is liable, yet, if indorsed in New York, the law of the latter State would control.[59] The law applying to an accommodation indorsement made in one State, but to be used in another, is elsewhere considered.[60]

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principle, to reconcile the distinction between such undertaking, and any other contract for performance at a particular place, where the law is different from the *lex loci contractus*. But the American doctrine has acquired the force of authority, and uniformity must be observed on this question."

54. 2 Kent Comm. 459, 460. And see Mullen v. Morris, 2 Barr, 87.

55. 2 Parsons on Notes and Bills, 347.

56. Bank of the United States v. Donally, 8 Pet. 361. See 2 Parsons on Notes and Bills, 352; Dunnegan v. Stevens, 122 Ill. 396.

57. Nichols, Ex. v. Porter, 2 Hagans, 13.

58. Carlisle v. Chambers, 4 Bush, 269.

59. Lee v. Selleck, 33 N. Y. 615, 32 Barb. 522.

60. *Ante*, § 868.

SECTION VIII

BY WHAT LAW THE VALIDITY AND EFFECT OF TRANSFER AND THE RIGHTS OF THE HOLDER ARE DETERMINED

§ 903. Questions have arisen whether negotiable notes and bills, made in one country, are transferable in other countries, so as to found a right of action in the holder against the other parties.[61] It has been held in England that the statute of Anne, which makes promissory notes payable to order or bearer negotiable, applies as well to foreign as to inland promissory notes; and, therefore, that a note made in Scotland and indorsed (whether in England or Scotland did not appear) could be sued in England by the indorsee against the maker, the Court of King's Bench saying: "It is for the advantage of commerce that foreign as well as inland notes should be negotiable." [62] And that a promissory note payable to bearer, made in England and transferred in France, could be likewise sued by the holder.[63] And this, although by the law of France mere delivery would be inoperative.[64]

§ 904. Very many other interesting questions arise in respect to the liabilities, rights, and remedies of parties to negotiable instruments when they have been drawn, made, or accepted in one country and have been transferred by indorsement or assignment in another. In the *first* place, suppose a note transferred in the country where made, so as to vest title in the transferee, does such transfer have the same efficacy where suit is brought? It has been held not. Thus, in Illinois, it appears it was necessary that a note payable to A. or bearer should be transferred by indorsement, so as to vest a title in the holder. The note sued on was made and transferred in New York without indorsement, and it was held that the transferee could sue in Illinois,

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61. Story on Bills, § 71.

62. Milne v. Graham, 1 B. & C. 192 (1823). See also to same effect, Splitberger v. Kohn, 1 Stark, 125 (1815); Chitty, Jr., on Bills, 947; Heuriet v. Morris, 3 Campb. 303 (1812). In Carr v. Shaw, Chitty, Jr., on Bills, 614 (1799), Lord Kenyon thought a note made in America not to be within the statute of Anne, but was evidence under the money counts. But it is settled that "all notes" described in the statute, wherever made, are within the statute.

63. De la Chaumette v. Bank of England, 2 B. & Ad. 385, 9 B. & C. 208; 1 Ames on Bills and Notes, 354.

64. Ibid.; Byles on Bills (Sharswood's ed.) [*385], 569.

but it would not follow that he could do so in his own name.[65] And it seems that the law of the forum would generally determine in whose name the suit should be brought.[66]

§ **905.** In the *second* place, suppose the instrument is made in one country, and is transferred in another, in a way valid by the law of the country where it was made, but not so by the law of the place where it was transferred. In such a case, as between the transferrer and transferee, it would doubtless be regarded that suit could not be anywhere sustained. But as between the transferee and the maker or acceptor, the law of the place of contract would prevail. This was well illustrated in a Scotch case. In Scotland, a bill or note is transferable by indorsement when payable to A. B. simply, without the negotiable words "to the bearer" or "or order" being added. And the note in question was made in Scotland, and indorsed in England, where such a note is not negotiable. Upon the maker being sued in Scotland, it was held that suit could be maintained, and Lord Medwyn said: "It is often said, and truly, that by indorsation a new contract is created; and I was puzzled, at one time, with the circumstance that the indorsation in the present case was by an Englishman to an Englishman, and executed in England; and it appeared difficult for me to conceive how such a contract could be validly entered into in a country where such an indorsation was not valid, so as not to constitute a right in favor of the one, or an obligation against the other. But although it might be consistent with principle to allow the law of the place where the indorsement was made to regulate its effect between indorser and indorsee, as between the indorsee and the maker no new contract is created, the contract between them remaining the same original contract, regulated by the *lex loci contractus;* the indorsee is merely substituted in the place of the original payee, and the maker remains under the same liability he contracted at the time he made the note, which was to pay to the payee or to the holder by indorsement; and he cannot object to the form of the transfer, if it be made according to the law which gives it its character, and regulates the quality of the note—that is, in the present case, according to the law of Scotland." [67]

65. Roosa v. Crist, 17 Ill. 450. Where a note was executed, made payable in and assigned in another State, the contract of assignment must be tested by the laws of that State. Weil v. Sturgis (Ky.), 63 S. W. 602.

66. Harper v. Butler, 2 Pet. 239; *ante*, § 883.

67. Robertson v. Burdekin, 1 Ross Lead. Cas. 812; Wharton on Conflict of Laws, § 542.

§ 906. It appears now to be settled that each holder has the same rights against the acceptor or maker as the original payee, though the intermediate indorsements were executed abroad, and were inoperative by the foreign law, while good by the law of the place of the acceptor's or maker's contract. Thus, on a bill payable to order, drawn, accepted, and payable in England, an indorsee can maintain an action against the acceptor in England, though such action could not be maintained in France, and though the indorser and indorsee were, at the time of the indorsement, which was made in France, residents of and domiciled in France.[68] On the other hand, when, by the law to which the defendant's contract is subject, the indorsements are defective, he cannot be sued on them in a foreign court. Thus, where a promissory note was made in France, and indorsed in blank by the payee in that country, the maker and payee, both at the time of making and indorsing the note being domiciled there, it was held that as no action could have been maintained upon it in the French courts of law, in the name of the indorsee, the indorsement, according to the law of France, operating as a procuration only and not as a transfer, so no action could be maintained by him in England.[69]

§ 907. Again, in the *third* place: Suppose a note not negotiable by the law of the place where made, but negotiable by the law of the place where indorsed. In such a case the right of action by the indorsee against the maker would be governed by the law of the forum.[70] It would seem that in the country where the note was made, suit could not be sustained by the indorsee against the maker, because inconsistent with its laws. But in the country of the indorsement the

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68. Lebel v. Tucker, 2 Q. B. 77 (1867), 8 Best & Smith, 830; Wharton on Conflict of Laws, § 454. See also Woodruff v. Hill, 116 Mass. 310, holding that where a note was made in Massachusetts, the contract of the maker with the payee and with any indorsee thereof was to be performed there and was to be governed by the law of that State, notwithstanding the fact that the payee and indorsee lived in New York and that the indorsement was made in that State. See *ant* , § 889.

69. Trimbey v. Vignier, 4 Moore & S. 695, 1 Bing. N. C. 151, 6 Car. & P. 25 (1834); Wharton on Conflict of Laws, § 455. In the case of Trimbey v. Vignier, the French law, as was afterward held in Bradlaugh v. De Rin, L. R., 5 C. P. 473 (1868), was misconstrued, it being held in the latter case that title passes in France by an indorsement in blank. See observations on these cases in 2 Ames on Bills and Notes, 807. See *ante*, § 867.

70. 2 Parsons on Notes and Bills, 353.

same reason would not apply; and if the maker used terms of negotiability in his contract, capable of binding him to the indorsee, there would not seem to be any solid objection to giving the contract its full effect there. Thus, it has been held, that where a note was made in Connecticut payable to order, but by the laws of that State was not negotiable, and was indorsed in New York, where it was negotiable, the indorsee suing in New York could recover against the maker.[71] But if there were no words of negotiability in the note, it might be different.[72] And as a general principle, it may be stated, that if the instrument be not assignable at all in its inception, the laws of no other country would enlarge the contract, and give title against the debtor, to any assignee against his consent.[73]

SECTION IX

BY WHAT LAW THE FORMALITIES IN RESPECT TO PRESENTMENT, PROTEST, AND NOTICE ARE GOVERNED

§ 908. In order to charge the drawer or indorser, the holder must exercise due diligence in presenting the bill to the drawee, or acceptor, and the note to the maker; and the necessity of making

71. Lodge v. Phelps, 1 Johns. Cas. 139, 2 Cai. Cas. 321.

72. Story on Conflict of Laws, § 253*a*; Story on Bills, § 175.

73. Talleyrand v. Boulanger, 3 Ves. Jr. 447. There is a striking criticism of the conflicting decisions upon the various questions connected with foreign transfers of negotiable instruments in volume II, Ames on Notes and Bills, 808. The editor of that work says: "Upon principle, it is submitted, the transfer of a bill is governed by the law of the place where it is at the time of transfer. If a bill can be regarded as a chattel, this law governs as a matter of right upon general principles of jurisdiction (Green v. Van Buskirk, 7 Wall. 139). If a bill must be considered simply as made up of as many choses in action as there are parties liable upon it, the liability of those parties to a transferee would depend, it is true, as a matter of jurisdiction, upon the law of the place where each party happened to be at the time of transfer. But the courts of the debtor's country, unless prohibited by the settled policy or declared will of their sovereign, would presumably adopt as their law, upon principles of comity, the law of the place where the bill was at time of transfer as the only law which would give full effect to the mercantile idea that a bill is negotiable as an entirety, and avoid the startling consequences which have been pointed out as corollaries from the doctrines advanced, in the English and New York cases; and the courts of other countries, in deciding according to the same law, would fully respect the law of the country having jurisdiction over the subject-matter of the transfer."

demand or presentment and protest depends upon the law of the place of contract,[74] while as the acts necessary to constitute a due presentment are to be done at the place upon which the bill is drawn, or at which the bill or note is payable, they must be governed by the law of the place upon which it is drawn, or at which it is payable, as the case may be. Thus, if a bill were drawn by a merchant in New York, payable at thirty days' sight, upon a merchant in London, England, it should be presented for acceptance, according to the law of England; and should be presented for payment at maturity, also according to the law of England, as it would be there payable.[75] But if the bill were drawn in like manner in New York upon London, with the exception that it was drawn and accepted payable at a particular place in New York or in France, then the law of England would control the presentment for acceptance, and the law of New York, or France, the presentment for and demand of payment. Accordingly, the question whether or not the bill should have grace would be determined by the law of the place of payment; and also, if allowable, in how many days grace should consist. In France no grace is allowable, while in England and the United States is it generally three

74. In Amsinck v. Rogers, 189 N. Y. 252, 82 N. E. 134, 12 L. R. A. (N. S.) 875, 121 Am. St. Rep. 858, the court said that while as to certain details, such as the days of grace, the manner of making the protest, and the person by whom protest shall be made, the law or custom of the place where it is payable will govern, the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn, rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the *lex loci contractus*. See also Guernsey v. Imperial Bank of Canada, 188 Fed. 300, and in Columbia Finance & Trust Co. v. Purcell, 142 Fed. Rep. 984, it was held that where a note was indorsed in a State other than that in which it was dated and delivered, the necessity of demand and protest is to be determined by the law of the place where the note was indorsed. See also, *post*, § 936.

75. Rothschild v. Currie, 1 Ad. & El. (N. S.) 434 (1 Eng. C. L. 428); approved in Phillips v. Im. Thurn., L. R. 1 C. P. 463. See also Rouquette v. Overman, L. R. 10 Q. B. 525 (14 Moak's Eng. Rep. 330); Todd v. Neal's Admr., 49 Ala. 266; Pierce v. Indseth, 106 U. S. 546; Sylvester *et al.* v. Crohan *et al.*, 138 N. Y. 496, 34 N. E. 514. The law of the place of performance governs the question of the proper time of presentment and demand of a promissory note. Vaughan v. Potter, 131 Ill. App. 334, where drafts had been drawn in Maryland upon a drawee residing in Dublin, who accepted them payable in London, the English law, as the *lex fori*, would regulate the method of their payment and the matters incident thereto. Hammond, Snyder & Co. v. American Express Co., 107 Md. 295, 68 Atl. 496 (1908).

days. But it ranges in different places from three to thirty days, and in each case the law of the particular place would determine.[76]

§ 909. The protest.—When a foreign bill is dishonored, it is necessary that it should be protested, and the protest should be made at the time, in the manner, and by the persons prescribed in the place where the bill is refused acceptance or payment, as the case may be. The bill might be drawn in New York upon England, and might be indorsed in Pennsylvania and in Maryland, in Germany and in France. But only one protest would be necessary, and that should be made according to the laws of England, where the bill is payable. To hold otherwise would subject the holder to the necessity of making five different protests conformably to the laws of the five different places in which the parties to be charged signed as drawer or indorsers, provided there were as many different styles of protest required. The doctrine on this subject is well settled,[77] and it is not until the question of notice arises that any conflict of authority presents itself.

§ 910. Notice.—In respect to notice, it has been distinguished from the presentment and protest in an often-quoted American case,[78]

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76. Bank of Washington v. Triplett, 1 Pet. 25; Bowen v. Newell, 13 N. Y. 290; Vidal v. Thompson, 11 Mart. 23; Goddin v. Shipley, 7 B. Mon. 575; Bryant v. Edson, 8 Vt. 325; Bank of Orange County v. Colby, 12 N. H. 520; Aymar v. Sheldon, 12 Wend. 439; Rothschild v. Currie, 1 Ad. & El. (N. S.) 43 (41 Eng. C. L. 428); Jewell v. Wright, 30 N. Y. 264; Thorp v. Craig, 10 Iowa, 461; Cribbs v. Adams, 13 Gray, 597; Blodgett v. Durgin, 32 Vt. 361; Walsh v. Dart, 12 Wis. 635; Hatcher v. McMorine, 4 Dev. 124. See *ante*, §§ 622, 623, 634. A note was made payable in the state of Connecticut, and the law of the place of payment must govern as to the allowance of days of grace on bills and notes. Pawcatuck Nat. Bank v. Barber, 22 R. I. 73, 46 Atl. 1095. Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664.

77. Townsley v. Sumrall, 2 Pet. 170; Carter v. Union Bank, 7 Humphr. 548; Raymond v. Holmes, 11 Tex. 54; Snow v. Perkins, 2 Mich. 238; Ticknor v. Roberts, 11 La. 16; Bank of Rochester v. Gray, 2 Hill (N. Y.), 227; Aymar v. Sheldon, 12 Wend. 444; Ross v. Bedell, 5 Duer, 462; Williams v. Putman, 14 N. H. 543; 1 Rob. Pr. (new ed.) 79; Wharton on Conflict of laws, §§ 699*a*, 462; 2 Parsons on Notes and Bills, 344, 345; Story on Conflict of Laws, 360; Story on Bills, §§ 138, 176; Todd v. Neal's Admr., 49 Ala. 266. The necessity of protest is to be determined by the law of the place where the note was indorsed. Columbia Finance & Trust Co. v. Purcell, 142 Fed. 984.

78. Aymar v. Sheldon, 12 Wend. 444; Lee v. Selleck, 33 N. Y. 815, 32 Barb. 522. See also Williams v. Putnam, 14 N. H. 543; Story on Bills, § 285; Snow v. Perkins, 2 Mich. 238. In Guernsey v. Imperial Bank of Canada, 188 Fed. 300, the

in which it is held that it must conform to the law of the place where the drawing or indorsement occurs, in order to charge the drawer or any particular indorser, on the ground that the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, and that the mode and time of notice constitute an implied condition of the contract.

In the case referred to, the bill was drawn in the French island of Martinique, on parties at Bordeaux, France. It was indorsed by the payee in New York to the plaintiffs, and was protested for nonacceptance in France. The contract of the drawer, according to the French law, was, that if the holder should present it within a year, and it should be protested for nonacceptance, and notice given, he would give security to pay it, and pay it if default were made in the payment by the drawee, after protest for nonpayment and notice. Suit being brought in New York after notice of nonacceptance, without any protest for or notice of nonpayment, it was held that the law of New York controlled the contract of indorsement there made, and that the defendant, having received notice according to the New York law, was liable to the plaintiff.[79] This case impliedly determines

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distinction is pointed out, that where an indorsement is made in one jurisdiction, and the commercial paper is payable in another, the manner of giving notice of dishonor and the sufficiency thereof are governed by the law of the place where the paper is payable, but that the laws of the place where the indorsement is signed or is delivered so that it becomes a contract, govern the validity and extent of the contract and therefore the necessity of some presentment, protest, and notice of dishonor.

79. Aymar v. Sheldon, 12 Wend. 444, Mr. Justice Nelson saying: "Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place in which the bill is drawn. It must be presented for payment when due, having regard to the amount of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is, therefore, to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition." So in Allen v. Merchants' Bank, 22 Wend. 215 (overruling same case, 15 Wend. 482), where a bill was drawn on New York in Philadelphia, Pa., it was held that a failure by the notary to give notice of nonacceptance was fatal, although by the law of Pennsylvania such notice was not necessary. See also Second Nat. Bank v. Smith, 118 Wis. 18, 94 N. W. 664, holding that a note dated in Wisconsin, but actually executed, negotiated, and made payable in Indiana, must be considered

that if the law of France, where the bill was payable, had been followed, the holder could not have recovered; and it is quoted with approbation by Story, in his treatises on Bills and Notes, and on the Conflict of Laws.[80] It has also been followed, though with evident reluctance, in Texas.[81]

§ 911. English ruling that notice must conform to law of place of dishonor.—But in England the question of notice has been considered to be on the same footing as that of demand and protest, and if it be in accordance with the law of the place where the dishonor of which notice is given occurs, it is sufficient.[82] Nor will

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an Indiana contract, and the law of Indiana controls as to the manner of giving notice of dishonor to the indorsers.

80. Story on Bills, §§ 285, 296; Story on Notes, § 339.

81. Raymond v. Holmes, 11 Tex. 55. See Third Nat. Bank of Springfield, Mass. v. National Bank of Commerce (Tex. Civ. App.), 139 S. W. 665, holding that in an action involving a note transferred in Missouri, a rule of Missouri law, not based upon any statute, when contrary to the law of the forum and the weight of authority, is not binding upon the domestic courts.

82. Rothschild v. Currie, 1 Ad. & El. (N. S.) 43 (41 Eng. C. L. 428). In this case it appeared that a bill was drawn in England upon a house in Paris, France, by whom it was accepted, in favor of the defendant, a payee in England; and was expressed to be payable in Paris, and indorsed to the plaintiff in England. Upon its dishonor for nonpayment notice was given to the plaintiff in England, which notice was good according to French law, but too late according to the English law. The notice was transmitted the same day by the plaintiff to the defendant. In an action in England, by the English indorsee against the payee and indorser, the Court of Queen's Bench held, that the bill being payable in France, the French law as to notice of dishonor transmitted from France to England must prevail. In Hirschfield v. Smith, L. R. 1 C. P. 350 (1866), Erle, Ch. J., said: "Due notice is such notice as can be reasonably required under the circumstances; and the reasonableness of the notice proved in evidence is a question of law depending on the facts of each particular case, and such facts are for the jury. In the course of practice, rules have been recognized by the judges, and so have become law. See the judgments of Grove, J., Lawrence, J., and Le Blanc, J., in Darbishire v. Parker, 6 East, 2. If, by the law of the place where the bill is payable, there are regulations for giving notice of dishonor, in order to make indorsers liable to the holder, a presumption is raised that notice according to those regulations is all that the indorser should require." "The indorser of a bill accepted payable in France promises to pay in the event of dishonor in France and notice thereof. By his contract he must be taken to know the law of France relating to the dishonor of bills; and notice of dishonor is a portion of that law. Then, although his contract is regulated by the law of England relating to indorsement, and although he may not be liable, unless reasonable notice of dishonor has been sent to him, yet the notice of dishonor according to the law of France may be, and, we think, ought to be, deemed reasonable notice according to the

notice, according to any other law, suffice. In this view high legal authorities concur,[83] and the reasoning upon which it rests seems to us unanswerable. It is undoubtedly true that the nature and extent of the liability of the drawer, or of any indorser, when it is once fixed, is determined by the law of the place of his contract; but we cannot see that that fact at all alters or concerns the conditions to be complied with by the holder in order to fix his liability. The contract of indorsement is a bilateral contract between the indorser and the holder, that he will pay the bill drawn upon a foreign land, provided that the holder will exercise due diligence in presenting the bill, and demanding payment of the drawee or acceptor at the place upon which the bill is drawn, or where it is payable, and in protesting it in the event of dishonor, and giving him due notice. Now, the payment is to be made by the indorser at the place of his indorsement; that is, the place where his part of the contract is to be performed, and by the laws of which it is accordingly to be governed. But the acts constituting due diligence, which the holder contracts to perform, are to be performed at the place where the nonpayment, which is to be protested and notified, occurs, and consequently they are to be

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law of England, and be sufficient in England to entitle the plaintiff to recover according to that law." It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever county they may be. Here the holder was a Frenchman, in France. The indorsement to him was by the plaintiff, a Frenchman, in France. The indorsement to the plaintiff was by the defendant, an Englishman, in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonor, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice valid according to the law of the place should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception." See Redfield & Bigelow's Lead. Cas., §§ 713 *et seq.* In Horne v. Rouquette, 3 Q. B. Div. 514, a bill drawn in England and payable in Spain was indorsed in England by defendant to plaintiff, and in Spain by plaintiff to M. Twelve days after dishonor for nonacceptance in Spain, M. sent notice to plaintiff, who, on receiving it, immediately notified defendant. By the law of Spain no notice for nonacceptance is necessary. The English Court of Appeals held that defendant was liable on his indorsement to plaintiff, but declined to decide whether M. could have charged defendant if no notice whatever had been given.

83. 2 Parsons on Notes and Bills, 344, 345, and 340, note *j;* Byles on Bills (Sharswood's ed.), 567; 1 Rob. Pr. (new ed.) 80; Todd v. Neal's admr., 49 Ala. 266; Wooley v. Lyon, 117 Ill. 244, citing the text.

defined and governed by its laws. It is simply a case in which each party contracts to do different things, at different places, and which fall severally and respectively under the laws of the place at which they are to be done.

§ 912. To hold otherwise than in accordance with these views would involve the law respecting notice in great perplexities. In the case of a bill drawn in Massachusetts upon a drawee in France, and indorsed successively in Pennsylvania and Maryland, Austria and England, the notice would have to conform to the law of Massachusetts in order to charge the drawer, and to the laws of the four different States and countries in order to charge the successive indorsers respectively. The holder in France, perhaps a bank for collection, might thus be under an intolerable burden; for notaries and other officials and agents could not be presumed to know the laws of foreign countries, and, indeed, it might be a matter of the greatest difficulty to ascertain them, even were counsel consulted. If the law of France were complied with in respect to the drawer and all the indorsers, we should say that it was sufficient for all purposes. If the holder in France only notified the English indorser, then the latter would have to notify the German indorser and his antecedents by English law, for in England his due diligence would have to be exercised, and so on, each successive party would have to act by the law of his own land.[84]

SECTION X

REVENUE LAWS OF OTHER COUNTRIES—LAW APPLICABLE TO STAMPS UPON NEGOTIABLE INSTRUMENTS

§ 913. It is frequently laid down as a general rule that one country will not regard the revenue laws of another country,[85] and it is applied to maintain the doctrine that a bill or note which, according to the law of the State or country where it is made, requires a stamp

84. See 2 Parsons on Notes and Bills, 345.

85. Byles on Bills (Sharswood's ed.), 563; 2 Parsons on Notes and Bills, 318, 321, 330; 1 Rob. Pr. (new ed.) 62; Ludlow v. Van Rensselaer, 1 Johns. 94; Lambert v. Jones, 2 Pat. & H. 144; James v. Catherwood, 2 Dowl. & R. 190; Skinner v. Tinker, 34 Barb. 333. Note held valid in New York, though without stamp required by laws of Cuba, where note was made.

in order to its validity, will, nevertheless, be regarded as valid in another State or country where suit is brought. But this rule is by no means universally conceded, and Story refers to it in terms of strong reprobation, declaring that "sound morals would seem to point to a very different conclusion," and citing with approval the view of Pothier that the doctrine is "inconsistent with good faith, and the just duties of nations to each other." [86] The general rule that the formalities, proofs, and authentications of a contract must conform to the laws of the place where it is made, is conceded, and why such an exception as this should be made to it, which not only involves departure from a principle wise in itself, but also, in the particular instance, leads to the countenancing of frauds upon, and evasions of, the fiscal laws of another people—is to us entirely undiscernible.

§ 914. **If instrument void where made for want of stamp it is void everywhere.**—The true view of this subject seems to us to be this: that if the bill or note be absolutely void according to the law of the place where it is made, unless it be stamped, then it is void everywhere; but if the *lex loci contractus* only declares that it shall not be admissible in evidence, then the regulation is regarded as merely a rule of evidence, and has no force or effect beyond the confines of the State or country whose laws enact it. Some of the English cases do not recognize this discrimination between contracts declared void and those which were only inadmissible in evidence; [87] but the later English as well as the later American cases adopt it as sound doctrine,[88] and it meets the approval of such text-writers as Story, Wharton, Phillimore, and Westlake.[89]

"It is now clear," says Phillimore, "that if by the foreign law the want of a stamp renders the contract void, it cannot be enforced in this country."

§ **915.** When a contract is made in one country to be performed in another, and by the laws of the latter a stamp is required to render

86. Story on Bills, §§ 136, 137.

87. Wynne v. Jackson, 2 Russ. 251; James v. Catherwood, 2 Dowl. & R. 190.

88. Fant v. Miller, 17 Gratt. 47; Alves v. Hodgson, 7 T. R. 241; Clegg v. Levy, 3 Campb. 166; Bristow v. Sequeville, 5 Exch. 279, Rolfe, B., saying: "I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here." See Lambert v. Jones, 2 Pat. & H. 144.

89. Story on Bills, § 137; Wharton on Conflict of Laws, §§ 685, 688; Phillimore, IV, 698; Westlake, art. 176. See 2 Parsons on Notes and Bills, 330.

it valid, the question arises whether it is governed by the *lex solutionis* or the *lex loci contractus*, as to the stamp. Here the general rule is applicable, that, as to the form, validity, interpretation, and effect of the contract, it is to be governed by the laws of the place of performance; but its mere form and authentication by the *lex loci contractus*. And, accordingly, it has been held that a stamp in such cases is not necessary.[90] This view is, as we think, sustainable also upon the ground that, in such cases of international transactions, the parties are entitled to elect by what law they will be governed, and that they will be presumed to have elected the law of the place by the laws of which their contract is valid, *ut res magis valeat, quam pereat.*[91]

SECTION XI

LAW APPLICABLE TO THE CURRENCY OF PAYMENT, AND INTEREST AND DAMAGES

§ 916. The first inquiry is to ascertain where the money, according to the contract, is payable;[92] and then the proper rule in all cases would seem to be to allow that sum in the currency of the country where suit is brought which shall approximate most nearly to the amount to which the party is entitled in the country where the debt is payable, calculated by the real par, and not by the nominal par of exchange.[93] Thus, suppose, to use the illustration of Story, that a debt of £100 sterling is contracted in England, and is there payable, and afterward a suit was brought in the United States to recover the amount, the par of exchange, fixed by law,

90. Vidal v. Thompson, 11 Mart. 23, the court saying: "An instrument, as to its form and the formalities attending its execution, must be tested by the laws of the place where it is made; but the laws and usages of the place of the obligation of which it is evidence is to be fulfilled must regulate the performance." Story on Conflict of Laws, § 318; Story on Bills, § 159; 2 Parsons on Notes and Bills, 331.

91. See Wharton on Conflict of Laws, § 698 *et seq.*, and *infra*, § 922.

92. Benners v. Clements, 58 Pa. St. 24.

93. Cash v. Kennon, 11 Ves. 314, where Lord Eldon held that if a man agree to pay £100 in London on a certain day, he ought to have that sum there on that day; and if he fails in that contract, wherever the creditor sues him, the law of that country ought to give him just as much as he would have had if the contract had been performed. See also Delegal v. Naylor, 7 Bing. 460; Lanusse v. Barker, 3 Wheat. 101; Grant v. Healy, 3 Sumn. 523; Lee v. Wilcocks, 5 Serg. & R. 48; Story on Bills, § 151; Story on Conflict of Laws, §§ 308–311; Wharton on Conflict of Laws, § 514; 2 Parsons on Notes and Bills, 370.

is to estimate the pound sterling at four dollars and forty-four cents. But the rate of exchange on bills drawn in the United States on England is generally at from eight to ten per cent. advance on the same amount. And accordingly, in order to replace in England the amount there borrowed and there payable, it would require a larger amount than four dollars and forty-four cents for every pound sterling which should have been there paid. The judgment should, therefore, be for an amount sufficient to enable the plaintiff to purchase the allotted amount of English currency at the place of performance;[94] for otherwise the defendant, who had broken his contract, would profit by its breach, and the plaintiff, who had already suffered by his default, would suffer still further.

§ **917.** This is the doctrine which obtains in the Court of King's Bench, where, in an action for a debt payable in Jamaica, but sued in England, it was held that the amount should be ascertained by adding the rate of exchange to the par value, if above it; and so, *vice versa*, by deducting it when the exchange is below the par.[95] And it is clearly the only doctrine consonant with justice. But in some of the United States, it is held, that the parties can only recover according to the par of exchange as established by law, and not according to the actual rate of exchange necessary to remit the amount to the foreign country where the debt is payable.[96]

§ **918. Interest and damages.**—The rate of interest which a bill of exchange or promissory note, or other contract bears, when no rate is specified, and the question whether or not it shall bear interest, are both determinable by the law of the place where it is expressly or impliedly to be paid.[97] Thus, if a note be made in

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94. Ibid.

95. Scott v. Bevan, 2 B. & Ald. 78. But Lord Tenterden expressed doubt as to the correctness of the judgment.

96. Schofield v. Day, 20 Johns. 102; Martin v. Franklin, 4 Johns. 125; Adams v. Cordis, 8 Pick. 280. But this case excepts bills of exchange.

97. Missouri, etc., Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. Rep. 179. Andrews v. Pond, 13 Pet. 65; Consequa v. Willings, 1 Pet. C. C. 225; De Wolf v. Johnson, 10 Wheat. 367; Kraus v. Torry, 146 Ala. 548, 40 So. 956. Camp v. Rundle, 81 Ala. 240; Gingnon v. Union Trust Co., 156 Ill. 135, 40 N. E. 556, quoting text; Kopelke v. Kopelke, 112 Ind. 435; Palmer v. Hill, 140 Mich. 468, 103 N. W. 838; Chase v. Dow, 47 N. H. 407; Campbell v. Nichols, 33 N. J. L. (4 Vroom) 81; Simpson v. Hefter, 87 N. Y. S. 243, 42 Misc. Rep. 482. Austin v. Imus, 23 Vt. 286; Arnott v. Redferne, 2 Car. & P. 88; Montgomery v. Budge, 3

Canada, where the rate of interest is six per cent., payable in England, where the rate is five per cent., the note will bear only the English interest of five per cent.[98] And so, it would seem, that if a bill were drawn in New York upon London, and were there accepted generally, so that constructively it would be payable in London, and default were made in payment, the acceptor would be bound to pay English interest, for his contract is like that of the maker of a note.[99] But the drawer would be liable for New York interest.[1] If no place of payment be specified, the instrument will carry interest according to the law of the place where the drawing, making, indorsement, or acceptance may have been made.[2]

The Federal courts, in dealing with a question of interest or usury, look to the laws of the State where the transaction took place and follow the State statute and judicial decisions.[3]

§ 919. **Where the note in terms bears interest,** it is as much a part of the debt as the principal;[4] and if the rate of interest be changed by statute after the note is made, it will, nevertheless, bear the rate expressly stipulated for.[5] When interest is not expressly payable, the law of the place of payment, if it allow interest, silently fixes the rate; and though the note be expressed to be payable "with-

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Dow. & C. 297. And if the plaintiff does not introduce evidence of the rate of interest in the State in which payment is to be made, he is not entitled to recover any interest. Kraus v. Torry, 146 Ala. 548, 40 So. 956.

98. Schofield v. Day, 20 Johns. 102. See also Davis v. Coleman, 7 Ired. 424; Summers v. Mills, 21 Tex. 77; Braynard v. Marshall, 8 Pick. 194; Boyce v. Edwards, 4 Pet. 111; Hawley v. Sloo, 12 La. Ann. 815; Hunt's Exr. v. Hall, 37 Ala. 702; Peck v. Mayo, 14 Vt. 33; Thompson v. Powles, 2 Sim. 194.

99. 2 Parsons on Notes and Bills, 376.

1. Gibbs v. Fremont, 20 Eng. L. & Eq. 555. See *ante*, § 898; *post*, § 920.

2. Troendle v. Highleyman (Ky.), 113 S. W. 812; Hewitt v. Bank of Indian Territory, 64 Nebr. 463, 90 N. W. 250, 92 N. W. 741; Smith v. Smith, 2 Johns. 235; Clark v. Seabright, 19 Atl. 941.

3. Missouri, etc., Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. Rep. 179. But as to questions arising out of interstate commerce, see page 361.

4. Fake v. Eddy, 15 Wend. 76; Gordon v. Phelps, 7 J. J. Marsh. 619; Staples v. Knott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480.

5. Lee v. Davis, 1 A. K. Marsh. 397; Thompson v. Kyle, 39 Fla. 582. Held, "That a note executed and payable in one State, though secured by mortgage on lands in another, will be governed as to the rate of interest it shall bear by the laws of the former; and if by such laws all interest is forfeited for usury, the same result will follow upon foreclosure of the mortgage securing it, in the State where the mortgage lands are situated."

out interest," interest may, nevertheless, be allowed as damages.[6] The law of the forum will fix the rate of interest, unless it be affirmatively shown that a different law applies.[7]

§ 920. The drawer of a bill and the indorser of a bill or note stand upon a footing very different from that of the acceptor or maker. If the bill be drawn by a drawer in one State or country, for a debt payable there, upon a person in another country, and, being non-accepted, an action is brought against the drawer, the plaintiff is only entitled to the rate of interest of the country where the bill was drawn, and not to that of the country in which he resides or in which the drawee was requested to pay it.[8] This is on the ground which has

6. Healy v. Gorman, 3 Green, 328.

7. Jaffray v. Dennis, 2 Wash. C. C. 253; Wood v. Corl, 4 Metc. (Mass.) 203; Aymar v. Sheldon, 12 Wend. 221; Ballingalls v. Gloster, 3 East, 481.

8. Crawford v. Branch Bank, 6 Ala. (N. S.) 15; Bayley v. Heald, 17 Tex. 102; Bank of the United States v. United States, 2 How. 711; Gibbs v. Fremont, 20 Eng. L. & Eq. 555, 9 Exch. 25, Alderson, B., saying: "The general rule in all cases like the present is, that the *lex loci contractus* is to govern in the construction of the instrument, but that applies only when the contract is not express; if it is special it must be construed according to the express terms in which it is framed. Now, a bill drawn on a third person, in discharge of a present debt, is, in truth, an offer by the drawer, that if the payee will give time for payment, he will give an order on his debtor to pay a given sum at a given time and place. The payee agrees to accept this order, and to give the time, with a proviso that if the acceptor does not pay, and he, the payee, or the holder of the bill, gives notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, and lawful interest. This is, then, the contract between the parties. If the interest be expressly, or by necessary implication, specified on the face of the bill, then the interest is governed by the terms of the contract itself; but if not, it seems to follow the rate of interest of the place where the contract is made. So if the mode of performing it be expressly or impliedly specified, as was the case of Rothschild v. Currie. In case of a bill drawn at A., it, *prima facie*, bears interest as a debt at A. would, if nothing else appeared; but if that bill be indorsed at B., the indorser is a new drawer, and it may be a question whether this indorsement is a new drawing of a bill at B., or only a new drawing of the same bill—that is, a bill expressly made at A. In the former case it would carry interest at the rate at B.; in the latter at the rate at A.; and on this subject we find a difference of opinion in the books—Mr. Justice Story, in his Conflict of Laws, § 314, maintaining the former, and Pardessus, Droit du Commerce, art. 1500, maintaining the latter opinion. But this case is a contract at San Francisco, by which the defendant there offers to pay to the payee, in discharge of a debt due there, the payment at Washington, by the acceptor thereof, of a given sum. That sum is not paid. The defendant's original liability then revives on notice of dishonor duly given to him, and the defendant has become liable to pay, as he was liable at the first. At first he was clearly to have paid the money at San Francisco, and if he did not, he would have

been already explained, that the place where the drawee or acceptor should pay is not considered that at which the drawer or indorser must pay in the event of his default. Their contract is to pay, upon receiving notice of dishonor, at the place where they respectively entered into the contract. In Vermont it has been held that the indorser is liable for interest according to the law of the place where the note is payable.[9] It has also been held in that State, that where a farm situated there was sold, and notes given in New York, they would bear Vermont interest, as the payee resided there and the land was there located.[10]

§ 921. **Damages.**—The rule applicable to interest applies as well to what is distinctly termed "damages." Each party, drawer, indorser, and acceptor, is liable according to the place where the bill is drawn, indorsed, or accepted. Thus, where a bill was drawn in Barbadoes by a merchant there upon drawees in Liverpool, England, and was indorsed by the defendant in Alexandria, Virginia, and it appeared that the damages allowed in Barbadoes was ten per cent., and in Virginia fifteen per cent., the indorser's contract was held to be governed by Virginia law, and fifteen per cent. allowed.[11] It was implied that the drawer would be liable for damages

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been liable to pay interest at the usual rate in California for a period as long as the debt remained unpaid; and that is the amount which he ought to pay now. This point was expressly ruled in Allen v. Kemble. It was also so ruled in Congan v. Bankes. And this is not to be left to the jury, for it depends on the rule of law. The amount of interest at each place is to be so left; so is the question whether any damage had been sustained by nonpayment of interest at all—for these are questions of fact. Here the jury have found interest was due, and that there was damage which ought to be recovered in the shape of interest. They also have found what the usual rate of such interest is at Washington, and what the usual rate of such interest is in California; but which rate is to be adopted by them is, so we think, a question purely of law for the direction of the judge to the jury. We think the direction in this case should have been, that the California rate of interest should be adopted by them, inasmuch as the contract was made in California; and, therefore, this rule must be absolute, to enter the verdict for the plaintiffs, with 19 per cent. additional interest to the 6 per cent. already allowed." But *contra*, that drawer is liable for interest according to place of payment. See Mullen v. Morris, 2 Barr, 87; Hanrick v. Andrews, 9 Port. 10.

9. Peck v. Mayo, 14 Vt. 33. But this is against the general tenor of the authorities. See *ante*, § 899.

10. Austin v. Imus, 23 Vt. 286. See De Wolf v. Johnson, 10 Wheat. 367; Stewart v. Ellice, 2 Paige, 604.

11. Slocum v. Pomeroy, 6 Cranch, 221; Gingnon v. Union Trust Co., 156 Ill. 135, 40 N. E. 556.

by the law of Barbadoes, where the bill was drawn. The doctrine of the text on this subject is well settled.[12] It follows that the various parties may be bound for different measures of damages.[13] Professor Parsons says, "This seems to us to arise from the clear rule that remedy depends upon the forum." [14] The subject is more fully considered elsewhere, in the chapter on Re-exchange and Damages.[15] Sureties are only secondarily liable, and they are liable for what their principal has bound himself. Therefore, if the rate of interest be legal in the State or country of the principal where the contract is to be performed, the surety will be bound for it, although in his own State or county it would be illegal and excessive.[16]

§ 922. **Election of law of place as to interest.**—We have already seen that if a contract is void where made, it is void everywhere; and that, although it be valid where made, yet if involving moral turpitude or injury to another nation or its citizens, such nation will not recognize or enforce it. There are some contracts, however, which would be illegal if all the parties resided or contracted either in the State where it is made or where it is to be performed, which are, nevertheless, recognized and enforced, if valid either in the one place or the other; and of this nature are contracts to pay interest at rates which, by the law of one place or the other, would be usurious and void. In such cases, the intention of the parties is effectuated, as a concession to trade and commerce between nations; and if the transaction is in itself not immoral, the rate of interest authorized either by the country where the contract is made or to be performed is allowed to prevail. Thus, it has been held that a promissory note, made in Louisiana, bearing ten per cent. interest, which was legal in that State, would not be usurious, but valid, although payable in New York, where all contracts to pay more than seven per cent. interest are usurious.[17] And the like view has been recognized and

12. Hendricks v. Franklin, 4 Johns. 119; Hicks v. Brown, 12 Johns. 142; Hazelhurst v. Kean, 4 Yeates, 19; Prentiss v. Savage, 13 Mass. 20; Gibbs v. Fremont, 9 Exch. 25; Lennig v. Ralston, 23 Pa. St. 137.

13. Ibid.; 2 Parsons on Notes and Bills, 346, 372, 373; Story on Conflict of Laws, § 314.

14. 2 Parsons on Notes and Bills, 342, note *k*.

15. Chapter XLV, vol. II.

16. Backhouse v. Selden, 29 Gratt. 586.

17. De Peau v. Humphreys, 20 Mart. 1; Joslin v. Miller, 14 Nebr. 91; Adams v. Pratt, 7 Paige Ch. 632; Thornton v. Dean, 19 S. C. 583, 45 Am. Rep. 796, citing the text; Taylor v. American Freehold Co., 106 Ga. 238, 32 S. E. 153; Underwood

adopted in numerous cases, and may be regarded as a recognized principle of English and American jurisprudence.[18]

§ 923. In like manner, although the rate of interest be greater than that allowed at the place where the contract is made, it will not be usurious if allowable at the place of payment, the parties having the right of election as to the laws of the place by which their contract is to be governed,[19] if it does not appear that the parties intended to evade the usury laws.[20]

It would seem that Story dissents from this doctrine in his work on the Conflict of Laws,[21] but in that on Bills of Exchange he recognizes it, and cites with approval cases which adopt it;[22] and the most approved text-writers generally follow the adjudicated cases.[23]

Where a party, temporarily in New York, where the rate of interest is seven per cent., made a note bearing twenty per cent. in-

v. American Mortgage Co., 97 Ga. 238, 24 S. E. 847; Odon v. New England Mortgage Co., 91 Ga. 505, 18 S. E. 131. *Contra*, Craven v. Bates, 96 Ga. 78, 23 S. E. 202; Bigelow v. Burnham, 83 Iowa, 120, 49 N. W. 104, citing text; Bigelow v. Burnham, 90 Iowa, 300, 57 N. W. 65; American Freehold Land and Mortgage Co. v. Sewell, 92 Ala. 163; McGarry *et al.* v. Nicklin, 110 Ala. 559; South Missouri Land Co. v. Rhodes, 54 Mo. App. 129.

18. Potter v. Tallman, 35 Barb. 182; Bank of Georgia v. Lewin, 45 Barb. 340; Richards v. Globe Bank, 12 Wis. 692; Vliet v. Camp, 13 Wis. 198; Berrien v. Wright, 26 Barb. 208; Chapman v. Robertson, 6 Paige Ch. 627; Edwards on Bills, 183; Miller v. Tiffany, 1 Wall. 310; Kilgore v. Dempsey, 25 Ohio St. 413; Sturdivant v. Memphis Nat. Bank, 9 C. C. A. 256, 60 Fed. 730, citing text.

19. Thompson v. Powles, 2 Sim. 194; Harvey v. Archibald, 1 Ry. & Moo. 184; Andrews v. Pond, 13 Pet. 65; Chapman v. Robertson, 6 Paige, 627; Van Schaick v. Edwards, 2 Johns. Cas. 355, where a note made in Massachusetts and payable in New York was held valid, although the interest by Massachusetts law was usurious; Jacks v. Nichols, 5 Barb. 38 (overruling 3 Sandf. Ch. 313, and affirming 5 N. Y. 178); Healy v. Gorman, 3 Green, 328; Miller v. Tiffany, 1 Wall. 310; Kilgore v. Dempsey, 25 Ohio St. 413; Brown v. Gardner, 4 Lea, 145; Pugh v. Cameron, 11 W. Va. 523; Findley v. Hall, 12 Ohio, 610; Second Nat. Bank v. Smoot, 2 MacArthur, 371; Scott v. Perlee, 39 Ohio St. 67; Jackson v. American Mortgage Co., 88 Ga. 756, 15 S. E. 812; Bigelow v. Burnham, 83 Iowa, 120, 49 N. W. 104; National Building Assn. v. Ashworth, 91 Va. 712, 22 S. E. 521; Long v. Long, 144 Mo. 352; Dygert v. Vermont Loan & Trust Co., 37 C. C. A. 389, 94 Fed. 913.

20. British & American Mtg. Co. v. Bates, 58 S. C. 551, 36 S. E. 917. See *post*, § 925.

21. Story on Conflict of Laws, § 292.

22. Story on Bills, §§ 148, 149.

23. Wharton on Conflict of Laws, § 507; 2 Parsons on Notes and Bills, 336, 337, 338, 378, 379; Edwards on Bills, 717, 718.

terest, which was valid by Texas law, and dated it "Matagorda, Texas," it was held legal and valid, the date showing it was intended to be governed by Texas law.[24]

§ 924. When instrument is usurious by law of place where made and where payable also.—If the bill or note bear usurious interest both by the law of the place where made and of the place where payable, the law of the place where made will govern as to the legal consequences of usury, and the effects imposed by way of penalties.[25] But a bill or note cannot be made payable in a particular place where the rate of interest is higher than at the place where the contract is made, for the mere purpose of creating a liability for the higher rate of interest; for such an arrangement would be a mere shift or screen to avoid the statutes against usury.[26] The doctrine is advanced, however, that if the money is really obtained for use at a particular place, the rate of interest allowable at that place may

24. Bullard v. Thompson, 35 Tex. 318; Bigelow v. Burnham, 83 Iowa, 120, 49 N. W. 104; Sturdivant v. Memphis Nat. Bank, 9 C. C. A. 256, 60 Fed. 730.

25. Andrews v. Pond, 13 Pet. 65; De Wolf v. Johnson, 10 Wheat. 367; Mix v. Madison Ins. Co., 11 Ind. 117; Thompson v. Kyle, 39 Fla. 582, 23 So. 12, 63 Am. St. Rep. 193.

26. De Wolf v. Johnson, 10 Wheat. 367. In Akers v. Demond, 103 Mass. 324, bills were drawn on New York payable in Boston, Massachusetts, and accepted for the drawer's accommodation by the drawee in Boston. They were discounted in New York at a rate of interest greater than that allowed in that State or in Massachusetts. Suit being brought in Massachusetts, the transaction was held void, and Wells, J., said: "It has often been held in States where restrictions upon the rate of interest are maintained, that it is not usury to charge upon negotiable paper whatever is the lawful rate of interest at the place where the paper is payable, although greater than the rate allowable where the negotiation takes place. But if the paper is so made for the purpose of enabling the larger rate to be taken, or the greater rate is received with interest to evade the statutes relating to usury and not in good faith, as the legitimate proceeds of the contract, it is held to be usury. So, also, if a greater rate is taken than is allowed by the law of either State, it is usury; such a rate necessarily implies an intent to disregard the statutes restricting interest. Andrews v. Pond, 13 Pet. 65; Miller v. Tiffany, 1 Wall. 298. The legal rate of interest or discount in Massachusetts is 6 per cent. per annum; and at the date of the negotiation of these bills a greater rate than 6 per cent. was usurious and unlawful. It follows from these considerations that upon the evidence as it now stands upon the part of the defendant, the transaction, upon which alone the bills in suit must depend for a consideration to give them validity as contracts, was illegal, and such as under the laws of New York renders them utterly void. No action, therefore, can be maintained upon them in the courts of Massachusetts, unless the effect of this evidence be in some way overcome or controlled."

be charged, although the bill or note be both made and payable within another State.[27] This is certainly carrying comity very far.

It was held at one time, in New York, that if by the law of the place of making, and also of payment, there be usurious interest charged, the instrument cannot be negotiated within another State where it is not usurious, and thus become valid; [28] but it was subsequently held, that if made or accepted for accommodation in one State, and there payable, the instrument may, nevertheless, be negotiated in another State at a rate of interest not usurious there, although usurious in the State of the accommodation making or acceptance, it being presumed that it was intended by the accommodation parties that the instrument might be so used by the party accommodated.[29] In a still later case, in which the authorities were reviewed, the New York Court of Appeals held that, where a promissory note was made in that State by a resident thereof, and there dated, by its terms payable in that State, with no rate of interest specified, and no intention of the maker existing that it should be discounted elsewhere, the negotiation of it in another State at a rate of interest lawful there, but greater than the legal rate in New York, was usurious.[30] The true test is the intention of the parties; and if they contemplate the law of the State where the rate is usurious as controlling, then the negotiation will be invalid. It makes no difference that the rate of interest is usurious at the place of negotiation if not so at the place of making or payment.[31]

§ 925. **Shifts to cover usury.**—In the cases hitherto cited, the transaction is supposed to be *bona fide.* If a mere shift to cover usury, it will be void, though otherwise it would be valid. Thus, where a bill was drawn in New York payable in Alabama, and was for an antecedent debt, and a larger discount was taken from the bill than allowed by the law of either State for the supposed difference of exchange, the United States Supreme Court considered the real question to be as to the *bona fides* of the transaction.[32] It seems that the law of the place where the note is made will govern as to

27. Wharton on Conflict of Laws, § 508.

28. Jewell v. Wright, 30 N. Y. 260.

29. First Nat. Bank of New York v. Morris, 1 Hun, 680.

30. Dickinson v. Edwards, 77 N. Y. 573.

31. Hackettstown Nat. Bank v. Rea, 64 Barb. 178; Davis v. Marbine, 160 N. Y. 269, 54 N. E. 704; Rodecker v. Littauer, 8 C. C. A. 320, 59 Fed. 857.

32. Andrews v. Pond, 13 Pet. 65; Smith v. Champion, 102 Ga. 92, 29 S. E. 160; Vail v. Van Doren, 45 Nebr. 450, 63 N. W. 787.

the legal consequences of usury when it is usurious by the law of that place and by the law of the place of payment also.[33] In respect to interest as well as to other liabilities, the place of delivery controls the law of the contract between the parties.[34] Where the law of the place of payment prohibits corporations from pleading usury, but its bonds were tainted with usury by the law of the place where made, as well as by that of the place of payment, it has been held that in a suit brought in the State where they were made, usury might be pleaded.[35]

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33. Ibid.

34. Cook v. Litchfield, 5 Sandf. 330. See Commissioners of Craven County v. A. & N. C. R. Co., 77 N. C. 289.

35. Commissioners of Craven County v. A. & N. C. R. Co., 77 N. C. 289.